

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

Case number: 4907/2006

In the matter between:

GOITSE GRIESSEL RAMAKARANE

Plaintiff/Respondent

and

CENTLEC (PTY) LTD

Defendant/Applicant

HEARD ON: 4 FEBRUARY 2016

JUDGMENT BY: PIENAAR, AJ

DELIVERED ON: 18 FEBRUARY 2016

INTRODUCTION

- [1] The applicant applies in terms of Rule 35(7) for an order that compels the respondent to comply with the applicant's Rule 35(3) notice delivered on the 25th of May 2015 by making the requested documents, being the respondent's IRP 5 documents, bank statements, income tax assessments and financial statements for the period August 2005 to 31 August 2010, available for inspection, alternatively that the respondent be directed to file a further and better affidavit in terms of Rule 35(3) in response to the applicants notice, failing which the applicant be granted leave

to approach the court for an order striking out the respondents claim.

- [2] The essence of the matter involves the interpretation and meaning of the word '*possession*' as used in Rule 35(3) and whether it must, in the context of the rule and the specific nature of the documents involved, be given a wider and secondary meaning in order to require from the respondent to make the said documents available for inspection although the respondent is not in actual and physical possession thereof but are, according to the applicant, readily available and obtainable by the respondent from the relevant third parties.

BACKGROUND

- [3] The respondent instituted action against the applicant during 2006 for payment of damages in the amount of R2 750 000.00. According to the respondent, the applicant appointed the respondent on a 5 year fixed-term contract at a salary of R550 000.00 per year, which the applicant breached by failing to allow the respondent to commence her duties in terms of the contract.
- [4] The applicant disputed the existence of the contract.
- [5] However, on the 4 March 2014 the parties settled the merits of the action and agreed that the applicant will pay 50% of the respondent's proven of agreed damages. This agreement was made an order of court.

[6] The *quantum* of the respondent's claim is still in dispute.

[7] Subsequent to the settlement of the merits, the applicant amended its plea in respect of the issue of *quantum* and, *inter alia*, pleads that:

“9.2 By virtue of the Court Order dated 4 March 2014, the defendant pleads as follows:

9.2.1 Once the plaintiff became aware of the defendants breach it was incumbent on her to immediately take all necessary and reasonable steps to mitigate the loss by seeking alternative employment.”

THE RULE 35(3) NOTICE

[8] The applicant avers that it is essential to consider the respondent's financial affairs over the 5 year period relevant to the claim due to the nature of the respondent's case and the applicant's defence.

[9] The applicant therefore delivered the Rule 35(3) notice on the 25th May 2015, in which it requested the respondent to make the following documents available for inspection in accordance with the provisions of Rule 35(6):

- “1. The Plaintiff's IRP 5 for the period 2005 to 2010;
2. The Plaintiff's bank statements for the period August 2005 to 31 August 2010;

3. The Plaintiff's Income Tax Assessment for the period August 2005 to 31 August 2010; and
4. Any financial statements prepared for the Plaintiff in relation to the period August 2005 to 31 August 2010."

[10] In response to the Rule 35(3) notice, the respondent delivered an "*affidavit in terms of Rule 35(3) & (6)*" on the 22nd of July 2015. In this affidavit, the respondent stated that she does not have the documentation in her possession and that the documents are also not readably available.

[11] The applicant was not satisfied with the respondent's response and therefore brought this application in terms of the provisions of Rule 35(7) for an order to compel the respondent to make the documents available for inspection and to comply with the provisions of Rule 35(3).

CRUX OF THE CONTENTIONS IN THE PAPERS

[12] In the founding affidavit, the applicant contends that it is entitled to the relief as:

"16.

I respectfully contend that the respondent's affidavit fails to comply with the prescripts of Rule 35(3).

17.

Furthermore, from the nature of the requested documents, possession thereof cannot honestly be denied. Bank statements,

financial statements and tax information remain in the respondent's possession even if she does not actually have a physical copy thereof. I submit that the respondent is being wilful, obstructive and obtuse in her conduct."

