

In the matter between:

PANTELLIS YIANNIS RABIE

Applicant

and

ANTONY CHARLES PATRICK COTTERELL N.O

First Respondent

ANITA BHIKA N.O

Second Respondent

BRIDGET MARY NAUDE N.O

Third Respondent

JUDGMENT

Bloem J.

- [1] This is an application to compel the defendants to make certain documents available for inspection in accordance with rule 35 (6) of the Uniform Rules of Court. The applicant is an adult male while the respondents are cited in their capacity as duly appointed trustees of the Kempston Motor Group Trust (the trust). I shall refer to the applicant as the plaintiff and the respondents either as the defendants or the trustees.
- [2] The plaintiff issued summons against the defendants wherein he claims damages arising from the trust's alleged breach of contract. The trust instituted two counterclaims for damages arising from the plaintiff's alleged breach of contract and dishonest alternatively fraudulent conduct. It is common cause that from about October 2012 the plaintiff was employed by the trust as a brand manager at its Isando Commercial Centre. The plaintiff claims that during December 2014 the trust, represented by Edward Cotterell, promoted

him to the position of general manager from December 2014, subject to a probation period of three months. He furthermore claims that he and Mr Cotterell agreed that, after the probation period, he would receive a basic salary of R35 000.00 per month as well as commission calculated at 10% of the branch's nett operating profit. The plaintiff claims that for the period between March 2015 to March 2017 he performed his duties as general manager but that the trust breached the above agreement by paying him only R20 000.00 per month plus commission during that period. The plaintiff accordingly claims the difference of R15 000.00 for 27 months. The defendants deny that the trust promoted the plaintiff to general manager pleading that Mr Cotterell had no authority to promote the plaintiff to that position on behalf of the trust.

- [3] In their first counterclaim the defendants allege that, in terms of the contract of employment as a brand manager, the plaintiff was entitled to receive the use of a company vehicle from the trust and that the plaintiff breached that contract in that he, knowing that he was not entitled to do so, appropriated to himself the use and enjoyment of a brand new Peugeot motor vehicle which formed part of the stock of the branch. They alleged that he used the Peugeot for eight months as a result of which it depreciated in value by approximately R62 000.00, being the damage allegedly suffered by the trust and which the defendants claim from the plaintiff. In the second counterclaim the defendants allege that the plaintiff dishonestly alternatively fraudulently sold one of the trust's vehicles, a Mercedes Benz, to RCS Auto for R530 291.84 and purchased two vehicles from RCS Auto for the aggregate of R530 291.84. However one of the vehicles had to be repaired to render it saleable. Both vehicles were thereafter sold by the trust for less than the price that was paid when they were purchased. The defendants claim that the trust suffered damages in the sum of approximately R330 300.00, being the difference between the purchase price and the amount achieved on resale as well as the

amount expended on repairs in respect of the one vehicle. The plaintiff's plea in both counterclaims was that he was authorised by Mr Cotterell to use the Peugeot and that Mr Cotterell instructed him to sell the Mercedes Benz and purchase the two vehicles.

[4] The central issue in the claim and counterclaims is whether Mr Cotterell had the authority, on behalf of the trust, firstly, to promote the plaintiff to general manager at a salary of R35 000.00 per month plus commission; secondly, to authorise the plaintiff to use the Peugeot; and thirdly, to instruct the plaintiff to conclude the above transaction with RCS Auto.

[5] After the defendants had served their discovery affidavits, the plaintiff served a notice in terms of rule 35 (3) wherein he required them to make documents, which the plaintiff listed in that notice, available for inspection. The defendants delivered a reply to the plaintiff notice in terms of rule 35 (3) after they had been ordered by this court to do so. This application relates only to documents which the defendants have not discovered or failed to make available for inspection.

[6] Rule 35 (3) reads as follows:

"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 on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him."

[7] Rule 35 (3) provides that the party who requires another party to make additional documents or tape recordings available for inspection must believe, not know, that those additional documents or tape recordings are in possession of the other party and that the

documents or tape recordings may be, not are, relevant to any matter in question. The belief must be based on reasonable grounds as the mere subjective belief is, by itself, insufficient to require the other party to make available for inspection such of those documents as are in his or her possession.¹ A party who gives notice in terms of rule 35 (3) may only obtain inspection of additional documents or tape recordings which are relevant to the issues on the pleadings.²

The documents in paragraphs 43 and 44 of the plaintiff's notice in terms of rule 35 (3)

