

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Numbers: **2022-034505**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
20/09/2024	
DATE	SIGNATURE

LYNN GERBER

Plaintiff / Applicant

And

GAVIN PETER BOYLE

First Defendant / Respondent

CONSULMET (PTY) LIMITED

Second Defendant/Respondent

JUDGMENT

SENYATSI, J

Introduction

- [1] This is an opposed application brought in terms of Rule 35(3) of the Uniform Rules in terms whereof the applicant seeks discovery of certain documents mentioned in the notice served on the first defendant/respondent on 7 June 2023. The parties are involved in litigation in the main action. For convenience purposes, the parties will be referred to as in the main action and reference will be made to the first defendant as defendant because the second defendant, against whom no relief is sought, is not a participant in this litigation.

Background

- [2] The plaintiff instituted action against the defendant claiming payment for various amounts. The claim is based on a settlement agreement in terms of which a partnership was dissolved. Relevant for this application, so contends the plaintiff, are the allegations as are set out in the particulars of claim in paragraphs 6.7 and 9.4 as well as clause 10 of the settlement agreement. Clause 10 reads as follows:

“10 Consulmet

In the event that Gavin sells his 46 % in Consulmet (Pty) Limited then Lyn will be entitled to 40 % of the sale price that Gavin is entitled to after deduction of any taxes”

- [3] After the exchange of the pleadings between the parties, the plaintiff served notice in terms of Rule 35(3) which notice was delivered on 22 March 2023 (“the first Rule 35(3) notice”). The defendant responded to the notice on 26 September 2023 and filed a supplementary discovery in terms whereof further documents were discovered by notice dated 20 September 2023. On receipt of the documents listed, the plaintiff complained that there was still

no proper compliance with Rule 35(3) and that resulted in the present application for an order for discovery of documentation that was not provided as per the supplementary discovery dated 20 September 2023 which is opposed by the defendant.

- [4] In her application in terms of Rule 35(7), the plaintiff avers that she seeks an order relating to discovery and disclosure in terms of the documentation referred to in paragraphs 1.3 to 1.8, 3.1 and 3.2 of the Rule 35(3) notice dated 7 June 2023. The reason why there is no prayer for the remaining paragraphs of the Rule 35(3) notice, so contends the plaintiff, is by virtue of the fact that the first defendant filed a further discovery affidavit dated 20 June 2023 and at the request of the plaintiff's attorney, provided copies of some of the discovered documents which were requested, but has omitted to reply and/or to discover the documentation referred to in paragraphs 1.3 to 1.8 and paragraphs 3.1 and 3.2 of the notice. The plaintiff avers that since June 2023, the defendant undertook to discover the documents referred to in the notice in terms of Rule 35(3). There was never any objection according to the plaintiff that the documents were not relevant to the pleaded case.
- [5] The defendant opposes the application and contends that the application to compel constitutes an abuse of process and this court is requested to dismiss the application with costs on a scale as between attorney and client.
- [6] The defendant states that the basis of opposition to the application is that the documents listed in the Rule 35(3) notice of 7 June 2023 are not relevant to any of the issues on the pleadings. The defendant protests and avers that the plaintiff appears to be prospecting, hoping to find information that may enable her to introduce a new and/or alternative cause

of action, alternatively, so he continues in his lamentation, the aim of the Rule 35(3) notices and application to compel is to harass him. The defendant states that this is confirmed by the contents of the plaintiff's replying affidavit. The defendant contends that in any event, the plaintiff is alluding to "disputes" not presently pleaded.

- [7] The defendant furthermore contends that in an application to compel discovery of documents listed in a Rule 35(3) notice, the applicant is required to demonstrate that the documents may be relevant to any matter in question. The defendant submits that the *onus* is on the applicant to bring his/her application within the ambit of Rule 35(3).
- [8] The first defendant states that the plaintiff did not even attempt to demonstrate why she is entitled to discovery of the documents in terms of Rule 35(3) in the concise affidavit filed in support of the application to compel. Furthermore, so avers the defendant, the founding affidavit comprises of four pages and mainly repeats what is set out in the Rule 35(3) notice.
- [9] In the notice in terms of Rule 35(3) the documents which were required and are the subject of this litigation, are as follows:-

“ 1.3. Copies of all or any agreements/deeds to vary any provisions of the trust deed and proof of lodgement of the amendment with the master as provided for in terms of the provisions of section 4 (2) of the trust property control act 57 of 1988;

