

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **017896/2022**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>05 February 2025</u>	
DATE	SIGNATURE

In the matter between:

LENAMILE ISAAC MPHATLANE N.O

First Applicant

NOMPUMELELO THANDEKA MOPHATLANE N.O
[In their capacity as trustees for the time being of the
Mpumi Maranga Family Trust (IT002734/2026T)]

Second Applicant

LENAMILE ISAAC MPHATLANE N.O

Third Applicant

NOMPUMELELO THANDEKA MOPHATLANE N.O
[In their capacity as trustees for the time being of the
Mpumi Maranga Family Trust (IT002734/2026T)]

Fourth Applicant

LENAMILE ISAAC MPHATLANE N.O

Fifth Applicant

and

RANDVEST CAPITAL INVESTMENTS (PTY) LTD First Respondent

OCEANSIDE TRADING 644 (PTY) LTD Second Respondent

CHRISTIAAN JOZUA ESKELL KLAAGSBRUN Third Respondent

CHRISTIAAN JOZUA ESKELL KLAGSBRUN Fourth Respondent
(In his capacity as trustee for the time being of the
Mpumi Maranga Family Trust (IT002734/2016T))

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION** Second Respondent

This matter was heard virtually (Ms teams) and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI J

[1] In accordance with the Commercial Court Practice Directives, this matter was allocated to me for case management on 3 October 2023. A case management meeting was held on 16 February 2024. One of the issues that was on the agenda was an application in terms of rule 35(7) of the Uniform Rules of Court, issued by the Applicants on 12 February 2024 in which they sought an order to compel the First to Fourth Respondents (“the Respondents”) to comply with the applicants’ notice in terms of rule 35(3) dated 20 September 2023. The rule 35(7) application, in essence, sought to compel the Respondents to produce and make available for inspection all the documents listed in the rule 35(3) notice. This is the application that is before court for determination.

[2] During the deliberations at the case management meeting, the Respondents disputed the relevancy of some of the documents that they objected to handing over to the Applicants. They however, agreed to hand over to the Applicants all the remaining documents that were not disputed. A directive was subsequently issued directing the Respondents to file their answering affidavit pertaining to those documents specified in the rule 35(3) notice that they objected to providing to the Applicants on the contended basis that the documents are not relevant to the dispute, by 1 March 2024. In respect of the balance of the documents that the Respondents were not opposed to handing over to the Applicants, the Respondents were directed to hand same over to the Applicants by 8 March 2024. The Applicants were directed to file their replying affidavit to the Respondents' answering affidavit and the parties to file heads of argument within specified timeframes. At the hearing of the rule 35(7) application, it was confirmed that all the documents, the relevancy of which was not disputed, had been handed over to the Applicants.

[3] The material dispute between the parties, as appears from the pleadings in this matter, turns on the alleged unlawful transfer of shares from the First Respondent to the Second Respondent and the unlawful removal of the Fifth Applicant as a director of the First Respondent. It is the Applicants' allegation that certain shares held in the First Respondent by the Mpumi Marang Family Trust and the Kgomo Jobe Family Trust were unlawfully transferred by the Third Respondent to the Second Respondent without the knowledge and consent of the Applicants; and that the Fifth Applicant was unlawfully removed as a director of the First Respondent. The said transactions are alleged to be invalid and fall to be set aside.

[4] The Respondents allege in their plea that the shares were lawfully transferred to the Second Respondent by virtue of an agreement concluded both orally and in writing between the Mpumi Marang Family Trust, the Kgomo Jobe Family Trust and the Second Respondent. They, further, aver that the First Applicant's removal as a director is lawful because it was done with the express knowledge and consent of the shareholders of the First Respondent and that the Fourth Applicant was also notified about the intended removal.

[5] After close of the pleadings, the Applicants served the Respondents with a notice of discovery which was responded to. The Applicants were, however, not satisfied with the response received from the Respondents. They, as a result, proceeded to issue a rule 35(3) notice in terms whereof the Respondents were called upon to make available for inspection certain documents that the Applicants believed were in the Respondents' possession or control or for the Respondents to state on oath within ten (10) days that such documents are not in their possession. A list of those documents is contained in paragraphs 1 to 11 of the rule 35(3) notice.

[6] The Respondents failed to respond to the rule 35(3) notice. In a letter dated 5 February 2024 sent to the Respondents' attorney, the Applicants' attorney demanded that a response be delivered by close of business on 9 February 2024 failing which the Applicants were to bring an application in terms of rule 35(7) to compel the Respondents to comply with the notice. No response was received to the letter; hence the present application was launched.