[8] The plaintiff requires the attendance register and minutes of the meetings of the executive committee of the trust which were held on 13 and 14 March 2017 as well as the trust's quarterly meeting which was held on 22 June 2016. The requested attendance registers and the minutes relate to the defendants' counterclaims. The defendants refused to make those documents available on the basis that they are allegedly irrelevant to the issues in dispute. The defendants do not claim that those meetings did not take place or that the documents do not exist. The plaintiff believes that those documents are or may be relevant because the attendance registers will show who attended those meetings, the plaintiff believing that Mr Cotterell and the first defendant attended those meetings. He furthermore believes that the minutes of those meetings will reflect whether any discussion took place about his use of the Peugeot and whether there was any discussion about the transaction with RCS Auto, and, if so, whether there was a complaint in respect thereof or whether there was a defence of his use of the Peugeot and the transaction with RCS Auto. The defendants contend that the plaintiff is on a fishing expedition, that he has not set out any grounds to establish that the

¹ *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 598F-G.

² *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 311A.

documents that he requires to be made available for inspection will or may be relevant to Mr Cotterell's authority.

- [9] In my view if the attendance registers and minutes reveal that the plaintiff's use of the Peugeot and the transaction with RCS Auto were discussed, such discussion may have covered Mr Cotterell's authority, or absence thereof, to allow the plaintiff to use the Peugeot and whether the transaction with RCS Auto took place on Mr Cotterell's instruction. If so, it might give credence to the defendants' defence that Mr Cotterell did not have authority firstly, to allow the plaintiff to use the Peugeot and secondly, to instruct him to transact with RCS Auto. On the other hand, if those items were not discussed, it might assist the plaintiff to establish that Mr Cotterell had ostensible authority to allow him to use the Peugeot and to instruct him to transact with RCS Auto. In the circumstances, the attendance register and minutes may be relevant to the issue of Mr Cotterell's above authority. The defendants should accordingly make them available for inspection.

The documents in paragraphs 16 and 17 of the plaintiff's notice in terms of rule 35 (3)

- [10] In those paragraphs the plaintiff requires the defendants to make available for inspection a copy of all the correspondence, including emails, letters, sms's and WhatsApp messages, in terms of which the trust, alternatively its trustees, informed the plaintiff that Mr Cotterell did not have the authority to promote him, to negotiate his salary and that his promotion was null and void alternatively that the trust, alternatively its trustees, informed Mr Cotterell that he did not have the authority to promote the plaintiff, to negotiate the plaintiff's salary and that the plaintiff's promotion was null and void. The defendants claim that, because the nature of the correspondence sought to be made available for inspection is extremely wide and unlimited, they have not been in a position to identify, source and determine the relevancy of those documents. In my view, the plaintiff's

request is in respect of specified documents to establish that the plaintiff and Mr Cotterell had been informed, and therefore had knowledge, that Mr Cotterell had no authority to promote the plaintiff and offer him an increased salary.³

- [11] The plaintiff claims that his requirement that the documents be made available for inspection is sourced in the defendants' plea that the plaintiff was aware that his salary and remuneration package could only be authorised by the first defendant and that the plaintiff was aware that the first defendant did not authorise his promotion and increased salary. In my view the documents sought to be made available for inspection in this regard are not relevant to the issue of Mr Cotterell's authority or lack thereof. The plaintiff's requirement is founded on the premise that the trust or the trustees informed him and/or Mr Cotterell about Mr Cotterell's lack of authority. That is not what the defendants pleaded. They pleaded that the plaintiff was aware of Mr Cotterell's lack of authority to promote him and offer him an increased salary. The documents which the plaintiff seeks to be made available for inspection are sought on a wrong premise, irrelevant to the issue of Mr Cotterell's authority. I agree with Mr Kotze, counsel for the defendants, that the information sought by the plaintiff in this regard would best be dealt with by a request by the plaintiff for further particulars to prepare for trial. In the circumstances, the plaintiff is not entitled to an order that the defendants make the documents listed in paragraphs 16 and 17 of the plaintiff's notice in terms of rule 35 (3) available for inspection.