[13] This was elaborated upon in reply:

"10.2 Bank statements (even those older than 5 years) are readily available and obtainable from the respondent's bank(s) and constitute documents in respondent's possession and/or under the respondent's control."

[14] On the other hand, the respondent contends that she has discovered any and all related documents that are in her possession and which may be relevant to the enquiry of the income she derived during the relevant period; that she was unemployed during the period and tried to make a living through business interests she had; and that she does not have an onus and duty to go and source documents that are not in her possession.

[15] She further elaborated upon the reasons why she is not in possession of the required documents:

"5.11 I am not in possession of the documents asked. I have already stated so under oath. If I had been in possession, there would not have been any reason for me to refuse. The simple reason why I had already stated that the documents cannot be discovered, is simply because they do not exist (the IRP certificates – which are issued by employers to employees ((as I have said I was unemployed))), no financial statements were

drafted for me during this period (I am an individual) and I am not in possession of my then bank statements.”

and

“5.15 I mention in passing that there rest no obligation upon me to keep financial records older than 5 years, for tax purposes or otherwise. This is also the reason why I am not in possession of any further documents related to the relevant period (including bank statements).”

THE ISSUES

[16] It is not the applicant’s case that the documents are indeed in the respondent’s actual and physical possession, but that because the documents are readily available and obtainable by the respondent from the respondent’s bank and the South African Revenue Services (“SARS”), it constitutes documents in the respondent’s possession or under her control.

[17] Both parties were therefore *ad idem* that the issues that have to be determined are:

(a) whether the respondent is in possession of the documents as contemplated in Rule 35(3), although she does not have actual and physical possession of the documents and are therefore obliged to discover and make the documents available for inspection in terms of Rule 35(3) read with subrule (6); and

- (b) whether the respondent's affidavit in terms of Rule 35(3) and 35(6) complies with the requirements of Rule 35(3) and, if not, whether the respondent could be compelled to file a *"further and better affidavit in terms of Rule 35(3)"*.

[18] Mr. Grobler for the respondent also submitted that the facts and circumstances relevant to the main action, in particular the period when the cause of action arose, the relevant period for which the documents are requested and the lapse of time since the action was instituted need to be considered in order to determine whether it will be fair and reasonable to compel the respondent to obtain and discover the said documents.

APPLICABLE PRINCIPLES IN RESPECT OF DISCOVERY

- [19] It is apposite to briefly deal with the general principles in respect of discovery before dealing with the parties' contentions.
- [20] Rule 35(1) and (2) requires from a party to an action that has been requested thereto, to make discovery on oath of all documents and tape recordings relating to any matter in question in such action which are or have at any time been in the possession or control of such party.
- [21] If a party is not satisfied with the other party's discovery, it may make use of the procedure provided for in Rule 35(3) to obtain inspection of documents which that party believes are in the

possession of the other party and which are relevant to any matter in question. Rule 35(3) provides that:

“(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 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.”

[22] The purpose of Rule 35(3) is therefore to provide for a procedure to supplement discovery which has already taken place but which is alleged to be inadequate. (See **The MV Urgup Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd** 1999 (3) SA 500 (C) at 515D; **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa** 1999 (2) SA 279 (T) at 320C – 321F)

[23] The contents of a discovery affidavit are regarded *prima facie* to be conclusive with regard to the existence of documents. A court is therefore reluctant to go behind the affidavit. (See **Makate v Vodacom (Pty) Ltd** 2014 (1) SA 191 (GSJ) at par [16])

[24] In determining whether to go behind the discovery affidavit, the court will have regard to:

- (a) the discovery affidavit itself;
- (b) the documents referred to in the discovery affidavit;
- (c) the pleadings in the action;
- (d) any admissions made by the party making the discovery affidavit; and/or
- (e) the nature of the case or the documents in question.

(See **Continental Ore Construction v Highveld Steal and Vanadium Ltd** 1971 (4) SA 589 (W) at 597 - 598; **Chester Wholesale Meat v Panayou and Another** [2006] JOL 17115 (D) at para [29] - [36])

[25] The party who is not satisfied with the discovery has the onus of proving on the probabilities that the documents exist or are relevant. (See **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa** *supra* at 320C.)