[7] It is in the context of the background that the rule 35(7) application is to be viewed.

[8] As already mentioned the Respondents were directed to file their answering affidavit by 1 March 2024, which was done. In the answering affidavit, the Respondents allege that the Applicants' notice is overly broad and unspecified and that the Applicants have not stated why the documents are relevant. The Applicants, on the other hand, contend that as the Respondents ignored the notice and did not raise the issue of relevance until they filed their answering affidavit, the Applicants were, as such, not expected to deal with why the documents are relevant in their founding affidavit in the present application.

[9] The crux of the Respondents' submission is that the Applicants have not, in the founding papers, made out a case for an order directing the Respondents to furnish them with the documents requested in their rule 35(3) notice. This is the issue that this court should determine.

[10] In resolving the issues in this matter the court is to determine the nature of the relief sought by the Applicants by scrutinizing the wording of Rule 35(7) with the background facts of the case. This will enable the court to determine whether the Applicants have made out a case in their founding papers which entitles them to an order compelling the Respondents to produce the documentation.

[11] The matter before court revolves around the discovery of documents. The object of discovery has been held to be ‘to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means, the issues are narrowed, and the debate of points which are incontrovertible is eliminated.’¹ Furthermore, it is said that discovery assists the parties and the court in discovering the truth and, by so doing, helps towards a just determination of the case.²

[12] The context of this matter deals with discovery under rule 35. Rule 35 regulates a procedure whereby a party to an action can: require his opponent to specify on oath the documents and tape recordings in his possession or under his control which relate to the action; and inspect and copy such documents and tape recordings.

[13] Subrule (3) of rule 35 provides a procedure for a party dissatisfied with the discovery of another party. The intention of the subrule is to provide for a procedure to supplement discovery which has already taken place, but which is alleged to be inadequate.³ If the defaulting party does not comply with the notice given under this subrule, the party requiring discovery is entitled to bring an application under the provisions of subrule (7) to take the matter further.

[14] At this stage of the proceedings, the question is, based on the background as set out above, should the court compel the Respondents to furnish the Applicants with the documents requested in the rule 35(3) notice.

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

² See *Publishers and Printers Limited v Novus Holding Limited* [2022] All SA 299 (SCA) para 25.

³³³ See Erasmus: Superior Court Practice vol 2 pD1-472 and the cases referred to.

[15] It is not in dispute that that Applicants served the Respondents with the rule 35(3) notice. It is trite that a litigant that is not satisfied with the discovery that has been made, must first exhaust the remedy under this subrule. 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."

[16] It has been held that it is important that a party who is dissatisfied with discovery should describe the documents, and the tape recordings required for inspection in such a manner that they are identifiable. Whilst a document need not be described specifically within the notice, it must be described with sufficient accuracy to enable it to be identified.⁴ This the Applicants have done. There is no dispute that the documents that the Applicants seek the production of have been clearly described in paragraphs 1 to 11 of the rule 35(3) notice.

[17] The subrule requires two things from the defaulting party, that is, either to provide the documents requested or to state on oath that such documents are not in his possession. Moreover, it has been held that under this subrule, a party is entitled to state in the affidavit that the documents or tape recordings referred to under the subrule are irrelevant to the issues in the action or that they are privileged from disclosure.⁵

[18] It is common cause that the Respondents provided no response to the Applicants' notice. Thus, having failed to respond, there was no way in which the Applicants would have known that the Respondents were not in possession of the documents or that the relevancy of the documents was being disputed, nor could they have known if the documents were privileged. This they could

⁴ See Erasmus: Superior Court Practice vol 2 pD1-473.

⁵ Chauvier v Selero 1980 BP 222 at 232A.

have known only if the Respondents had responded to the rule 35(3) notice. But the Respondents failed to do so. As a result, when the Applicants approached court for the rule 35(7) application, they had no knowledge that the Respondents were going to dispute the relevancy of the documents to the issues in the action.

[19] Subrules (1) and (3) of rule 35 contemplate the discovery of all relevant documents and tape recordings relevant to any matter in question. It was, thus, incumbent upon the Respondents to respond to the Applicants rule 35(3) notice and indicate that they were disputing the relevancy of the documents sought to be produced as being irrelevant to the matters in question. This, they failed to do even though they had no reason, none was in fact proffered, not to do so. The Applicants had gone at length to describe the documents that they believed were relevant to the issues in the action and were in the possession or control of the Respondents. As already stated, the documents are succinctly described in paragraphs 1 to 11 of the notice.