The documents in paragraphs 3, 4 and 7 of the plaintiff's notice in terms of rule 35 (3)

- [12] The plaintiff also requires the defendants to make available for inspection the contracts of all employees appointed by the trust in Gauteng and its George dealership during the

³ *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N) at 560A-564D.

period between 1 January 2014 and May 2017 as well as all the correspondence between the trust and the above employees relating to their promotion or demotion and the increase of their remuneration packages. The plaintiff believes that the above documents are relevant to Mr Cotterell's disputed authority to promote him and offer him an increased income. He refers to an email of 23 December 2013 from the Chief Executive Officer of the Kempston Motor Group informing certain people in the group, including Mr Cotterell and the first respondent, that with effect from 1 January 2014 Mr Cotterell had been promoted to the position of the trust's "*Gauteng Director, for all franchises represented in the area, including the George dealerships based in the Western Cape*". The plaintiff alleges that to the best of his knowledge, for the period between 1 January 2014 and May 2017, Mr Cotterell, as Director for all franchises in Gauteng and in George, appointed and concluded contracts with new employees, promoted employees and communicated the above appointments and promotions to those employees in Gauteng and George. He believes that the employment contracts and the communications addressed to the new and promoted employees will assist to demonstrate Mr Cotterell's authority to, on behalf of the trust, promote him and to enter into the agreement upon which his claim is based. The defendants allege that the contracts of employment in respect of other employees are irrelevant to the issue of Mr Cotterell's authority. They concede that in some cases Mr Cotterell signed contracts of employment but that he did so, not as Director of the trust, but because he was expressly authorised by the first defendant to do so on behalf of the trust.

- [13] Those documents, or even some of them, might show that Mr Cotterell signed those letters or contracts of appointment and promotion and in what capacity he signed them. Where they show that he signed them in his capacity as Director of the trust it might assist the plaintiff to demonstrate that Mr Cotterell had ostensible authority to also

promote him. The plaintiff acknowledged that some of the information contained in other employees' contracts of employment or letters of promotion might be private or confidential. He is not interested in such information and agreed that the documents may be redacted accordingly. In the circumstances, the defendants should make available for inspection the documents listed in paragraphs 3,4 and 7 of the plaintiff's notice in terms of rule 35 (3). The defendants would be entitled to delete personal or confidential information on those documents relating to other employees.

The documents in paragraphs 5 and 6 of the plaintiffs notice in terms of rule 35 (3)

- [14] In those paragraphs the plaintiff requires the defendants to make available for inspection the employment contract between the trust and Gary Bakos in respect of his position as Dealer Principal/General Manager at the Isando branch. He also seeks the letter of appointment that was given to Mr Bakos relevant to his appointment to the above position. It is undisputed that the trust appointed Mr Bakos to the above position during or about January 2014 and he held that position until about November 2014. That was the position to which the plaintiff claims he was promoted. The defendants admit that Mr Cotterell signed Mr Bakos' contract of employment but claim that he did so on the basis that he had delegated authority to sign that document on behalf of the trust. For the same reasons that the defendants should make the documents listed in paragraphs 3,4 and 7 of the plaintiff's notice in terms of rule 35 (3) available for inspection, they should also make the documents in paragraphs 5 and 6 of that notice available for inspection. Once again, private and confidential information relevant to Mr Bakos should be deleted from those documents.

Costs

[15] Mr Kotze submitted that the costs of this application should be reserved for determination by the trial court which will determine whether the documents that the defendants were ordered to make available for inspection were in fact relevant to the issue of Mr Cotterell's authority. I do not agree. The present enquiry is whether or not the plaintiff is entitled to an order that the defendants make the documents available for inspection. One of the factors that this court had to take into account was whether the documents may be relevant to the issue of Mr Cotterell's authority. The documents which the defendant will be ordered to make available for inspection may be relevant to Mr Cotterell's authority, hence the order that the defendants make them available to the plaintiff for inspection. In the circumstances, because the plaintiff was substantially successful, he is entitled to the costs of the application.

[16] In the result, it is ordered:

- 16.1. the defendants make available for inspection by the plaintiff, within fifteen days from the date of service of this order by the plaintiff's attorney on the defendants' attorney, the documents listed in paragraphs 3, 4, 5, 6, 7, 43 and 44 of the plaintiff's notice in terms of rule 35 (3) served on the defendants on 15 March 2018;
 - 16.2. the defendants may delete private and confidential information contained in the documents listed in paragraphs 3, 4, 5, 6, and 7 of the plaintiff's aforesaid notice;
 - 16.3. the defendants, in their representative capacities, pay the plaintiff's costs of this application jointly and severally the one paying the other to be absolved.
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G H BLOEM
Judge of the High Court

For the plaintiff/applicant:	Dr G Ebersöhn of Gerrie Ebersöhn Attorneys, Johannesburg and Bate Chubb & Dickson Inc, East London
For the defendants/respondents:	Adv C D Kotze, instructed by Kirchmanns Inc, East London
Date of hearing:	18 October 2018
Date of delivery of the judgment:	1 November 2018