

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/37135

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>29/7/2013</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

THE ESTATE AGENCY AFFAIRS BOARD APPLICANT/DEFENDANT

and

GRAHAM CARL GUTHRIE 1st RESPONDENT/CEDENT

DURRANVALE TRADE AND INVESTMENT (PTY) LIMITED 2nd RESPONDENT/PLAINTIFF

J U D G M E N T

DOSIO, AJ:

INTRODUCTION

- [1] This is an application in terms of Rule 35(5)(c) of the uniform rules. The defendant, who is the applicant, seeks discovery of various documents by the cedant (the first respondent) in an action in which the plaintiff (the second respondent) sues as a cessionary.

- [2] The application is opposed by the plaintiff, but not by the cedant.
- [3] The two questions that this court is called upon to decide are;
- i. whether Rule 35(5)(c) is applicable to a defendant who seeks discovery from a cedant who is not a party to the action and where the parties involved in the action are not registered companies as defined in the Motor Vehicle Insurance Act, 1942, as amended; and
 - ii. if Rule 35(5)(c) is applicable, whether the defendant has presented sufficient grounds for the application to be favourably considered.

FACTS OF THE MAIN ACTION

- [4] Graham Guthrie, ("the cedant") was the sole member of CRS Brokers CC ("CRS") during the period 1 January 2007 to 31 December 2009, and was entitled to a salary from CRS. Both the cedant and CRS were entitled to be issued with fidelity fund certificates by the defendant.
- [5] In December 2009, the defendant refused to renew the fidelity fund certificates of both the cedant and CRS. CRS ceased to exist and the cedant lost his entitlement to a salary.
- [6] It is alleged by the plaintiff that the cedant would have carried on for 15 (fifteen) years as an estate agent and that CRS would have received a net profit, after tax of R44,819,536-90 (forty four million, eight hundred and nineteen thousand, five hundred and thirty six rands and ninety cents). This amount would have accrued to the cedant.
- [7] The plaintiff suggests this claim lies against the defendant arising from its failure to re-new the fidelity fund certificates to the cedant and CRS.
- [8] On 13 September 2012, the cedant ceded to the plaintiff his right to the aforesaid claim against the defendant.

THE PURPOSE OF THE APPLICATION

- [9] The defendant requested this court, in its notice of motion, firstly to order the cedant to discover certain documents in terms of rule 35(5)(c)¹, and secondly, in the event that the cedant fails to discover these documents, that the defendant requests permission to approach the court on the same papers, duly supplemented, for an order dismissing the plaintiff's action against the defendant with costs.²
- [10] At the hearing, however, the defendant persisted only with prayer 1.
- [11] A letter dated 25 February 2013 forwarded by the plaintiff's attorney to the defendant's attorney, indicated that although the cedant had received the Rule 35(5)(c) notice, he did not intend complying with the notice as he was not a party to the action and that the provisions of Rule 35(5) would not apply to him.
- [12] The documents that the defendant requires are the following: the certificate of registration and deregistration of CRS Brokers CC; documents containing the sale, cession, assignment, transfer and making over of Mr. Guthrie's claim to the plaintiff; documents reflecting income or remuneration earned by Mr. Guthrie from January 2010, (including Mr. Guthrie's letters of appointment, contracts of service of employment, tax returns, tax assessments, bank statements); documents pertaining to any other business or business ventures in which Mr. Guthrie had been involved since 1 January 2010; bank statements relating to these businesses or business ventures from 1 January 2010; annual financial statements and management accounts of these business ventures from 1 January 2010; financial statements, management accounts and tax returns of CRS Brokers CC from the commencement of its business until cessation of its business; and tax returns of Mr. Guthrie over period referred to above.
- [13] The objections raised by the plaintiff to the application are:

¹ Prayer 1 of the notice of motion

² Prayer 2 of the notice of motion

- i. *"The provisions of Rule 35(5), including the relevant Rule, apply only to actions in which a registered company as defined in the Motor Vehicle Insurance Act, 1942, as amended, is a party by virtue of the provisions of the said Act."* Neither the plaintiff nor the cedant are registered in terms of this Act and accordingly Rule 35(5)(c) is not applicable to either of them.
- ii. *"Rule 35(5) provides for discovery to be made in a manner, according to a procedure, and by persons different to that and not contemplated in Rules 35(1), (2), (3) and (4)."*
- iii. *"Firstly, Rule 35(5)(a) describes the type of action to which the provisions of Rule 35(5) are applicable, namely that to which a registered company as defined in the Motor Vehicle Insurance Act, 1942, as amended ("the Act") is a party by virtue of the provisions of the Act."*
- iv. *"Secondly, it provides for the discovery to be made, not in accordance with Form 11 of the First Schedule (as is the case of discovery in terms of Rules 35(1) and (2), but in the manner described in Form 12 of the First Schedule."*
- v. *"Thirdly, it provides for any party to the action to be entitled to be furnished with a written statement of documents of a specified nature that are or have been in the possession of two classes of persons, namely:-*

-the driver or owner of the vehicle insured by the said registered company including the driver of a vehicle owned by a person, State, Government or body of persons referred to in Section 19(3) of the Act;

-a cedant of a claim in respect of which the plaintiff sues as a cessionary."

- vi. ***"If the Rule maker intended the provisions of the relevant Rule to be applicable in cases to which a registered company as defined in the Act is not a party, provision would have been made for the cedant to make discovery in accordance with Form 11 of the First Schedule."***

- [14] The plaintiff's attorney recorded that the reasons for it opposing the application were that should this court order that the cedant comply with the order, and in the event the cedant fails to comply, then the court's order will constitute *res judicata* as against the plaintiff. The plaintiff will accordingly be precluded from opposing any application that the defendant may later make in terms of prayer 2 of the notice of motion for an order dismissing the main action based on the cedant's non-compliance.
- [15] The plaintiff's attorney contended that when a court has to consider a question which depends entirely upon the language of a particular section of a Statute, it must read the Statute as against the background of the common law. Accordingly the same applies to the interpretation of the uniform rules of the High Court. This court was referred to the case of ***Biden v The French and D' Esterre Diamond Mining Company (1882) 1 Buch AC 95***, where the learned Barry J.P at page 101 stated that whilst the court might enjoy inherent jurisdiction in exceptional circumstances, the Court will not order a person who is not a party to an action to make discovery of documentation in his possession or under his control if the person seeking delivery enjoys another remedy to obtain access to the documents required to be discovered.
- [16] The plaintiff's attorney submitted that the further remedy that the defendant enjoys would be to issue a subpoena *duces tecum* to the cedant.
- [17] The defendant's counsel disagreed that a subpoena *duces tecum* should be used and submitted that the rules relating to discovery are

far more powerful than a subpoena *duces tecum*. In addition he argued that should a right to discovery exist then this right should be enforced.

- [18] The defendant's counsel argued that rule 35 (5) has 4 sub parts. There is no preamble to the sub rule and there is no pre-linking clause between rule 35(5) (a),(b), (c) and (d). Counsel contends that there is no explanation why this rule should be applicable only to a cedant in a motor vehicle accident type matter.

THE LEGAL PRINCIPLES

- [19] Rule 35 (5) reads as follows:-

“(5)(a) Where a registered company as defined in the Motor Vehicle Insurance Act, 1942, as amended, is a party to any action by virtue of the provisions of the said Act, any party thereto may obtain discovery in the manner provided in paragraph (d) of this sub rule against the driver or owner (as defined in the said Act) of the vehicle insured by the said company.

(b) The provisions of paragraph (a) shall apply mutatis mutandi to the driver of a vehicle owned by a person, state, government or body of persons referred to in sub-section (3) of section nineteen of the said act

(c) Where the plaintiff sues as a cessionary, the defendant shall mutatis mutandi have the same rights under this rule against the cedant.