1.4 A copy of the agreement in terms whereof of the Gal Share 2 Trust acquired . the 46 shares in the second defendant;

1.5 A copy of the agreement by virtue of which the Gal Share 2 Trust disposed of the 46 shares held by the trust in the second defendant to the first defendant as per the letter dated 26 February 2021 addressed to Absa bank;

1.6. Copies of all resolutions passed by the trustees of the Gal Share 2 Trust during the period

1.7. Proof of the opening of a separate trust account by the Gal Share 2 Trust at a banking institution as provided for in terms of the provisions of Section 10 of the Trust Property Control Act;

1.8. Proof of payment of the amount of R8,518,519 by the Gal Share 2 Trust to the second defendant during the period 1 March 2012 to 28 February 2013 reflected as a shareholders loan in the second defendants financial statements dated 28 February 2013;”

- [10] The defendant protests that the documents set out in paragraph 9 above are irrelevant for the purpose of the main action and that insistence on being compelled to provide them constitutes an abuse of process.

Issue for determination

- [11] The issue for determination is whether or not the application constitutes an abuse of process and whether the plaintiff is entitled to be provided with the documents.

Legal principles

- [12] Rule 35 (3) provides that:

“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 sub-rule (6) or to state under oath, within ten days, that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.”

[13] The object of discovery is to ensure that before the trial both parties are made aware of all the documentary evidence at the disposal of the parties which in turn assists not only the litigating parties but the court to discover the truth¹. Discovery affidavits are regarded as *prima facie* conclusive save where it can be shown that there are reasonable grounds for believing that the other party has the relevant documents or that the other party is false in his or her assertions.²

[14] In *Swissborough Diamond Mines v Government of the Republic of South Africa*³, the Court had the following to say:

“As indicated above, Rule 35 (3) provides the procedure for a party dissatisfied with the discovery of another party. He requires the former party to give notice to the latter party to make the documents or tape recordings available for inspection in accordance with Rule 35 (6). Rule 35 (6) requires the notice to be, as near as may be, in accordance with Form 13 of the First Schedule. Form 30 requires the production for inspection of ‘the following documents referred to in your affidavits.’ It is obviously designed for inspection of discovered documents. It must be adapted to deal with the situation envisaged in Rule 35 (3). In particular, the degree of specificity of the documents that the party dissatisfied with, the discovery must comply with the notice must be determined. The importance of this requirement cannot be understated. A party can clearly be severely prejudiced by a notice which does not exhibit the necessary degree of specificity. Failure to comply with the notice can result in an order compelling compliance, and failure to comply thereafter can result in the claim being dismissed or defence being struck out in terms of Rule 36(7).”

[15] The intention of the sub- rule is to provide for a procedure to supplement discovery which has already taken place but which is alleged to be

¹ See *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083.

² See *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749H.

³ 1999 (2) SA 279 TPD at 321 F

inadequate.⁴ In *MV Urgup; Owners of the MV Urgup v Western Bulk Carriers (AUST)*⁵ the Court had the following to say:

“As to the alternative relief claimed by the Respondents which, as I have said, would in effect be an order in terms of uniform rules 35 (3) or 14 compelling the Applicants to make available for inspection and copying the documents listed in Annexure A to the notice of motion, this may be dealt with fairly shortly. These sub- rules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent’s possession or under his control which may be relevant to the issues and which he is able to specify with some degree of precision. In the case of Rule 35 (3) the intention is a supplement discovery which has already taken place but which is alleged to be inadequate.”

- [16] Once a party that has been requested to produce documents has set out the reason for so refusing, such as the reason that the documents are irrelevant, the requesting party may proceed with the next step.⁶ He may follow the judgment of Van der Byl AJ in *Visser and Others v Vardakos Attorneys and Others*⁷, where the Court took the view that the issue of whether or not a document is relevant should not be left to the decision of the party that is requested to produce it alone. The requesting litigant should be given the document so that he must himself decide whether the documents are indeed not relevant. In other words, it is not enough for a party that is requested to produce a document just to claim that the documents are irrelevant and refuse to produce them. The requesting party is entitled to have access to

⁴ *Zulu v Red Ant Security Relocation and Eviction Services (Pty) Ltd* (10953/18) [2021] ZAGPPHC 261 (23 April 2021)

⁵ 1999 (3) SA 500 CPD at 515 B-C

⁶ *Zulu v Red Ant Security Relocation and Eviction Services* above at paragraph 27.