[26] The aforesaid principles and approach are not only applicable where the relevance of the documents is in dispute, but also in respect of a dispute about the possession and/or existence of the documents. (See **Richardson's Woolwasheries Ltd v Minister of Agriculture** [1971] 4 All SA 212 (E) at 218)

[27] The courts require a sufficient degree of certainty that the documents exist before it will go behind the affidavit. However, the court will go behind the discovery affidavit where there is a probability that the party making the affidavit has or has had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made. (See **Swissborough Diamond Mines v Government of the RSA**, *supra*, at 320 F-G; **Makate v Vodacom (Pty) Ltd**, *supra* at para [16] and [17])

[28] As held by Spilg, J in **Makate v Vodacom**, *supra* at par [16]:

“The consequence of a court order being *de facto* impossible to implement exposes the offending party to contempt proceedings for not procuring something he did not have in the first place and exposes the order to ridicule. Accordingly it is necessary to be circumspect before directing production in the face of the denial of the document’s existence.”

[29] In applications under 35(7), the court has a discretion whether or not to compel discovery or inspection. This discretion is clear from the wording of the subrule, which provides that:

“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 a claim or strike out the defence.”

(Also see Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd 2016 (1) SA 78 (GJ) at par [29]; Continental Ore Construction v Highveld Steel and Vanadium Ltd *supra* at 594 - 595.)

DETERMINATION OF THE ISSUES

POSSESSION

[30] In the founding affidavit, as well as during argument, the applicant did not contend that the respondent is indeed in actual and physical possession of the documents, but that:

“.....Bank statements, financial statements and tax information remain in the respondent’s possession even if she does not actually have a physical copy thereof.”

and

“Bank statements (even those older than 5 years) are readily available and obtainable from the respondent’s bank(s) and constitute documents in respondent’s possession and/or under the respondent’s control”

[31] Mr. Johnson for the applicant also accepted the respondent’s explanation that the IRP certificates and financial statements do not exist and therefore only persisted with the main relief in

respect of the respondent's bank statements and income tax assessment for the period August 2005 to 31 August 2010.

- [32] The applicant urged this court to apply a wider and secondary meaning to the word '*possession*' as used in Rule 35(3) rather than interpreting it in a narrow sense. The crux of the wider meaning and interpretation which the applicant seeks to be applied is that a party who is required to discover documents in terms of Rule 35(3), is required to make such documents available for inspection when it is not in his or her physical possession but are readily available and obtainable by that party from the relevant third parties that have actual possession thereof.
- [33] Mr Johnson submitted that the wider interpretation is justified by virtue of the fact that the respondent has easy and unrestricted access to the required documents; that the documents are in possession of institutions, namely the respondent's bank and SARS, which are obliged to make the required documents available to the respondent on request; and the fact that the respondent can easily gain access to the documents in order to make it available for inspection.
- [34] In support of the applicant's contentions, the applicant relied on the dicta in **MIP Holdings (Pty) Ltd v Dawkins** 2004 JDR 0130 (W) and **International Law and Institute (Pty) Ltd v Firstrand Bank Ltd** 2006 JDR 0911 (T).

- [35] In the **MIP Holdings**-case, the court had to determine whether a servant who possesses a thing on behalf of his master is regarded as the possessor, which was answered in the negative.
- [36] The **International Law and Institute**-case involved the question whether documents that were in possession of a company within the Firstrand Group were to be considered being in the possession of Firstrand Bank for purposes of discovery. The court held that the said company and the bank formed part of the Firstrand group and divisions thereto and that the entities in the same group have easy access to documentation in respect of the other entities from which a rigid reliance on compartmentalizing of the different entities of the group is misplaced and misleading.
- [37] The respondent is not part of SARS nor the relevant bank that are, probably, in possession of the documents.
- [38] It is further trite that documents that are in the possession of a party's agent, i.e. an attorney or auditor, have to be discovered by that party. (See **Arlow v Arlow** (2008) JOL 22881 (T) at par [11]). It cannot be said that the relationship between the respondent and the relevant bank and SARS are akin to that of principle and agent. This is also not what the applicant contends.
- [39] The aforesaid decided cases on which the applicant relied are therefore distinguishable from the present matter and are not authority for the applicant's contentions.

