IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 1849/2024

In the matter between:

PAUL DAVID HARDING	Applicant/First Defendant
and	
SWEET SENSATIONS 210 PTY LTD t/a MOORGAS & SONS	First Respondent/Plaintiff
AIRBORNE PROPERTIES CC	Second Respondent/Second Defendant

Date of Hearing: 25 March 2024
Date of Judgment: 11 April 2025

JUDGMENT

PARKER AJ

Introduction

[1] This is an interlocutory application pertaining to that where discovery notices were already delivered. The applicant sought documents as set out in his Rule 35 (12) notice. Pertinently, the issues are whether the applicant (who is the defendant in the

main action), who is also a director and a shareholder, is able to receive supporting information, and, as well as under section 31(1)(b) of the Companies Act No 71 of 2008 (the "Act").

[2] Despite requests by the applicant for certain documentary information (detailed further below), under a Part A as well as in terms of Part B, to enforce shareholder rights conferred upon him in terms of section 31(1) (b) of the Act.

[3] The background to this application stems from an annexure A to first respondent's particulars of claim in the main action, which contained information in respect of a calculation. In order for the applicant to agree to the calculation it requires the documentation from respondent, to assess how the final amount is calculated, and, to conduct an independent analysis whether the amount set out in the said annexure was correctly calculated. It is this information which applicant is seeking.

[4] The applicant was of the view that the purpose of the rule is to determine the truth and to assist a party in such a determination of the truth the source document/s are therefore relevant. This was opposed by the respondent.

[5] The opposition also extended to Part B, that being of the beneficial interest. Furthermore, the applicant owes money to the business, he is a debtor, and first respondent avers an applicant cannot through an interlocutory application enforce statutory rights.

[6] First respondent contended that applicant should have utilized the provisions provided for in terms of rule 35(3) for further and better discovery and therefore the application sought in terms of rule 35(12) is premature.

[7] In the relief, which was sought under Part B, applicant seeks first respondent to provide him with its annual financial statements from 2017 to date of the application which relief is in terms of the Act, as applicant is a 50 percent shareholder and director of first respondent.

[8] First respondent's claim in the main action against the applicant is for payment of monies allegedly due to the first respondent in respect of loans made by it to applicant. In terms of first respondent's particulars of claim the calculation of the claim amount was made by first respondent's auditors which was contained in the annexure A to its particulars of claim. It is these documents which applicant now seeks from the first respondent in terms of applicant's notice in terms of rule 35(12).

[9] The provisions of rule 30A (1) allows the applicant to bring an application to apply for an order that such a rule, notice, request, order or direction be complied with or that the claim or defence be struck out.[1]

[10] What the respondent fails to provide are the requested documents, bearing in mind that the first respondent's entire calculation of its claim was done by referring to annexure A. The documentation sought by the applicant were access to various financial documents inter alia.

10.1 approved financial statements of the first respondent

10.2 current accounting records of the first respondent

10.3 draft financial statements of the first respondent

10.4 management accounts of the first respondent

10.5 bank statements of the first respondent

[1] Rule 30 A (1) (a)-(b)

10.6 summary of (alleged) advances to first defendant by the first respondent

10.7 schedules summarizing (alleged) payments to second defendant by the first respondent

10.8 related schedules and additional supporting documentation of first respondent

[11] The reason advanced by the first respondent for the failure to provide the documentation is on the basis that the documentation is irrelevant. Further it is argued that the application is fundamentally misconceived as it relies on rule 35(12), which in its view is not the appropriate mechanism to obtain the type of discovery sought as the rule is narrowly focused on documents specifically referred to in pleadings or affidavits, not broad categories of documents that might be relevant to the case generally. It is suggested that if applicant wish to obtain broader discovery the appropriate mechanism would have been rule 35 (3).

