

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

Case No.: 2597/2012

In the application between:-

SUZETTE MALHERBE N.O.

Applicant

And

PETRUS PAULUS KIRSTEIN

Respondent

In Re:

Case No.: 2597/2012

In the matter between:-

SUZETTE MALHERBE N.O.

Plaintiff

and

SUZETTE MALHERBE N.O.

1st Defendant

PETRUS PAULUS KIRSTEIN

2nd Defendant

PETRUS PAULUS KIRSTEIN N.O.

3rd Defendant

(In his capacity as a trustee of the
Tarentaalbos Trust)

CAREL STEPHANUS ERASMUS MULLER N.O.

4th Defendant

(In his capacity as a trustee of the
Tarentaalbos Trust)

PETRUS PAULUS KIRSTEIN N.O.

5th Defendant

(In his capacity as a trustee of the
Kirstein Boerdery Trust)

HUGO AMOS KIRSTEIN N.O.

6th Defendant

(In his capacity as a trustee of the
Kirstein Boerdery Trust)

CAREL STEPHANUS ERASMUS MULLER N.O 7th Defendant
(In his capacity as a trustee of the
Kirstein Boerdery Trust)

PETRUS PAULUS KIRSTEIN N.O. 8th Defendant
(In his capacity as a trustee of the
Rustig Trust)

HUGO AMOS KIRSTEIN N.O. 9th Defendant
(In his capacity as a trustee of the
Rustig Trust)

CAREL STEPHANUS ERASMUS MULLER N.O 10th Defendant
(In his capacity as a trustee of the
Rustig Trust)

PETRUS PAULUS KIRSTEIN N.O. 11th Defendant
(In his capacity as a trustee of the
Mosega Trust)

HUGO AMOS KIRSTEIN N.O. 12th Defendant
(In his capacity as a trustee of the
Mosega Trust)

CAREL STEPHANUS ERASMUS MULLER N.O 13th Defendant
(In his capacity as a trustee of the
Mosega Trust)

CORAM: MOLOI, J

HEARD ON: 4 SEPTEMBER 2014

DELIVERED ON: 18 SEPTEMBER 2014

MOLOI, J

[1] This is an application to compel the respondent to comply with two notices in terms of the provisions of Rule 35(3) of

the Uniform Rules of Court, the first dated 10 December 2013 and the second dated 4 July 2014. The respondent is opposing the application.

- [2] The applicant is the executrix of the estate late Gerbreggie Dorothea Kirstein (the deceased) who was married out community of property with the respondent, Petrus Paulus Kirstein (Kirstein). The applicant instituted an action against the respondent seeking the following relief:

- 2.1 An order declaring that a partnership existed between the deceased who died on 19 July 2011 and Kirstein in equal shares in respect of the farming business and the ceramics business conducted by them;
- 2.2 An order declaring that the partnership between the deceased and Kirstein was dissolved on the death of the deceased on 19 July 2011;
- 2.3 An order appointing a liquidator with the authority to realise the whole of the partnership assets, including the assets registered in the Tarantaalbos Trust, IT 1474/2000; the Kirstein Boerdery Trust, IT 1473/2000; the Rustig Trust, IT 1768/2002; the Mosega Trust, IT 1472/2000. Kirstein and deceased, to liquidate the liabilities of the partnership, to prepare a final account and to pay to the deceased's estate and Kirstein whatever is owing to them by virtue of the partnership agreement ..."

- [3] The basis of the alleged partnership is that the deceased and the respondent ventured into joint farming undertaking where each one contributed financially and through active participation in the activities of the business. In due course a ceramic business was established and the deceased and the respondent conducted the same in partnership having agreed so orally or tacitly. A good number of farmers were acquired and held by both the deceased and the respondent and the ceramic business also grew substantially. In his plea, the respondent disputed that a partnership existed. In his discovery affidavit in terms of Rule 35(1) he listed a number of documents in the different schedules to such an affidavit. The applicant was, however, not satisfied about that discovery and served the notices in terms of Rule 35(3). When the respondent failed to respond thereto, this application was launched.
- [4] In the first notice dated 10 December 2013 the respondent is required to make available for inspection or to state under oath within ten days that such documents are not in his possession. The documents sought to be made available relate to proving all the income and/or earnings per year from the date bought until sold, if at all, from all the farms and properties listed. The respondent is also sought to disclose the interest earned and bank statements, etc. The respondent, respondent thereto on 18 December 2013 but the applicant is of the view that the response was inadequate. A second notice dated 4 July 2014 was served requiring the respondent to make available for inspection documents in his possession relating to the documents on

which a scientific research was based to “determine rectifying payments” between the estate of the deceased with certain details, documents setting out written results of the scientific research, written appraisals used in the determination of the value of the properties, complete exposition of all income derived by the respondent from mealie crops for a period of five years preceding the deceased’s death, a complete exposition of all assets alienated or disposed of whether movable or immovable, etc.

