REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 15228/2009

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

8.VII.16
DATE

SIGNATURE

In the matter between:

LOUREIRO, LICINIO	First Plaintiff
LOUREIRO, VENESSA	Second Plaintiff
LOUREIRO, LUCA-FILIPE	Third Plaintiff
LOUREIRO, JEAN-ENRIQUE	Fourth Plaintiff

and

IMVULA QUALITY PROTECTION (PTY) LTD	Defendant

JUDGMENT

S DU TOIT, AJ:

INTRODUCTION:

[1] This matter involves two separate applications. The first concerns plaintiffs' application to amend their particulars of claim. The second concerns the defendant's application to compel further and better discovery. The two applications were heard at the same time as they essentially revolve around the same facts. Those facts were set out with inimitable clarity and brevity in *Loureiro and Others v Imvula Quality Protection (Pty) Limited* 2014(3) SA 394 (CC). It is therefore not necessary to repeat them here. The Constitutional Court ordered, *inter alia* at [69] that:

> "*(a)* *The respondent* (defendant herein) *is declared liable in contract to the first applicant* (the first plaintiff herein) *for whatever damages may be proved.*
>
> *(b)* *The respondent is declared liable in delict to the second, third and fourth applicants* (second, third and fourth plaintiffs herein) *for whatever damages may be proved.*"

[2] Plaintiffs' claims arise out of an intrusion into plaintiffs' home and a robbery committed there by robbers masquerading as policemen. The first plaintiff (Mr. Loureiro) had employed the defendant to guard his home. At [40] of the Constitutional Court's judgment, it posed the problem as follows:

> *"[40] To determine whether iMvula is liable to Mr. Loureiro, three issues must be decided: first, whether Mr. Loureiro's express prohibition against opening the pedestrian gate without prior authorisation amended the terms of the contract; second, whether this prohibition should be interpreted as imposing strict liability or instead as including a reasonableness qualifier; and third, whether the contract was breached."*

The Constitutional Court found in favour of Mr. Loureiro in relation to all three of those questions. As a consequence, it granted the order which I have quoted in part above. The judgment of the Constitutional Court did not deal with the nature or extent of the damages which Mr. Loureiro could prove.

APPLICATION TO AMEND:

[3] In his particulars of claim, Mr. Loureiro pleaded that property belonging to him, to the value of R11 874 866 was stolen. He had been compensated in respect of a portion of the stolen items to the extent of R2 056 422. As a consequence he claimed R9 818 444. He also claimed R270 760 for medical expenses and general damages.

[4] Mrs. Loureiro, the second plaintiff and Mr. and Mrs. Loureiro's two minor children, the third and fourth plaintiffs, claimed in delict against the defendant. This claim was based on "*severe emotional trauma and shock*", future emotional trauma and loss of amenities of life. The claim included a claim for hospital, medical and related expenditure, future medicals and general damages, on behalf of both Mrs. Loureiro and the two children.

[5] Plaintiffs seek a number of amendments to their particulars of claim.

[6] The first amendment is to amend the total value of the goods stolen to R12 776 337. iMvula does not take issue with this amendment. This total amount however is now split up. Mr. Loureiro now wishes to plead that property to the value of R3 103 239 belonged to him, and property to the value of R9 673 098 belonged to his wife.

[7] I now quote the salient parts of the notice of amendment:

> "*9.3A* *The loss of R9 673 098 ....., is a loss suffered by the first plaintiff, by virtue of the first plaintiff being obliged, in terms of his oral and/or tacit undertaking/s to the second plaintiff, that he would replace property that the second plaintiff may lose as the result of theft or other causes and which undertaking/s were orally and/or tacitly accepted by the second plaintiff.*
>
> *9.3B* *The first plaintiff's undertaking was established through and evidenced by .....*
>
> *9.3C* *The first plaintiff is therefore bound to replace the items stolen from the second plaintiff.*
>
> *9.3D* *This claim is in the alternative to the second plaintiff's claim in paragraph 18.4 hereunder.*"

[8] What Mr. Loureiro is now seeking to plead is the fact that he has to reimburse his wife for that part of the stolen property belonging to her.

[9] The notice of amendment also seeks to amend Mrs. Loureiro's claim to the effect that the robbers stole property belonging to her to the value of R9 673 098. This is in the alternative to Mr. Loureiro's proposed amended claim.

[10] The nub of iMvula's objection to these amendments is that they introduce claims which

10.1 introduce a new contract, when the provisions of the guarding contract had been pronounced on finally by another court; or

10.2 had prescribed.

[11] I quote from the notice of objection:

"1. *The trial court ordered a separation of the merits and the quantum in terms of Rule 33(4).*

2. *The merits trial proceeded to final judgment.*

3. *The question as to the nature of the contract between the parties was finally determined as part of the merits trial.*

4. *The first plaintiff pleaded a contract and a breach of such contract.*

5. *The first plaintiff pleaded that the losses that he alleged were damages that flowed naturally and generally from the alleged breach, being the loss of property owned by the first plaintiff.*

6. *In the proposed amendment, in paragraphs 9.3A to 9.3C, the first plaintiff now seeks to introduce losses alleged to flow from a separate contract between himself and his wife (the second plaintiff).*

7. *Such losses, to be claimable as damages flowing from the breach of the contract between the first plaintiff and the defendant, would be extrinsic damages, which would require a term in the contract between the first plaintiff and the defendant that specifically contemplated such damages as a consequence of breach.*

8. *This requires a different contract between the first plaintiff and the defendant from the contract pleaded by the first plaintiff upon which the court finally pronounced in the merits trial.*

9. *The first plaintiff is precluded from seeking to plead a different contract as part of the quantum trial.*"

[12] The notice of objection then goes on to state a further ground. It is that the loss which Mr. Loureiro now seeks to recover "*amounts to a different debt from the loss*" he initially sued for. That different debt was introduced in September 2015 while the loss occurred in January 2009. The different debt had "*clearly prescribed by now*".