[40] The only basis upon which the respondent can therefore be compelled to make the documents that are, possibly, in the possession of the bank and SARS available for inspection in terms of Rule 35(3), is if '*possession*' is given the meaning and interpretation that the applicant urges this court to give.

[41] The state of the law in respect of interpretation was expressed in **Natal Joint Municipal Pension Fund v Endumeni Municipality** (2012 (4) SA 593 (SCA) at par [18]) as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is a language of the provision itself', read in context and having regard to the purpose of

the provision and the background to the preparation and production of the document.”

(Also see **Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA) at par [10] – [12] ; **Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA) at para [24] – [31])

- [42] Thus, in order to determine whether the rule-maker intended to use the word ‘*possession*’ in the wide sense, the context provided to the word by reading the provisions of Rule 35(3) in the light of the whole of Rule 35, the other applicable rules of court and the circumstances attended upon its coming into existence must be objectively considered.
- [43] Rule 35(1) provides that any party to an action may require from the other party, by notice, to discover under oath all documents to any matter in question in such action which are or have at any time been in the possession or control of that party.
- [44] The manner in which discovery must be made, is expressly provided for in Rule 35(2). It must be made in accordance with Form 11 of the First Schedule to the rules. It requires from a party to specify separately such documents and tape recordings in his or her possession or that of the agent; such documents and tape recordings in respect of which he or she has a valid objection to produce; and such documents and tape recordings which he or she, or the agent, had but no longer has in their possession at the date of the affidavit.

[45] Form 11 makes provision for the following:

- “(1) I have in my possession or power the documents relating to the matters in question in this cause set forth in the first and second parts of the First Schedule hereto.
- (2) I object to produce the said documents set forth in the second part of the said schedule hereto.
- (3) I do so for the reason that (here state upon what grounds the objection is made, and verify the fact as far as may be).
- (4) I have had, but have not now in my possession or power, the documents relating to the matters in question in this action, set forth in the Second Schedule hereto.
- (5) The last-mentioned documents were last in my possession or power.....(state when).
- (6) The(here state what has become of the last-mentioned documents, and in whose possession they are now).
- (7) According to the best of my knowledge and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody or power of my attorney, or agent, or any other person on my behalf, any document, or copy of, or extract from any document, relating to any matters in question in this cause, other than the documents set forth in the First and Second Schedules hereto.”

[46] According to the learned authors of the work Herbstein and Van Winsen, **The Civil Practice of the High Courts of South Africa** (5th Edition, Volume 1, p 797), the wording of Form 11 has been taken over from the English Rule in respect of discovery. The essence of the English Rule is summarised in Halsbury’s, Laws of England (4th Edition, Volume 13, par 39), as follows:

“The existence of all documents must be disclosed which the party giving the discovery has or has had in his possession, custody or power. For this purpose ‘possession’ means the physical or corporeal holding of the document pursuant to the right to its possession, as in the case of an agent or bailee; ‘custody’ means the mere actual physical or corporeal holding of a document, regardless of the right to its possession, as in the case of a servant or employee; and ‘power’ means an enforceable right to inspect it or to obtain possession or control of the document from the person who ordinarily has it in fact. The requirements of the rules that the documents to be disclosed must be or have been ‘in the possession, custody or power’ of the party making the discovery are disjunctive in their operation, so their disclosure must be of all documents which are or have been in possession or the custody or the power of that party; and equally only those documents can properly be withheld from disclosure which have not been in the possession or custody or power of that party.

Accordingly, all documents must be included of which the party given discovery has, or has had, possession or custody even if he had, or has had, no property at all in them; but documents which never were in his possession or custody need not be included unless he had some kind of property in them. Documents which are or were in the possession or custody of the party’s agent must be included provided the agent held them in his capacity as agent.”