- [5] The respondent did not respond to this notice but in opposition of the application he contended that the financial statements he discovered were a complete record of all his dealings, involvement, income, expenses, assets and obligation, meaning there were no more documents in his possession; the respondent furthermore pointed out that under order of the Magistrate’s Court, the applicant seized all the other records required; the documents used during settlement negotiations were privileged and documents relating to activities subsequent to the deceased’s death were irrelevant. The response of the respondent was vehemently attacked by Advocate du Bruyn for the applicant. So I do not propose in this judgment, to deal with the validity or otherwise of those arguments. This I do because the decision I reached is based purely on the interpretation of Rule 35(3) as expounded in the cases I will refer to hereunder. The second consideration is the urgency of the matter as the hearing took place virtually on the eve of a recess and the matter is enrolled for hearing from 6 October 2014.

[6] Rule 35(3) partly state 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 ...”

On closer look at the provision one cannot escape the two grounds on which such notice may be served for it to be valid. Firstly, is the phrase believes and the second is relevant. It is required of the applicant to lay sound grounds of his belief and not a mere subjective belief that the documents do, in fact, exist: **Continental Ore Construction v Highveld Steel and Vanadium Corporation 1971 (4) SA 589 (w) at 598**. In **Bothma v Protea Furnishers (Pty) Ltd 1970 (3) 180 (0) at 183 E – F**, Erasmus J, stated:

“... it would in order to succeed be sufficient for the applicant to substantiate his belief in terms of Rule 35(3) by showing that the documents or books are in fact in existence and are relevant to any matter in question concerning the case.”

In her founding affidavit to the application, the applicant merely repeated the word “believe” without substantiating or expanding on the grounds of such belief. Even in argument before me the grounds on which such belief was based were not even alluded to.

- [7] The documents required to be produced for inspection are set out in paragraph 4 above. They all relate to the values of the properties, the income derived there from, the details of the research conducted etc. The issues that need to be resolved over which there is a dispute in the case and which the applicant prayed relate to the existence or not of the partnership and, if it is found that a partnership existed, the liquidator be appointed to take control of the entire estate, settle the debts and distribute the residue between the estate of the deceased and the respondent. At this point in time and before the existence of the partnership had been established, what have the values, income, expenditure etc. got to do with the gravamen of the claim. Only documents relevant and “relating to the matters,” and relevant to any aspect of the case must be produced for inspection or discovered: **Durbach v Fairway Hotel Ltd, 1949 (3) SA 1081 (SR) at 1083**. In her particulars of claim the applicant gave grounds on which the claim of a partnership are based and they have nothing to with the values, income, scientific research and so forth. The key issue is whether there was a partnership or not and only documents relating to that issue are relevant and must be discovered.
- [8] The relief of the appointment of the liquidator illustrates the point even better. There can be no liquidator appointed if the applicant is not successful with the declaration of the existence of a partnership. The liquidator, if appointed, is the one that will be given “the authority to realise the whole of the partnership assets” as prayed for in the particulars of claim. S/He is the person that will be entitled to determine

the whereabouts of the assets, the income they generated, what assets were disposed of and their values, pay the liabilities of the partnership and distribute the residue between the respondent and the deceased estate. Starting with the assets, their values, the income etc is really putting the cart before the horse. Those will be relevant only after the partnership issue has been settled.

[9] In **The MV Group: Owners of the MVURGUP v Western Bulk Carriers (Australia) (Pty) Ltd and Others, 1999 (3) SA 500 (c) at 515** the following was stated:

“In the case of rule 35(3) the intention is to supplement discovery which has already taken place but which is alleged to be inadequate. Rule 35(3) and (14) do not afford a litigant a licence to fish in the hope of catching something useful.”

To my mind the applicant failed to meet the requirements of the belief she had in the inadequacy of the discovery made as well as to illustrate the relevance of the information or documents demanded to be inspected. The entire exercise is nothing but the fishing expedition referred to above and amounts to abuse of legal process worthy of being visited with a punitive costs order.

ORDER:

[10] In the premises the following order is made:

(a) The application is dismissed;

- (b) Applicant is ordered to pay the costs on attorney and client scale which costs shall include the costs of two counsels.

K. J. MOLOI, J

On behalf of the applicant: Adv. Du Preez
Instructed by:
PHATSHOANE HENNEY
BLOEMFONTEIN

On behalf of respondent: Adv. Du Bruyn
Instructed by:
HILL, McHARDY & HERBST
BLOEMFONTEIN

/rm