



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not reportable

Case no. 4424/2023

In the matter between:

MTHULISI MAVIYO

Applicant

and

VELOCITY FINANCE (RF) LIMITED

Respondent

JUDGMENT

LAING J

[1] This is an application for leave to appeal against the court's decision to dismiss, with costs, an application brought to compel the production of certain documents. These comprised the items listed under the applicant's notice in terms of rules 35 (12) and 35 (14), delivered previously.

[2] The main grounds relied upon by the applicant are that the court erred in holding that the respondent made no reference in its answering affidavit to the items in question. They comprised the following: the original signed transaction schedule; the Altech Netstar service mentioned in a transaction schedule; and the instalment sale agreement, signed electronically. The applicant contended that the respondent

made sufficient reference thereto in its papers to justify the production thereof, citing a recent decision of the Supreme Court of Appeal in that regard.

[3] The test for the granting of leave to appeal is contained in section 17 (1) (a) of the Superior Courts Act 10 of 2013. The judge in question must believe that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard. In *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen*,¹ the court said that the above provisions had raised the bar for the test to be applied to the merits of the proposed appeal. This is the generally accepted approach to applications of the present nature.²

[4] In argument, the applicant asserted that the respondent's reference to 'the transaction schedule' as well as a copy thereof was sufficient to be understood as a reference to the original document. To that effect, he relied on the decision in *Democratic Alliance and others v Mkhwebane and another*,³ to contend that a document referred to directly or indirectly in an affidavit or an annexure thereto, and which was relevant, must be produced when requested in terms of rule 35 (12). The court, per Navsa ADP, held that:

' . . . It appears to me to be clear that documents in respect of which there is a direct or indirect reference in an affidavit or its annexures, that are relevant, and which are not privileged, and are in the possession of that party, must be produced. Relevance is assessed in relation to rule 35 (12), not on the basis of issues that have crystallised, as they would have had pleadings closed or all the affidavits filed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised, and on the basis that they will better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences.'⁴

¹ Unreported, LCC case no. LCC14R/2014, dated 3 November 2014.

² See the discussion in DE van Loggerenberg *Erasmus: Superior Court Practice* RS 4 (2024) D-102–7.

³ 2021 (3) SA 403 (SCA).

⁴ Para 41.

[5] The court previously held that the respondent referred to a copy of the transaction schedule. It could well be argued, as the applicant has done, that the reference was sufficiently wide to include reference to the original document. Based on *Democratic Alliance*, however, the reference must also be relevant. The applicant has failed to demonstrate this. The closest that he came to doing so, in the immediate application, is the allegation that it is relevant to reasonably anticipated issues regarding the main application. He did not, however, disclose the nature of such issues. There was simply no indication from the applicant's papers why the original version of the transaction schedule, rather than a copy, was relevant.

[6] Regarding the Altech Netstar service mentioned in the transaction schedule, it is important to observe that the applicant's notice in terms of rules 35 (12) and (14) referred to the production of an Altech Netstar certificate. There is a clear distinction between 'service' and a 'certificate'. The applicant has moved the goal posts, so to speak. In any event, to the extent that *Democratic Alliance* can be used as authority for the contention that the respondent's reference to the transaction schedule was sufficiently wide to include reference to the services offered by Altech Netstar, the relevance thereof to the main application was simply not explained.

[7] Turning to the electronically signed instalment sale agreement, the respondent made no reference at all in its answering affidavit to the data messages mentioned by the applicant in its notice and the application for leave. In that regard, section 13 of the Electronic Communications and Transactions Act 25 of 2002, cited by the applicant, addresses the use of electronic signatures and their legal force and effect. To assert, as the applicant seemed to do, that the respondent's reference to an electronically signed instalment sale agreement was an indirect reference to a data message, as used within the context of section 13, is to strain, to breaking point, the principles mentioned in *Democratic Alliance*. There is no connection between the terms, whether direct or indirect. The relevance of the data messages mentioned by the applicant is, in any event, not apparent.

[8] A further aspect to be considered is whether an appeal lies against the order already granted by the court. The erstwhile Appellate Division held, in *Pretoria Garrison Institutes v Danish Variety Products (Pty), Limited*,⁵ that:

‘ . . . a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to “dispose of any issue or any portion of the issue in the main action or suit” or . . . unless it “irreparably anticipates or precludes some of the relief which would or might be given at the hearing”.’⁶

[9] The applicant has not argued that the order disposes of any issue in the main application; he has also not argued that it anticipates or precludes any of the relief sought in terms thereof. The applicant has not been prevented from delivering his replying affidavit or from requesting that the matter be referred for oral evidence (if so advised). The order does not have the final effect required to make it appealable. Instead, the applicant appeared to contend that the production of the documents was required to allow a proper ventilation of the issues. This is plainly insufficient.

[10] In the circumstances, the court does not believe that the requirements of section 17 (1) (a) of the Superior Courts Act 10 of 2013 have been met. The following order is made:

(a) the application for leave to appeal is dismissed; and

(b) the applicant is ordered to pay the respondent’s costs.

JGA LAING
JUDGE OF THE HIGH COURT

⁵ 1948 (1) SA 839 (A).

⁶ At 870. See, too, the discussion in A C Cillier et al *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed (2009) ch39-p1206–12.

APPEARANCES

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