- [47] With regard to the purpose of the first part of Form 11, the court in **Carpede v Choene NO and Another** (1986 (3) SA 445 (O) at 453H) held that:

“What defendant should have done, therefore, is that she should first of all, have made full and timeous discovery of all the documents in her possession and which relate to the matters in question in the

cause, in the sense that these documents should have been mentioned in the first and second part of the first schedule to her discovery affidavit. Thereafter she should have deposed in paras (2) and (3) of the discovery affidavit that she objects to produce the documents said forth in the second part of the first schedule of her discovery affidavit because (seeming such to be the case) they ...”

- [48] The second part of Form 11, paragraphs 4 to 6 thereof, further requires from the discovering party to set out any documents which has been in his or her possession but is no longer in his or her possession or power, and, in such event, to state when the documents were last in his or her possession, what have become of it and in whose possession the documents are. It does not place a duty on the discovering party to source and obtain those documents in order to make it available for inspection.
- [49] It is trite that no discovery order can be obtained against the person into whose possession the document has passed if that person is not a party to the matter. (See **Benson and Simpson v Controllers of Orenstein Arthur Koppel Ltd (In Liquidation)** 1918 WLD 45). The party desiring production of such a document will have to obtain it by means of a subpoena *duces tecum* issued in terms of Rule 38(1).
- [50] Rule 38(1) allows any party desiring the attendance of any person to give evidence at the trial to sue out from the office of the registrar one or more subpoenas for that purpose. If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be

produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court at the trial.

- [51] That witness must, in terms of Rule 38(1)(b), hand the document over to the registrar as soon as possible, unless the witness claims that it is privileged. Thereafter the parties may inspect the document and make copies or transcription thereof, after which the witness is entitled to its return. (See **Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenberg** 1989 (1) SA 145 (C) at 149; **PFE International and Others v Industrial Development Corporation of South Africa Ltd** 2013 (1) SA 1 (CC) at para [17] - [32])
- [52] Having regard to the context of Rule 35(1) and (2), as well as the provisions of Rule 38(1), it is evident that the purpose of the rule, and the intention of the rule-maker, is not to oblige a party to search for and obtain any documents that were previously in his or her possession in order to discover and make same available for inspection. All that is required from the discovering party is to specify such documents, state when the documents were last in his or her possession or power, what has become of the documents and in whose possession they are.
- [53] It is obvious that the purpose of the aforesaid requirements in respect of those documents is to afford the other party an opportunity to obtain access to those documents in terms of the provisions of Rule 38(1) by the issuing of a subpoena *duces tecum*.

[54] The same principles that are applicable to Rule 35(1) and (2) also apply to the provisions of Rule 35(3), as was confirmed in **Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd** (2000 (3) SA 181 (W) at par [24]):

“Rule 35(3) must be read in context with subrules (1), (2), (4) and (6). Questions such as when a document is under the control of a party as referred to in subrule (1) and the proper method of discovery of documents as referred to in subrule (2) and the sanction against use of undiscovered documentation as referred to in subrules (4) and (6), are, in my view, *mutatis mutandis* applicable to discovery pursuant to a Rule 35(3) notice. These general principles of discovery are therefore as applicable to discovery pursuant to a notice in terms of Rule 35(3) as they are pursuant to a notice for discovery under Rule 35(1).”

[55] If one has regard to the specific provisions of Rule 35(3), it requires from the discovering party to make the specified documents available for inspection in accordance with Rule 35(6). If the documents are not in his or her possession, the party must state it on oath and is then obliged to state their whereabouts, if known.

[56] If it was the purpose of the rule, or the intention of the rule-maker, to afford the wider meaning to the word ‘*possession*’ as submitted by the applicant, then the second leg and requirement of subrule (3), as well as the second part of Form 11, are superfluous. If that was the intention, the party who received a notice to discover will have to search for and obtain the

documents that were previously in his or her possession from the person in whose possession the documents are in order to make it available for inspection. There would then be no need for such a party to specify the whereabouts of any documents that are not in his or her possession in the Rule 35(3) response or even in Form 11.