[12] A further ground for the opposition is attributed to the first respondent's management accounts, bank statements and financial records, which it avers contain proprietary information of a confidential nature which cannot be shared with the applicant, particularly, as it contends that the applicant is merely a shareholder in name only and not an active participant in the business of the first respondent.

[13] In this regard the first respondent relied on Lutzen v Knysna Municipality,[2] where the court held that claims of commercial sensitivity or confidentiality must be balanced against the requirement for relevant discovery. This balancing excludes documents that are not directly related to the matters in dispute. Therefore, the items called for were refused.

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[2] (695/2020) [2023] ZAWCHC 100 (8 May 2023)

[14] In respect of the beneficial interest argument this was challenged by the applicant. On interpretation and when it applied the definition of "beneficial interest" and the meaning of "securities" and "share" as defined in s1(a), (b) and (c) of the Act, it is clear that applicant, as a shareholder has a beneficial interest in the company and because of his 50 percent shareholding, has rights which can be exercised supporting applicant's right to compel the discovery.

ANALYSIS

[15] It is necessary for me to spell out the rules relating to discovery specifically the sections necessary which will serve as a basis for the determination. The provisions of 35(1), (3), (6) and (12) are:

> *"35. Discovery, inspection and production of documents*
>
> *(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.*
>
> *(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 such party to make the same available for inspection in accordance with subrule*

(6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.

(6) Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver within five days, to the party requesting discovery, a notice in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of such party's attorney or, if such party is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise.

(12) (a) Any party to any proceeding may at any time before the hearing thereof deliver a notice in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to—

(i) produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or

(ii) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or

(iii) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known.

(b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording." (underlined -own emphasis)

[16] The underline portions of the rules quoted above is simple and straightforward. The applicant enjoys the right to utilise *(12) (a) "whose pleadings or affidavits reference is made to any document."* Applicant was of the view that an annexure to a particulars of claim is part of a pleading because it is relied upon by the plaintiff, else what purpose does an annexure serve if the converse is true. This is not the same as calling for better discovery in terms of rule 35 (3) which is distinctive to "*If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents."* The question remains, are other documents as purported by the rule being requested? if one reads the wording of subrule (12), it is apparent that it differs from subrule (3). Other documents are not what are being requested and rather it is such document as described where "*whose pleadings or affidavits reference is made to any document.*"

[17] Furthermore, Erasmus puts it succinctly. The object of discovery is "*that before trial both parties are made fully 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.*"[3] In respect of rule 35 (12) the author explains the purpose of discovery *"to assist the parties and the court in discovering the truth and to promote a just and expeditious determination of the case."*[4]

[18] The argument that the items were not provided as the applicant is only a shareholder and not involved in the day-to-day running of the business, and therefore not entitled to it, is without substance. Nor does the fishing expedition complained of by the first respondent, hold any water because the defence is an empty vessel and the arguments are barren. Particularly since the annexure emanated from the first respondent particulars of claim and as such forms part of the pleading. It is their source document and therefore first respondent cannot escape the full disclosure.

[19] I say so as s1 shows us that as a shareholder, applicant is entitled to the information and the provisions of rule 35(12) allows for such avenue. It is common cause that the applicant is a 50 percent shareholder of the respondent and therefore the refusal to deliver the company information on the basis of its confidentiality, is also an empty defence. The applicant's statutory right to call for the enforcement of a shareholder's right to have insight into the company's statutory requirements enjoys protection in terms of the Act.

