IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15326/24

In the matter between:

E39 DOLPHIN BEACH (PTY) LTD	First Applicant
ARIE LEVY	Second Applicant
and	
THOMAS GNEFKOW	First Respondent
SMITH TABATHA BUCHANAN BOYS (STBB)	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent

Coram:	**NUKU J**
Heard on:	**24 February 2025**
Delivered on:	**12 March 2025**

JUDGMENT

NUKU, J

[1] This is an opposed interlocutory application to compel production of certain documents that were requested by the applicants from the first respondent in terms of Rule 35 (12) of the Uniform Rules of Court. These documents are:

1.1 a copy of the shareholders certificate reflecting that the Shalom Trust is the sole shareholder of the First Applicant as referred to in paragraph 16 of the affidavit of Boni Levi;

1.2 a copy of the shareholders agreement in terms whereof the Shalom Trust acquired all the shares in the First Applicant;

1.3 Any and/ or all resolutions by the trustees of the Shalom Trust which record the acquisition of the shares by the aforesaid trust including but not limited to the amount paid for 100% shares in the first applicant by the above trust;

1.4 A copy of the resolution and/ or mandate authorising Bony Levi to act on behalf of the first applicant in the sale of E39 as referred to in paragraph 20 of the affidavit of Boni Levi;

1.5 A copy of the settlement agreement referred to in paragraph 22 of the affidavit of Boni Levi;

1.6 A copy of the settlement agreement referred to in paragraph 24 of the affidavit of Boni Levi

1.7 A copy of the written mandate to act as agent granted to Ms Dorethea Dossier on behalf of the first applicant to market E39 as referred to in

paragraph 37 of the affidavit of Boni Levi and paragraph 5 of the affidavit of Ms Dorethea Dossier;

1.8 A copy of the proof of payment of the amount of R173 000.00 allegedly made by the Body Corporate to the second applicant referred to in paragraph 34 of Bony Levi's affidavit;

1.9 Copies of the WhatsApp communications referred to by Boni Levi in paragraph 41 of his affidavit, specifically, for the periods 01 January 2020 to 28 February 2020; and

1.10 A copy of the entire document marked "BL5" referred to in paragraph 49.5 of the affidavit of Bony Levi.

[2] The applicants had sought production of the above documents, together with some other documents that the first respondent has since produced, in terms of the applicant's notice in terms of Rule 35 (12) and (14) dated 11 September 2024. In terms of this notice, the first respondent was required to either produce the documents so requested or state if he objects to the production of the documents and set out the grounds upon which he objects to the production of the documents or to state under oath that he is not in possession of the documents requested and to state their whereabouts, if known to him.

[3] The first respondent responded as follows to the applicants' notice in terms of Rule 35 (12) and (14):

3.1 He objected to producing documents requested under Rule 35 (14) on the ground that Rule 35 (14) does not apply in these proceedings in the absence of an order made in terms of Rule 35 (13);

3.2 He objected to producing the documents referred to below on the basis that these documents had not been referred to in the answering affidavits and that in

any event they are not in his possession, and their whereabouts are unknown to him. These documents are:

3.2.1 the shareholder certificate of the Shalom Trust;

3.2.2 the shareholders agreement evidencing the acquisition by the Shalom Trust of the shares in the first applicant;

3.2.3 the resolution of the Shalom Trust recording the acquisition of the first applicant's shares by the Shalom Trust; and

3.2.4 a copy of the written mandate authorising Ms Dorethea Dossier to market E39

3.3 He stated that he is not in possession of the documents referred to below, and their whereabouts are unknown to him. These documents are:

3.3.1 the resolution and/ or mandate authorising Bony Levi to act on behalf of the first respondent in the sale of E39;

3.3.2 the settlement agreements referred to in paragraphs 22 and 24 of affidavit of Bony Levi; and

3.3.3 a copy of the proof of payment of the amount of R173 000.00; and

3.4 He stated that he is not in possession of the WhatsApp communications as well as the document marked "BL5" referred to in paragraph 49.5 of the affidavit of Bony Levi which he believed to be in the possession of Bony Levi.