- [57] Having regard to the contents of Rule 35 as a whole and in context with the provisions of Rule 38(1), as well as the principles in respect of a party's obligation to make discovery of all documents in his or her possession, or that of his or her agent, there is no room to give a wider meaning and interpretation to the word '*possession*' as used in Rule 35(3).

- [58] I can find no reason or justification to do so. To do that, this court will have to negate the provisions and purpose of the rule, as well as the settled principles and law in respect of discovery.

- [59] The relevant relationship between the respondent and her bank, as well as with SARS, also does not justify the wider meaning and interpretation of the provisions of Rule 35(3).

- [60] It is accepted that the basic relationship between a banker and a customer is of a contractual nature, being one of debtor and creditor. (See **Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd** 1995 (4) SA 510 (CPD) at 530G – 531E) There is no evidence of the specific obligations that the bank has towards the respondent in respect of the power, control and possession of the bank statements nor is there any evidence that

the said bank is indeed still in possession of the relevant bank statements.

[61] Although it might be correct to accept that a person has, in the ordinary course of business, access to his or her bank statements, the question to be answered in this matter is whether it is also the position in respect of bank statements that are older than 5 years and whether such statements should be regarded as being in the possession, power or control of the respondent. In the absence of any evidence to the contrary, I am unable to find that the respondent has any power or control over the bank's affairs and administration, particularly with regard to any bank statements in respect of accounts that are, or were, under the bank's control. I am therefore of the view that the respondent is not in possession of the required bank statements, being possession as contemplated in Rule 35(3).

[62] The relationship between the respondent and SARS is also not a novel one. In the matter of **Tooch v Greenaway** (1922 CPD 331) Watermeyer, AJ, as he then was, was also requested to direct a respondent to discover and disclose his income tax return, alternatively to authorise the Receiver of Revenue to allow inspection thereof. In that matter, the respondent also did not discover and disclose any income tax returns as he was not in possession thereof. However, the applicant applied for an order directing the respondent to make discovery of the returns. Watermeyer, AJ refused the application and held that:

“Here the respondent is not in possession of the document applied for so I do not see how the applicant can succeed in the first part of the application. Alternatively the applicant asks for an order authorising the Receiver of Revenue, Cape Town, to allow the applicant’s attorney to inspect the income tax return. It seems to me in the first place this is not an order which the court can make, and in the second place if it could, this is not the stage where such an order should be applied for. This income tax return is in existence and in possession of the Receiver of Revenue, and he can always be called as a witness at the trial to produce it if it is relevant in the action; and when he’s called as a witness and refuses to produce the return, it is for the Court to decide whether it would order its production in terms of the Income Tax Act. It seems to me that the correct course, if the applicant wishes to put the document in as evidence, is to call the Income Tax Commissioner when the action is tried, and if he refuses to produce it, the applicant can then make the application for its production, and the Court can decide whether or not it should be produced. That is, however, quite a different matter from granting an order for inspection before the trial for which no precedent has been quoted.”

[63] It is evident from the abovementioned decided cases and the principles in respect of discovery that the law as applied by Watermeyer has since then not changed. (Also see **Scott v Scott** [2006] JOL17813 (C) at p 10; **Trust Sentrum (Kaapstad) (Edms) Bpk and Another v Zevenberg** *supra*).

[64] Although the applicant also contended that the contents of the respondent’s opposing affidavit contradicted the respondent’s affidavit in reply to the Rule 35(3) notice, which according to the applicant demonstrates that the respondent is not being open and

frank with the court and which places the veracity of her denial in doubt, there is no basis on which her version can be rejected. In the Rule 35(3) affidavit, she stated that she is not in possession of the documents. Rule 35(3) does not require from her to give any reasons why the documents are not in her possession. The respondent elaborated on this issue in her opposing affidavit. In any event, the applicant does not rely on actual and physical possession in support of the relief.