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[3] See Uniform Rules of Court volume 11: Erasmus Superior Court Practice and the reference to Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1081 and further authorities quoted Including Logicrose Ltd v South End United Football Club Ltd [1988] 1 WLR 1256

[4] Erasmus, Superior Court Practice RS23 2024, D1

[20] Applicant relied on Nova Property Group Holdings Ltd and Another v Cobbett [5] in which case Moneyweb brought a Part B application to give it access to a shareholder registry. On appeal, Nova was dismissed, and it was found that "*when a company fails or refuses to provide access, that person is entitled, as of right, to an order compelling access. The question of the motive or purpose is simply irrelevant*"[6] . Further, "*s 26 (2) of the Companies Act provides an unqualified right of access to securities registers.*"[7]

[21] Staying with the Nova case, it also highlighted the role that companies play in our society and the need for transparency including the right of access to information in s32 of the Constitution of the Republic of South Africa, "is central to the interpretation *of section 26 (2) of the Companies Act. Both this court and the Constitutional Court have recognized that the manner in which companies operate and conduct their affairs is not a private matter*"[8]

[22] Nova, in referring to Bernstein v Bester[9] where the Constitutional Court made the position plain that "The *establishment of a company as a vehicle for conducting business on the basis of a limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include amongst others the statutory obligations of proper disclosure and accountability to shareholders.*"[10]

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[5] 2016 (4) SA 317 (SCA)
[6] Supra para [36]
[7] Supra para [47]
[8] Supra para [16]
[9] Bernstein and Others v Best NO and Others 1996 (2) SA 751 (CC); 1996 (4) BC LR 449; 1996 ZACC 2; pat at 98 with the constitutional court made it plain
[10] Ibid para [85]

[23] The first respondent belatedly (as it has costs consequences) and only at the hearing tendered the delivery of items 8.6 to 8.8. However, respondent did not accede to items 8.1 to 8.5. In terms of s 31(b) there is no question what a shareholder is entitled to. Respondent has not presented a cogent opposition save for stating that the information is confidential, irrelevant or that the applicant is not involved with the day to day running of the business, that together with the argument that the applicant is only a shareholder and not involved in the day-to-day running of the business is dismissed for reasons stated above.

[24] The applicant was perfectly entitled to compel in terms of rule 35 (12). Clearly this is not about better or broader discovery and therefor rule 35 (3) does not apply. First respondent has not raised any valid objection to the documentation that is requested by the applicant. First Respondent conceded that applicant is a 50% shareholder and director of the first respondents. Accordingly, the applicant is entitled to its relief.

COSTS

[25] The applicant is not seeking a punitive cost order against first respondent and rather, a party and party costs order.

[26] Since a tender was made at the hearing by the first respondent, therefore applicant on the whole has succeeded in its application. It follows that there are no reasons to depart from the norm that costs follow the result. In so far as the remainder of the non-tendered items are concerned costs follow the result, based on the reasoning set out above resulting in this order.

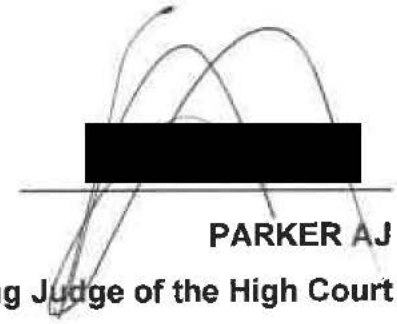
[27] Accordingly it is ordered:

(a) First respondent is to comply with the applicant's notice in terms of Rule 35(12) dated 10 June 2024 within 10 days from service of the order.

(b) In the event of first respondent failing and/or neglecting and/or refusing to comply with paragraph (a) above, applicant is granted leave to apply on the same papers, duly supplemented, if necessary, for an order striking out first respondent/Plaintiff's claim in the main action, and for judgment to be granted in favour of applicant as prayed for in his Plea.

(c) In terms of Section 31(1)(b), first respondent is to deliver to applicant its annual financial statements for the financial years from 2017 to date of this application within 10 days from date of service of the order.

(d) First respondent pays applicant's costs for the bringing of this application on a party and party scale A.



PARKER AJ

Acting Judge of the High Court

Appearances

Counsel for the Applicant:	Adv Daniel Rabie
Instructed by:	Madeleine Wöhler Attorneys
Attorney representing Respondents:	Mr. B Varkel
Instructed by:	Barry Varkel Consulting

This judgment was handed down electronically by circulation to the parties' representatives by email.