(d) The party requiring discovery in terms of paragraph (a),(b) or (c) shall do so by notice as near as may be in accordance with Form 12 of the First Schedule”

- [20] The authors Farlam, Fichardt and Van Loggenrenberg in *Erasmus Superior Court Practice*, are silent in their commentary as to whether the provisions of rule 35(5)(c) are applicable to parties that are not

registered companies as defined in the Motor Vehicle Insurance Act, 1942, as amended.

- [21] The commentary in the tenth edition of Jones and Buckle, *The Civil Practice of the Magistrates' Courts in South Africa* is also silent in respect to the application of rule 23(5)(c) which is similar in nature to Rule 35(5)(c), the only difference being the former regulates applications in the Magistrate Court.

EVALUATION

WHETHER THE MEANING OF RULE 35(5)(c) CAN BE EXTENDED TO NON PARTIES WHO ARE NOT REGISTERED IN TERMS OF THE MOTOR VEHICLE INSURANCE ACT, 1942, AS AMENDED

- [22] The learned author KE Kellaway in *Principles of legal interpretation of statutes, contracts and wills*³ states at p 102 that;

"Where the language of a provision in a statute is not calculated to deal with any unforeseen case, it must nevertheless be so interpreted as to apply to it. If there are two or more possible interpretations which are fairly evenly balanced, the interpretation which involves the least alteration to the existing law should be applied."

- [23] It is this court's opinion that Rule 35(5)(c) could have been more clearly phrased. It could not have been the intention of the legislature to prevent a defendant in terms of Rule 35(5)(c) from obtaining discovery from a cedant who is not a party to the action and where the parties involved are not registered companies as defined in the Motor Vehicle Insurance Act, 1942, as amended
- [24] The phraseology of Rule 35(5)(a) and (b) include the words "driver" and "vehicle". Rule 35(5)(a) and (b) are more closely related than paragraph (c) and (d) in that the latter two paragraphs make no

³ Butterworths, Durban

mention of the words "registered companies defined in terms of the Motor Vehicle Insurance Act 1942", "driver", "owner" or "vehicle".

- [25] In the absence of any reference to the words mentioned above in Rule 35(5)(c), a court may interpret paragraph (c) as being applicable to all parties who are not parties to the action in instances where the plaintiff sues as cessionary.
- [26] If one considers the broader context of Rule 35(5), and the subject matter which it deals with, namely discovery of documents, then this court is unable to find justification for any of the plaintiff's submissions.
- [27] The learned authors Jones and Buckle, *The Civil Practice of the Magistrates' Courts in South Africa* stated;

"In the superior courts it is possible to obtain discovery under Supreme Court Rule 35(5) from certain parties who are not parties to the action (see Richardson's Woolwasheries Ltd v Minister of Agriculture 1971 (4) SA 62 (E) at 66)"⁴

- [28] Counsel for the defendant referred this court to the *obiter dictum* in *Richardson's Woolwasheries Ltd v Minister of Agriculture 1971 (4) SA 62 (E)*. In that case the true plaintiff was P E Undertakings (Pty) Ltd which sued in the name of Richardson's Woolwasheries. The court raised the possibility that Corlett Drive Estates Limited may have ceded its rights under a certain agreement with Richardson's Woolwasheries to PE Undertakings (Pty) Ltd, but did not have to decide that issue. In that context, Kannemeyer J said the following at 66 G-H;

"...if Corlett Drive Estates Ltd, is indeed a cedant then the machinery provided under Rule 35(5)(d) should have been used to require it to make discovery. Rule 35(5) is intended to make it possible to obtain discovery from one who is not a party to an action. Thus if Corlett Drive Estates Ltd falls within the ambit of Rule 35(5)(c) it can be required to make discovery."

⁴ Seventh Edition Footnote 5 on page 234

[29] The latter case was not concerned with the Motor Vehicle Insurance Act of 1942, yet the *obiter* remark in respect to Rule 35(5)(c) suggests that discovery may be obtained from a cedant where the plaintiff sues as cessionary, regardless of the cause of action.