[65] Accordingly, the respondent cannot be compelled to make the said documents, being the bank statements and income tax assessments for the period August 2005 to 31 August 2010, available for inspection in terms of Rule 35(3) read with subrule (6) as I cannot find that those documents are in her possession, being '*possession*' in the ordinary sense and meaning as contemplated in Rule 35.

[66] There is another reason why I would not have been inclined to grant the main relief. As stated above, a court has a discretion in applications of this nature. For the reasons that follow, I am not inclined to exercise my discretion in favour of the applicant.

[67] The main action was instituted during 2006, approximately 10 years ago. Although the merits were only settled during March 2014 and the said amendment to the plea was effected thereafter, the issues between the parties were already defined in the particulars of claim and the initial plea.

- [68] The respondent's discovery affidavit was already filled on the 30 August 2012.
- [69] The applicant did not provide a satisfactory explanation, if any, why discovery of the said documents were only requested during May 2015. From the onset, the applicant knew that the respondent's claim is disputed and ought to have known that the documents might be relevant to the respondent's claim and the *quantum* thereof. It, however, only decided to request discovery of the documents at this very late stage in the proceedings and after such a lengthy period of time since the cause of action arose. By saying this, I appreciate the fact that a party may at any time during the proceedings make use of the procedure in Rule 35(3). However, the applicant ought to have known that there is a great possibility that documents relating to the period in issue could be lost over time and that the respondent will in such event not be able to make it available for inspection.
- [70] The applicant now expects from the respondent to search for and obtain the documents which relate to a period of more than 5 years ago and which documents are not in her possession. Notwithstanding the applicant's own belated actions, the applicant blames the respondent of being wilful, obstructive and obtuse in her conduct and failure to obtain the documents, which are unfounded.
- [71] The applicant can obtain the documents and information through a subpoena in terms of Rule 38 of the rules. The applicant is therefore not without a remedy.

[72] Accordingly, the applicant's application in respect of the main relief cannot succeed.

COMPLIANCE WITH RULE 35(3) – WHEREABOUTS THE OF DOCUMENTS

[73] The respondent did not state the whereabouts of the documents in her affidavit in response to the Rule 35(3) notice.

[74] Although it was not clear from the applicant's founding affidavit on what basis the applicant contends that the respondent did not comply with the provisions of Rule 35(3), it was evident upon the mere reading of the rule and the contents of the respondent's Rule 35(3) affidavit that she failed to state the whereabouts of the documents.

[75] Mr. Grobler for the respondent contended that the respondent does not have an obligation to deal with the whereabouts of the documents if it is not known to her. If not known, this aspect does not have to be addressed in the affidavit.

[76] It is not necessary to consider the merits of that contention as it is evident from the respondent's opposing affidavit that she indeed has knowledge of the whereabouts of the documents. She gave her consent to the applicant to approach SARS and seeks whatever documents related to her. A similar consent was not given in respect of her bank statements.

- [77] The respondent ought to have known when responding to the Rule 35 notice that the bank statements were, and might be, in the possession of the bank. The particulars of the bank are undoubtedly known to her. The respondent did not advance any reason why the whereabouts of the bank statements, especially the particulars of the bank, could not be disclosed.
- [78] The applicant will only be in a position to issue a subpoena to procure the bank statements if the particulars of the bank are disclosed by the respondent.
- [79] Mr. Grobler however contended that Rule 35(3) is not intended to be used to obtain information that a party requires for the preparation for trial. If the applicant needs the particulars of the respondent's bank, the bank accounts and other related particulars and information, it must do so in terms of the provisions of Rule 21. The applicant could also informally request the whereabouts of the documents, which the applicant did not do.
- [80] In terms of Rule 35(7) the court has a discretion to order compliance with the rule, being Rule 35. This includes proper compliance with Rule 35(3).
- [81] In any event, section 173 of the Constitution of the Republic of South Africa, 1996 gives this court the inherent power to protect and regulate its own process, taking into account the interest of justice.