[4] The first respondent, in addition to the above response, deposed to an affidavit stating, inter alia, that "*I wish to confirm that I am not in possession of the documents requested by the Applicants under paragraphs 1,2,3,4,5,6,10,11,12,13 and 15 in their*

Notice in terms of Rule 35 (12), nor are the whereabouts of such documents known to me, although I suspect that they are in the possession of both the Second Applicant and/ or Mr Bonny Levi."

[5] On 10 October 2024, the applicants' attorney wrote to the first respondent's attorney advising that he viewed the first respondent's response to the applicants' notice in terms of Rule 35 (12) and (14) inadequate. He afforded the first respondent until 15 October 2024 to file an adequate response failing which the applicants would bring an application to compel the first respondent to do so.

[6] The first respondent's attorney responded on 16 October 2024 denying that the first respondent's response was inadequate and complaining that the applicants' attorney had failed to explain why he views the first respondent's response as inadequate. The first respondent's attorney further explained that "*the documents requested are entirely unrelated to*" the first respondent "*and as a result could not, on any reasonable basis, be within his possession*."

[7] The applicants, dissatisfied with the first respondent's explanation regarding his inability to produce the documents, brought this application seeking, in addition to costs, orders that:

> '1. the first respondent being the first respondent in the main application is compelled to adequately reply to the applicants' notice in terms of Rule 35 (12) and (14) dated 11 September 2024 and to provide the documentation and information s requested within Ten (10) DAYS from date of this Order being granted; and
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> 2. should the first respondent fail to comply with paragraph 1 above, the applicants will be entitled to approach the honourable court on the same papers, duly supplemented, for an order dismissing the first respondent's opposition of the application.

[8] The applicants' attorney deposed to the affidavit in support of the application stating, inter alia, that "*I shall indicate below that all the documents/information forming part of this application are in (a) possession of the first respondent and/ or the deponents to first respondent's supporting affidavits to his opposition in the main application (his witness and/ or both), (b) not privileged, and (c) relevant to issues in the main application*." Thereafter he goes on to state that the documents requested are referred to in Bony Levi's affidavit whereafter he castigates the first respondent for what he refers to as an unusual approach of not relying on his own evidence but that of Bony Levi.

[9] The applicants' attorney then refers to what was stated by Mr Bony Levi (**Mr Levi**) in the supporting affidavit in the main application wherein he had indicated his, as well as the second applicant's willingness or agreement to provide the first respondent with information at their disposal in order to facilitate the first respondent's intended opposition of the main application. On the basis of what is stated in Mr Levi's supporting affidavit, the applicants' attorney concludes that "*The Applicants aver that the aforesaid assertions set out in the first respondent's witness affidavit shows his witness is in possession of the information/ documents expressly referred to in the witness affidavit*."

[10] Turning to the averments made by the first respondent in the answering affidavit, the applicants' attorney refers to the fact that the first respondent stated that he had been advised by his legal representatives that Mr Levi, who has personal knowledge of the history of the matter was willing to depose to an affidavit in support of the first respondent's opposition to the application. The applicants' attorney lays particular emphasis on what the first respondent stated in paragraph 11 of the answering affidavit that "*My response is therefore largely based on the evidence he has provided in his affidavit*" for the conclusion he draws that "*it is plain from the averments of the first respondent's witness that he (the witness) made the necessary information/ documents available to the first respondent*." Based on all of this, the applicants' attorney surmises that **"***it does not avail the first respondent to now claim that he is not in possession of the documents/information requested under Rule 35 (12) and (14) of the Rules*."

[11] The first respondent, in opposing the application, raised the following defences, namely (a) a point in limine that the applicants had failed to set out a cause of action, (b) a point in limine regarding the applicants' failure to obtain an order in terms of Rule 35 (13) in so far as they requested documents in terms of Rule 35 (14), (c) that he is not in possession of the requested documents, (d) that some of the documents are irrelevant to these proceedings, and (e) that some of the documents have not been referred to in the answering papers.

[12] Counsel for the applicants advised during the hearing that the applicants have abandoned any reliance on the provisions of Rule 35 (14) as the request under the said subrule had, in any event, been in the alternative to the request made under Rule 35 (12). This took care of the necessity to determine the first respondent's second point *in limine* relating to the applicants' failure to obtain an order in terms of Rule 35 (13) in so far as they had requested documents in terms of Rule 35 (14).