⁷ 14355/2010) [2012] JAGPPHC 98 (8 June 2012) at para [10]

those documents to enable it to decide whether or not the documents are irrelevant. In the circumstances, it is compulsory for the party so requested to furnish the requesting party with such documents to put that requesting party in a position to do their own examination. In the afore going judgment the Court stated that:

"There is, relevancy being the only issue, no reason why the Plaintiffs are not entitled to inspect the documents in order to satisfy themselves whether or not the documents are indeed relevant."

[17] In *Compagnie Financiere Et Commerciale du Pacifique v Peruvian Guano Co*⁸ the Court said the following:-

"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

Therefore, in determining whether a document is relevant, the Court will accordingly have regard to whether the document requested may directly or indirectly enable the parties seeking the document to advance his own case or damage the case of the adversary.

⁸(1982) 11 QPD 55

[18] In *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th Edition 1997*. The learned author states that:

"The scope of discovery is wide It extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence which may fairly lead to an enquiry relevant to the issues."

[19] In *Norman & Co. (Pty) Ltd. v Hansella Construction Company (Pty) Ltd*⁹ the Court that :-

"the framers of the Rules could not have intended Rule 30(5) prior to non-compliance with the provisions of Rule 35 (12), in view of the special sanction provide for in the latter Rule . In my view, the argument is not correct. The sanction provided for in Rule 35 (12) is in my view, quite different in nature and in fact from the kind of sanction envisaged in Rule 30(5). The sanction of Rule 35 (12) is of a negative nature, deem to the fact that the party failing to comply with the notice are not, say with the leave of the court, and view the documents in question, provided that any other party may use such documents. It is a sanction that comes into operation automatically upon non-compliance with the provisions of the Rule. Rule 30(5) on the other hand, operates in an entirely different manner. Under that Rule , a party making a request, or giving notice , as the case may be, to which there is no response by the other party, may give a further notice to the other party that after the lapse of seven days application will be made for an order that the notice or request be complied with or that the claim or defence be struck out, as the case may be. Failing compliance within the seven days mentioned, application may then be made to court and the court may make an appropriate order. "

Evaluation and reasons

[20] I now deal with the contention that the application constitutes an abuse of the Court process because no basis was disclosed of the relevance of such

⁹ 1968(1) SA 503 (T)

documents. This contention is without any factual basis because the defendant, through his attorney, had undertaken as far back as 21 June 2023 where in the reminder to provide the listed documents in terms of the notice dated 7 June 2023 the defendant's attorney through correspondence stated:

"Thank you for your email. Please be advised that we are in the process of obtaining all the requested documentation. We anticipate being able to discover them or to file the appropriate affidavit by Tuesday or Wednesday next week. We trust the above is in order."

The documents were to be provided as undertaken but only on 14 September 2023 which the plaintiff found inadequate as certain documents as stated in the Notice to Compel were not provided. No explanation was provided to the plaintiff by the defendant as to why the documentation listed in items 1.3 to 1.8 could not be provided. In fact until the 27 November 2023, there was no objection or indication of any reason why the documentation could not be provided.

[21] The main basis of the objection to provide the documentation, as I understand, from the defendant's heads, is that they are not relevant to the pleaded case. The defendant's counsel has not provided me with any authority on the proposition that it is up to the parties to determine the relevance of the documents required to be disclosed. There is no reference in the rule that the party who believes that there are other documents (including copies thereof) or tapes recordings which may be relevant to any matter in question in possession of any party thereto that the party seeking the additional documents must state their relevance when asking for such documents or tape recordings. It follows in my view that the grounds for objection must fail.

[22] The grounds for opposing the discovery of the documents despite the undertaking to provide them are in my view, without legal basis. There is

no basis to suggest that requiring a better discovery under the circumstance in the instant case constitutes an abuse of the Court process because clearly, the defendant had failed to make all the documentation available to the plaintiff as undertaken including items stated in 1.3 to 1.8 of the Rule 35(3) Notice. Accordingly, having considered the papers, the submissions and the legal principles, I hold the view that the plaintiff has succeeded and made out her case.

Order

[23] The following order is made:

- (a) The First Defendant shall serve its reply to the Plaintiff's notice in terms of Rule 35(3) dated 20 November 2023 within 10 days from date of delivery of this order.
- (b) The First Defendant is to pay the Plaintiff's cost as between Party and Party



ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **20 September 2024**.

Appearances:

For the applicant: Adv AP Bruwer

Instructed by Schalk Britz Incorporated

For the first respondent: Adv D Hewett

Instructed by Kevin Barnard Attorneys

Date of Hearing: 29 February 2024

Date of Judgment: 20 September 2024