- [82] The applicant, as all litigants, has the right to a fair trial, which right can only be protected, in the circumstances of this matter, if the applicant is provided with the whereabouts of the bank statements in order to procure it for trial in terms of the provisions of the rules.
- [83] I am therefore inclined to compel the respondent to provide the applicant with the particulars of the bank and/or banks at which she held bank accounts during the period August 2005 to August 2010 as, firstly, the respondent was obliged to state the whereabouts in her rule 35(3) affidavit and, secondly, as it is in the interest of justice that the information be provided to the applicant to ensure a fair trial.

COSTS

- [84] Although I am, in the exercising of my discretion, inclined to grant the aforementioned order, it does not mean that the applicant was substantially successful with the application.
- [85] The applicant's case is set out in its founding affidavit. It is clear that the application was premised on the applicant's alleged right to demand discovery from the respondent of the documents that were not in actual and physical possession of the respondent and the proposed interpretation and meaning of the word '*possession*'. These were the material issues between the parties.

- [86] The alternative relief did not form part of the material issue nor was it the real substance of the matter. This is evident from the manner in which this issue was raised in the founding affidavit.
- [87] The applicant did not, as is practice in this division, informally require from the respondent to disclose the whereabouts of the documents, in particular that of the bank statements, before this application was launched. However, the applicant addresses a letter on the 3 August 2015 to the respondent in which the applicant took issue with the fact that the respondent contends that she cannot obtain copies of the documents from SARS. In that letter, the applicant did not address the issue of the non-disclosure of the whereabouts at all.
- [88] A simple request could have had the result that it would have been unnecessary to approach this court with an application of this nature merely to obtain the whereabouts of the documents.
- [89] However, even if the respondent provided the applicant with the whereabouts of the documents, it is evident that the applicant would still have pursued the application in respect of the main relief. This is clear from the fact that the applicant persisted with the main relief notwithstanding the fact that the respondent gave an explanation of the reasons why she is not in possession of the documents and why she cannot make it available for inspection.
- [90] The main relief took up most of the papers before this court, as well as the arguments during the hearing of the matter. I have

already indicated that the applicant's application in respect of the main relief cannot succeed.

- [91] Costs are in the discretion of the court, which discretion must be exercised judicially upon the consideration of the facts and relevant circumstances of each case. These would, *inter alia*, include the nature of the proceedings and the conduct of the parties. In essence, it is a matter of fairness to both parties. (See **Intercontinental Exports (Pty) Ltd v Fowles** 1999 (2) SA 1045 (SCA) at par [25]; **Ferreira v Levin, Vryenhoek v Powell** 1996 (2) SA 621 (CC) at par [3])
- [92] The general rule is that a successful party should be given costs. In determining who the successful party is, the court looks at the substance and not the form of the judgment. If the matter turned on issues in regard to which the ultimately successful party was unsuccessful, the court may depart from the general rule. (See **Galion (Pty) Ltd v Burger** 1972 (4) SA 652 (C) at 654B; Herbstein and Van Winsen, **The Civil Practice of the High Courts of South Africa**, Volume 2, at p 957 – 958)
- [93] Although I am inclined to grant an order against the respondent, the circumstances of the matter justify the exercise of my discretion in respect of the costs issue in favour of the respondent. The matter essentially turned on the issue in respect of the main relief to which the applicant was unsuccessful. That issue also forms the substance of this judgment. The respondent was therefore substantially successful. Having regard to the aforesaid, as well as all the relevant circumstances of the matter

as a whole and in respect of to the alternative relief, such order will also be fair and just. I therefore cannot find any reason why the respondent should not have her costs.

[94] Accordingly, the following order is made:

[94.1] The respondent is directed to file a supplementary affidavit as contemplated in Rule 35(3) within 10 days from the date of this order in which affidavit the respondent shall state the whereabouts of the respondent's bank statements for the period August 2005 to 31 August 2010, as well as the particulars of any and all bank institutions at which the respondent held bank accounts during the period August 2005 to 31 August 2010.

[94.2] The applicant is ordered to pay the costs of the application.

PIENAAR, AJ

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