[13] Turning to the first respondent's first point in limine**,** the first respondent made the following averments in support of his claim regarding applicants' failure to set out the cause of action:

> '8. The Applicants have completely neglected to specify on what basis this application is brought.
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> 9. No reference is made to any Rule which empowers the Applicants for an order granting the prayers set out in the notice of motion and thus the Applicants have failed to set out any cause of action entitling them to the relief sought.
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> 10. The Applicants' failure to do so renders the application fundamentally defective and fatal. The application therefore falls to be dismissed on this point alone.'

[14] The heads of argument filed on behalf of the first respondent explain that the real issue, in so far as this point *in limine* is concerned, is the applicants' failure to have complied with the provisions of Rule 30A, in so far as they considered the first respondent to have failed to comply with their Rule 35 (12) request. This argument is based on the reading of Rule 30A which requires a party that has failed to comply with a request made in terms of the rules to be given a notice of ten (10) days within which to comply before an application to compel is brought. The argument on behalf of the first respondent, thus, is that the applicants are not entitled to the relief because of their failure to comply with the rule that would have entitled them to the relief, namely Rule 30A.

[15] The deponent to the answering affidavit, responded by denying the applicants failure to set out a cause of action and stated that "*This application is founded on the provisions of Rule 35 (12) and (14) of the rules*." Not much was said, on behalf of the applicants, to demonstrate that the relief sought in this application is the one provided for in either Rule 35 (12) or Rule 35 (14). Having already disposed of the point *in limine* relating to Rule 35 (14) above, I confine my further assessment of the first respondent's point *in limine* to Rule 35 (12).

[16] Mr De Abreu, who appeared for the first respondent did not point me to any authority to support the proposition that the applicants are not entitled to the relief they seek for their failure to comply with the provisions of Rule 30A. For his part, Mr Tsegarie, who appeared for the applicants, could not point me to any authority for the proposition that a party may rely on the provisions of Rule 35 (12) in seeking an order compelling compliance with a request made in terms of the same rule.

[17] As a starting point, I think that the first respondent is correct that a party seeking compliance with a request made in terms of the rules must do so in terms of Rule 30A, unless a particular rule provides otherwise. An example of a rule that provides otherwise is Rule 35 (7) that provides relief for non-compliance with a request for discovery in general or a request made in terms of Rule 35 (6). In this regard, Rule 35 (7) provides that "*If a 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 the claim or strike out the defence."

[18] Rule 30 A deals with non-compliance with rules and court orders and reads:

> '(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order –
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> (a) That such rule, notice, request or direction be complied with; or
>
> (b) that the claim or defence be struck out
>
> (2) Where a party fails to comply within the period of 10 days contemplated in sub-rule(1), application may on notice be made to the court and the court may make such order thereon as it deems fit.'

[19] The applicants' Rule 35 (12) request is, in my view, a request made pursuant to the rules and failure to comply with same should be preceded by a letter affording the defaulting party, the first respondent in this case, a period of ten (10) days to comply prior to the institution of an application to compel. This, the applicants failed to do. Instead, the applicants' attorney wrote to the first respondent's attorney demanding compliance within a period of 3 days and the application followed 6 days from the date of the demand. In this regard, even if one were to be generous and regard the application as the one which had been properly made in terms of Rule 30A, the applicants' failure to comply with the requirements laid down by the rule, without any application for condonation for such failure, should disentitle the applicants to the relief.

[20] As Ponan JA stated, albeit obiter, in ***Centre for the Child Law***[1], failure by a party to give notice in terms of Rule 30A that it intended, after the lapse of 10 days, applying for an order that its rule 35 (12) notice be complied with, coupled with an application in terms of rule 30A to compel production of the documents sought may, in and of itself be fatal to an application. This, in fact was the case in ***Universal City Studios***[2] where Booysen J declined to order compliance with a rule 35 (12) notice) on the basis that the procedure laid down in rule 35 (5) (the predecessor to the current rule 30A had not been followed stating that "*a party who deliberately chooses not to claim relief of a particular nature, should in general, even if it were competent, not be granted such relief under the general prayer of alternative relief*".

