



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

Case No: 17144/24

In the matter between

ESPERANCE VINEYARDS FARMING (PTY) LTD

1ST APPLICANT

PAUL JACQUES NAUDE

2ND APPLICANT

PAUL JACOBUS NAUDE

3RD APPLICANT

PAUL JACQUES NAUDE NO

4TH APPLICANT

ARNOLDUS JACOBUS STOFBERG NO

5TH APPLICANT

PAUL JACOBUS NAUDE NO

6TH APPLICANT

AND

LIEBENLOGISTICS (PTY) LTD

RESPONDENT

Date of Hearing : 27 June 2025

Date of Delivering : 03 September 2025

JUDGMENT

THULARE J

ORDER

- (a) The respondent is compelled to comply with the applicants' notice in terms of rule 35 which was served on the respondent on 20 December 2024 within 10 days of this order.
- (b) Should the respondent fail to comply with para (a) above the applicants are entitled to approach the court to have the respondent's claim dismissed with costs.
- (c) The respondent to pay the costs

[1] This is an application in terms of Rule 35(7) of the Uniform Rules of Court to compel the respondent, which is the plaintiff in the main action, to discover, and if it failed, to allow the applicants to approach the court to have the respondents action dismissed. The notice was served on the respondent on 20 December 2024 and gave the respondent 20 days within which to discover. The respondent did not deliver its discovery affidavit. Letters on four different dates were sent to the respondent between January and April, and they did not result in the discovery. A Rule 30A notice was also served on 11 April 2025 and still there was no discovery. This application was launched in May 2025 and set down for 24 June 2025.

[2] On 20 June 2025 the respondent filed what it considered its discovery affidavit. The deponent thereto, Leon De Villiers (de Villiers) was a Director of STP Insurance Brokers underwritten by Lloyds of London (STP), the respondent's insurer in the matter. In the affidavit De Villiers indicated that the rights of the respondent were subrogated to its insurers, and that he had in his possession or under his control the documents relating to the action, which were divided into the First and Second Parts of a Schedule. The

respondent did not object to the First Part but objected to producing the documents in the second part of the Schedule.

[3] The applicants rejected the respondent's discovery affidavit in that the affidavit did not constitute proper discovery as the deponent to the affidavit was not a party to the proceedings and that the doctrine of subrogation was apposite as insurance law assumed. The respondent did not file any notice to oppose and answering papers. However, at the hearing of the application, it was represented by Counsel who argued the matter.

RULE 35(7)

[4] Rule 35(7) reads:

“35. Discovery, inspection and production of documents

(7) 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 the claim or strike out the defence.”

Rule 1 defines “party” as “‘party’ or any reference to a plaintiff or other litigant in terms, includes such party’s attorney with or without an advocate, as the context may require.’ A litigant is someone directly involved in a lawsuit or legal proceedings. That someone is involved in the sense that they are making a formal legal complaint about someone or a complaint is made about them. It is someone whose involvement is central to the resolution of a legal matter. The Rules define specific roles and responsibilities of each party or litigant, to navigate the legal process. The distinct roles, in the nature of the matter before me, an application, causes the assumption of the role as an applicant who initiates by filing a document that outlines the claim and the relief sought, to formally commence the legal process; or a respondent upon whom legal

documents are delivered, setting out the complaint, compelling a response and prompting them to defend.

[5] STP is not cited as a party in the pleadings. It did not become a party to the legal dispute in these proceedings when it indemnified the respondent for the loss it allegedly suffered. Rule 35 required a discovery affidavit to be deposed to by a party to the proceedings. That party is the respondent. STP Insurance Brokers, not being a party to the application cannot through its director discover on behalf of the respondent [*Le Bonheur Wine Estate (Pty) Ltd v Stellenbosch Vineyards (Pty) Ltd and Others* (17111/2021) [2025] ZAWCHC 260 (20 June 2025) at para 35 to 68]. In the circumstances, the respondent has not delivered its discovery affidavit.

[6] I am not persuaded that *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA) is authority for the proposition that STP, as the respondents indemnity insurer in the matter, is a party to the proceedings. At para 17 it was said:

“[17] Nevertheless this court, with reference to *Ackerman v Loubser* and *Teper*, held that
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‘ an insurer under a contract of indemnity insurance who has satisfied the claim of the insured is entitled to be placed in the insured's position in respect of all rights and remedies against other parties which are vested in the insured in relation to the subject matter of the insurance. This is by virtue of the doctrine of subrogation which is part of our common law.’

What this court had in mind in *Commercial Union* were the three rules of the *lex mercatoria* (and not only of the English law of insurance): that the wrongdoer is not entitled to benefit from the fact that the person wronged was insured; that the insured may not be enriched at the expense of the insurer by receiving both the insurance indemnity and damages from the wrongdoer; and that the insurer replaces the insured, ie the insured is subrogated by the insurer, which entitles the insurer to claim the loss from the wrongdoer.”

An inductive reading of *Rand Mutual* makes it plain that STP had an election whether to sue in its own name, or in the name of the respondent. The judgment did not hold that once the requirements for subrogation were met, the insurer automatically became a party to proceedings where it was never cited as a party. STP elected to sue in the name of the respondent. It must be bound to its election, as to who is the party before the court in the proceedings. It cannot be allowed to elect to be anonymous when it sues it, and lead from the front when it so elects, in the same proceedings, without first attending to its choice of who is the party to litigate in the matter. STP must respect procedural rules of the court once it has made its election. As the law of subrogation in insurance law stands STP was free to sue in its own name or in the name of the respondent. It is not free to change names of the litigant who is suing the applicants at its pleasure during the same proceedings and then claim to rely on subrogation in insurance law. For these reasons the order is made.

DM THULARE
JUDGE OF THE HIGH COURT