[30] The learned authors Herbstein and Van Winsen in *The Civil Practice of the High Courts of South Africa* ⁵ at page 823 also supports the contention that Rule 35(5) is intended to provide for discovery from persons who are not parties to the action in two instances, namely

“(a) Where a third-party insurer is a party to any action, any party to the matter may obtain discovery against the driver or owner of the insured vehicle. This provision applies, mutatis mutandis, to the driver of a vehicle owned by a person, state, government or body of persons that acts as its own insurer for purposes of third-party claims. [and]

(b) Where the plaintiff sues as a cessionary, the defendant has, mutatis mutandis, the same rights under the rule against the cedant.”

[31] Accordingly the learned authors, clearly support the interpretation that the relief is available in the circumstances contended by the defendant.

[32] This court finds the *obiter dictum* of the *Richardson’s Woolwasheries Ltd* case to be sufficiently persuasive.

[33] This court is satisfied that the relief claimed is available to the defendant.

WHETHER THE DEFENDANT HAS MADE OUT A CASE FOR RULE 35(5)(c) TO BE GRANTED.

[34] The defendant’s counsel argued that the information that it seeks is necessary as the lack thereof will prejudice the defendant in the preparation of its case and render it powerless. The defendant needs

⁵ 5th Edition, Juta, page 823

to know how the alleged loss suffered by the cedant has been calculated.

[35] Although these submissions by the defendant's counsel were not supported with as much facts as this court would have preferred, the plaintiff did not dispute the defendant's submissions. The only prejudice alluded to on behalf of the plaintiff was that if this court were to grant an order in terms of Rule 35(5)(c), and if the cedant failed to comply therewith, that the defendant may bring an application to have the plaintiff's action dismissed. This fear would not be realized as this court is not required to grant such an order any longer.

[36] In the absence of adequate grounds to counter the defendant's explanation for the necessity of these documents, this court finds that they are of sufficient importance to the defendant to prepare for trial.

[37] The plaintiff's contention that a subpoena *duces tecum* procedure was a more appropriate remedy for the defendant cannot be supported.

[38] The difficulty created by a subpoena *duces tecum* is that the party seeking the information would have to wait until the trial to determine whether he or she will need such evidence.

[39] The procedure as envisaged by discovery is quicker, less expensive and less burdensome.

[40] The defendant accordingly succeeds in its application.

COSTS


[41] The defendant's counsel requested that the cedant pays the costs of this application, and that in the event that the plaintiff opposes the application, that the plaintiff be ordered to pay the costs of this application jointly and severally with the cedant.

[42] In addition, counsel for the defendant requested that due to the magnitude of the claim, costs for two counsel be allowed.

- [43] The plaintiff's attorney has argued that the plaintiff should not be penalized for objecting to this application as they were compelled to enter the case in the light of the defendant's second prayer for the dismissal of the plaintiff's claim.
- [44] In addition the plaintiff's attorney submitted the matter was not sufficiently complex to merit the employment of two counsel.
- [45] Although this court agrees with the counsel for the defendant that the main action may be one of substance, this court cannot agree that it is of such importance or complexity to warrant the need for two counsel in this application, despite counsel's reliance on the case of *Davis v Caledon Municipality and Another* 1960 (4) SA 885 (C).
- [46] This court is satisfied that the cost order ought to follow the result of the application. This court can find no reason in the circumstances not to order the cedant (first respondent) to pay the costs.
- [47] This court finds the plaintiff's reasons for opposing this application cannot be faulted in the light of prayer 2 of the notice of motion. Accordingly an order for costs will not be made against the plaintiff

ORDER

- i. Prayer 1 of the application is granted and the cedant (first respondent) is directed to comply with the defendant's notice in terms of rule 35(5)(c) within 30 days of the date hereof.
- ii. First respondent (cedant) is to pay the costs of this application, including the costs of one senior counsel.



D. DOSIO
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: ADV. A. GAUTSCHI SC
INSTRUCTED BY: A. B. SCARROTT ATTORNEYS
COUNSEL FOR THE DEFENDANT: MR C ZIMAN
INSTRUCTED BY: CYRIL ZIMAN & ASSOCIATES INC.