[21] Rules of court are made for a purpose and to achieve an orderly administration of justice. Non-compliance thereof should be explained where it occurs, and it is not for litigants to simply ignore them at will and with impunity. In my view, there is merit in the submissions made on behalf of the first respondent that the applicants are not entitled to the relief for their failure to comply with the provisions of Rule 30A. The point was not elegantly pleaded but the applicants' non-compliance with the provisions of Rule 30A is glaring.

[22] Rule 30A makes provision for the defaulting party to be called upon not only to remedy non-compliance but also for the defaulting party to be forewarned of the consequences of failure to remedy the non-compliance. In this matter, the letter addressed to the first respondent's attorney complaining about non-compliance with the applicants' rule 35 (12) notice that the applicants' attorney had instructions to compel compliance. In this application, the applicants seek an order that the first respondent's opposition of the application should be dismissed in the event of him failing to comply with the order directing him to produce the requested documents. The first respondent was, however, never forewarned of these drastic consequences which should have been brought to his attention as the rule requires. This, however, is not the only difficulty

[1] Centre for the Child Law v Hoerskool Foschville And Another 2016 (2) SA 121 (SCA) at 131H-132B
[2] Universal City Studios v Movie Time 1983 (4) SA 736 (D). at 746H-I

that the applicants have, and I consider next whether the applicants had made out a case for an order compelling compliance with their rule 35 (12) notice.

[23] The first respondent, in his reply to the applicants' notice in terms of Rule 35 (12) and (14), an affidavit he deposed to in response to the applicants' notice in terms of Rule 35 (12) and (14), the correspondence that followed prior to the launch of this application as well as in his answering affidavit in this application, has repeatedly stated that the documents requested by the applicants are not in his possession and that their whereabouts are unknown to him. In respect of some documents, he has stated that he suspects that they are either in the possession of Mr Levi and/or the second applicant and/ or both. He stated this, however, whilst maintaining that the whereabouts of the documents are unknown to him.

[24] It was submitted on behalf of the first respondent that the fact that the documents sought are not in possession of the first respondent or under his control should be the end of the matter because the first respondent has complied with the applicants' rule 35 (12) notice when he stated under oath that the documents are not in his possession as this is what the applicants' rule 35 (12) notice required him to do in respect of documents not in his possession.

[25] The issue having narrowed to the question whether it is competent for a court to direct a party to produce a document where the said party has stated under oath that it is not in possession thereof, I requested counsel for the applicants to file a post hearing note with reference to some authorities for the proposition that the court may grant an order compelling a party not in possession of a document to produce same.

[26] The post hearing note commences with an acknowledgment of the general principle, with reference to ***Moulded Components***[3] that "*where a party seeks documents in terms of Rule 35 (12) and those documents are not in the other parties' possession, a court will generally not make an order against such a party to produce the*

[3] Moulded Components & Rotomoulding SA (Pty) Ltd v Coucarkis And Another 1979 (2) SA 457 (W) at 461A to B

documents." It was suggested, however, that this is not an immutable position but depends on the particular facts of the matter. Reference was made to two decisions of this court, **Van Zyl**[4] and **Pentagon**[5], where parties claiming not be in possession of documents were, nevertheless, ordered to produce those documents.

[27] The ratio for this court's decision in **Van Zyl** was that a party which refers to a document in its pleading needs to set up facts to support its claim that it is not in possession of the documents sought.[6] In addition, at least a reasonable attempt should be made to find the document and produce it, where such an attempt was made, but unsuccessfully, this should be confirmed by affidavit.[7] It was, thus, upon the respondent's failure to meet these two requirements that the court ordered production of documents which the respondent claimed were not in its possession.

[28] One of the documents whose production was sought in ***Pentagon*** related to a Mauritian company, which was not a party to the litigation but whose director was. The claim by the director of the Mauritian company that he was not in possession of the documents was found by the court to be a red herring.[8] Inherent in that finding was the court's rejection of the claim that the document was not under the control of the party obliged to produce it. Thus, the court ordered the production of the document because it was satisfied that it was under the control of the party claiming that the document was not in his possession or under his control.