[20] The Respondents opted to ignore the Applicants' rule 35(3) notice, and a subsequent letter sent to their attorneys demanding a reply to the rule 35(3) notice. This they did at their own peril.

[21] The rules allows a litigant to approach court in terms of rule 35(7) for an order to compel the defaulting party to produce the documents sought in subrule (3). And this is what the Applicants did in this matter. Rule 35(7) provides as follows:

"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."

[22] The relief that the Applicants seek in this application is for an order 'Compelling the First to Fourth Respondents to comply with the entirety of the Applicants' notice in terms of Rule 35(3) dated 20 September 2023 ("the Notice") within 5 (five) days of the granting of this order'.

[23] The court is said to have the discretion whether to enforce discovery or inspection. It has been held that the discretion is predicated on the documents, in respect of which discovery is sought, being relevant.⁶ In *Baard v Allem*,⁷ an unreported decision of the full court of this Division, at paragraph 17 thereof, the following is stated:

“[17] It is trite that the court deciding an application in terms of Rule 35(7) exercises a discretion whether or not to grant the relief sought. The relevance of the documents sought will be one of the factors which will have an influence on the exercise of that discretion. Relevance is determined having regard to the issues between the parties.”

[24] It means that the granting of the relief sought in the rule 35(7) application is at the discretion of the court on condition that the documents sought are relevant to the issues in the matter or to any matter in question in the case.

[25] The meaning of relevance is said to be circumscribed by the requirements in both subrules (1) and (3) that the document or tape recording may relate to or may be relevant to ‘any matter in question’. The matter in question is further determined from the pleadings and not extraneously therefrom.⁸ It follows, therefore, that a party may only obtain inspection of documents and tape recordings or be furnished with documents and tape recordings that are relevant to the issues on the pleadings.⁹

[26] It is my view that, in this instance, the discretion should be exercised in favour of the Applicants and that the Respondents be compelled to furnish the Applicants with some of the documents which are set out in the Applicants’ notice in terms of Rule 35(3), which in my opinion relate to or may be relevant to any matter in question that is determinable from the pleadings.

[27] There are two sets of documents that the Applicants seek production of, namely, the documents falling within the period which it is alleged that the shares were transferred to the Second Respondent and when the Fourth

⁶ *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 93E – H.

⁷ *Baard v Allem* (A5005/2021; 44725/2016) [2021] ZAGPJHC 518 (14 October 2021).

⁸ *Makate v Vodacom (Pty) Ltd* 2014(1) SA 191 (GSJ) at 197I – 198B.

⁹ *Makate v Vodacom (Pty) Ltd* 2014(1) SA 191 (GSJ) at 197I – 198B.

Respondent was removed as a director of the First Respondent; and the documents falling outside that period.

[28] According to the Applicants' particulars of claim, the shares were allegedly transferred on 1 April 2020 whilst the Fourth Respondent was allegedly removed as a director in terms of a purported resolution of the board of directors of the First Respondent dated 18 February 2021 which was affected from 21 July 2021. In their plea, the Respondents aver that the transfer was effected in terms of an agreement concluded on 28 October 2019 and that notice of the Fourth Respondent's removal was duly given to the Fourth Respondent before the resolution for his removal was taken.

[29] It is thus clear that the documents that ought to be regarded as relevant to the issues in the matter, as gleaned from the pleadings, are those that fall within the period between 28 October 2019 and 21 July 2021. All the other documents that the Applicants seek by virtue of rule 35(3) that do not fall within the aforementioned period, are for purposes of this matter irrelevant, as they do not relate to any issues that are raised in the pleadings.

[30] Consequently, the following order is granted:

1. The application in terms of rule 35(7) is granted with costs on scale B.
2. The First to Fourth Respondents are ordered to provide the Applicants with the documentation listed in the Applicants' rule 35(3) notice which falls within the period between 28 October 2019 and 21 July 2021.
3. The order should be complied with within ten (10) days of the granting of this order.


E M KUBUSHI
JUDGE OF THE HIGH COURT
PRETORIA

Appearances:

For the First to Fifth Applicants:
Instructed:

Adv J Hoffman
Assheton-Smith Ginsberg Inc

For the First to Fourth Respondents:
Instructed:

Adv A Basson
JI Van Niekerk Inc Attorneys

Date of arguments :26 November 2024

Date of Judgment : 05 February 2025