[29] The soundness of the above decisions referred to by the applicants is beyond question. A party claiming not to be in possession of documents referred to in his or her pleading must set up facts to support his or her claim and must make reasonable attempts to find the documents, where possible. This is so that the court is able to

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[4] Bertie Van Zyl (Pty) Ltd v Up To Date Tomatoes (Pty) Ltd (13329/14) [2016] ZAWCHC 105 (28 July 2016)
[5] Pentagon Financial Solutions (Pretoria) (Pty) Ltd and Others v Pieter Willem Basson the Legare Business Trust and Others (13001/2021) [2023] ZAWCHC 122; [2023] 3 All SA 560 (WCC) (15 May 2023)
[6] Van Zyl at para [28]
[7] Van Zyl at para [29]
[8] Pentagon ap para [79]

assess for itself whether indeed the documents are not in the party's possession or under his control. These authorities do not, by any stretch of imagination, suggest that a court may order a party not in possession of a document to produce it. Instead, a party claiming not to be in possession of a document may be ordered to produce it when the court is not satisfied with the explanation that the document is either not in the possession of that party or under that party's control. To hold otherwise would be to suggest that it is competent for a court to order the performance of the impossible.

[30] Turning back to the facts of the present case, and by way of background, the first respondent is a German national who bought a property that was owned by the first applicant. The second applicant is the sole shareholder of the first applicant. Mr Levi is the son of the second applicant and from time to time, they have conducted business together utilising various corporate structures.

[31] Mr Levi, ostensibly having been duly authorised by the second respondent, sold the property known as E39 Dolphin Beach (**the property**) to the first respondent. The applicants in the main application seek an order cancelling the agreement of sale and reclaiming the property from the first respondent on the basis that the sale of the property was not authorised by the second applicant, the sole director of the first applicant.

[32] The first respondent, having only dealt with Mr Levi when he purchased the property, reached out to Mr Levi when he received the application. This was because he had no knowledge of the background facts and authorisations relating to the sale of the property. Mr Levi, who is not a party to these proceedings, in explaining that the sale of the property was authorised, referred to some of the documents sought to be produced. From this, it must be clear that the documents are not in the possession of the first respondent.

[33] The applicants, however, take issue with Mr Levi and the second respondents' indication or agreement that they would provide the first respondent with the necessary documents to assist him in the opposition of the application. Neither Mr Levi nor the

second respondent has, however, indicated that they have provided the first respondent with any of the documents sought by the applicants. There is, thus, no basis to gainsay the first respondent's claim that he is not in possession of the documents sought to be produced.

[34] The first respondent does not just stop at claiming not to be in possession of the documents sought to be produced. He goes further to explain the attempts that his attorney has made which have resulted in him producing a further document that he was unable to initially produce. His attorney, he explains, requested Mr Levi to provide certain documents, but Mr Levi provided only one document and offered no explanation for his failure to provide the remainder of the documents that had been requested by the first respondent's attorney.

[35] The authorities referred to by the applicants are, in my view, distinguishable, and as such cannot assist them. As already stated, in ***Van Zyl*** the court was not satisfied with an explanation relating to the claim of not being in possession of the document sought as well as whether reasonable attempts had been made to find the documents. In **Pentagon**, the court was satisfied that the document sought to be produced was under the control of the party obliged to produce it.

[36] That a party claiming not to be in possession of a document whose production is sought needs to set out facts in support of such claim accords not only with the decisions of this court but also with what was stated in ***Tracklot***[9] by Olivier AJ that '*if a party resists the delivery of a particular document, he should adduce evidence why he is resisting. It is only with this evidence that the court would be in a position to exercise its discretion properly and appropriately.'* This is what, in my view, the first respondent has done in this matter and he should, accordingly, be released from an obligation to produce the documents.

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[9] *Tracklot General Trading (Pty) Ltd v Sethole and Another* (7406/2015) [2016] ZAGPPHC 214 (23 March 2016) at para 24

[37] For all the above reasons, I am of the view that the application should fail and that the first respondent, as the successful party, should be awarded costs.

Order

[38] In the result, I make the following order:

> The application is dismissed, and the applicants are ordered to pay the costs, jointly and severally, one paying the other to be absolved.

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LG NUKU

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicants	:	Adv. C Tsegarie
Instructed by	:	Bossr Inc, Durbanville
C/O	:	Robert Charles Attorneys, Cape Town
For the First Respondent	:	Mr J P De Abreu
Instructed by	:	De Abreau Essop Inc, Cape Town