[13] iMvula also raises an objection to Mrs. Loureiro's proposed amendment. It is that she now claims for patrimonial loss whereas her claim previously was for shock, pain and suffering, medical expenses and loss of amenities. The loss of property therefore "*entails a different debt to the existing claim for injury*". This claim, iMvula says, has prescribed.

[14] It is of course trite that a court will not allow an amendment introducing a claim which has prescribed. See *Stroud v Steel Engineering Co Ltd and Another* 1996(4) SA 1139 (W) at 1142 D. But as Flemming D.J.P. said there, a plaintiff should not be "*deprived of his chance to put his claim before Court because of apparent probabilities at the time when amendment is considered*".

[15] In argument, Mr. Hellens SC, with him Mr. Pretorius, somewhat narrowed iMvula's objection to Mr. Loureiro's proposed amendment. He

argues that it is incompetent for Mr. Loureiro to introduce his claim (i.e. based on his alleged undertaking to his wife) after the court had already pronounced finally on the issue of the merits. The defendant did not persist with the objection to Mr Loureiro's proposed amendment on the basis that the claim had prescribed. The objection to Mrs. Loureiro's proposed claim remained that it had prescribed.

[16] Mr. Hellen's argument was the effect that Mr. Loureiro had claimed losses which flowed "*naturally and generally from the alleged breach of the guarding contract, being the loss of property belonging to him*". The proposed amendment, he argued, now seeks to introduce losses alleged to flow from a separate contract between Mr. Loureiro and Mrs. Loureiro. Such damages, he says, would be extrinsic damages "*which would require a term in the guarding contract that the parties contemplated such damages would result from a breach of the guarding contract*". This, he says, constitutes a contract which is different in terms from the guarding contract pleaded by Mr. Loureiro. In regard to that pleaded contract, there had been a final pronouncement.

[17] It was not a question of quantification, the argument continued, it was a question of liability.

[18] I disagree. On my reading of the judgment of the Constitutional Court it found only that iMvula had breached the contract by allowing unauthorised entry. As a consequence, iMvula was declared liable "for whatever damages may be proved". Whether or not Mr. Loureiro can prove his special or extrinsic damages, is therefore not dealt with in the judgment of the Constitutional Court. The term of the contract that was breached was the one precluding unauthorized entry.

[19] Furthermore, in his particulars of claim Mr. Loureiro specifically pleads alternatively that "*at the time of the conclusion of the guarding service agreement the first plaintiff and the defendant were aware*" that in the event that iMvula breached its obligations Mr. Loureiro would suffer loss or damage. The guarding agreement was concluded on that basis. It is clear therefore that, as an alternative, Mr. Loureiro pleaded that the parties were conscious of the fact that unlawful entry would cause him to suffer loss. Both loss resulting from the theft of his personal property and the loss arising from his undertaking to his wife are, in my view, encompassed in the aforesaid pleading. This does not amount to a different contract to the one in respect of which the Constitutional Court held iMvula liable. It is, however, so that Mr. Loureiro still has to prove that loss.

[20] It should be noted that the contractual claim raised by Mr. Loureiro is said to be in the alternative to the delictual claim by Mrs. Loureiro. No double recovery is sought.

[21] As regards the proposed claim by Mrs. Loureiro, iMvula argues that the claim previously related to claims for injury whereas the proposed amended claim sought damages flowing from a loss of property. This claim, it was argued, is not "*substantially the same as the claim arising from injury to the person*". It accordingly would have prescribed.

[22] In iMvula's heads of argument it is conceded that Mrs. Loureiro had claimed damages for both patrimonial and non-patrimonial loss.

[23] iMvula correctly states that the word "*debt*" in the Prescription Act 68 of 1969, must be given a wide and general meaning and does not bear the technical meaning of the phrase "*cause of action*". See *CGU Insurance v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 627-628.

[24] Prescription is of course interrupted in terms of s 15(1) of the Prescription Act by the service of process claiming payment of the debt. It is common cause that process here was served before the three-year period of prescription had elapsed. In my view, Mrs. Loureiro's claim is based on the same set of facts which begot Imvula's debt. She is merely seeking to expand or extend her original claim. She was not attempting to raise a different right of action and therefore a different debt. *Cf Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A).

[25] The objections to the proposed amendments are therefore dismissed with costs, including the costs consequent upon the employment of two

counsel. The amendments are allowed. The provisions of rule 28 must however be given effect to.

APPLICATION TO COMPEL:

[26] This brings me to consider iMvula's application to compel further and better discovery.

[27] The rules relating to discovery are part of our adjectival law. As so much else, this is derived from English precedents. More than a century ago G.J. Morice (in English and Roman-Dutch Law, 2nd edition, p. 372) wrote that "*the procedure of Roman-Dutch law has become almost entirely obsolete*".

[28] C.H. van Zyl, The Theory of the Judicial Practice, 2nd edition (1902) defines "*discovery*" as "*the power which a Court has of compelling a litigant, in answer to his opponent, to reveal or disclose on oath, any fact resting merely within his knowledge, or discover any document in his power or possession which would aid the Court in the enforcement of a right.....*"

[29] The power had its origin "*in the practice of the old Court of Chancery in England....*". This arose out of the equity jurisdiction that court had. Only in the 1870's was that power extended to other courts by statute.

[30] Halsbury's Laws of England (Hailsham), 2nd edition, (I have deliberately chosen an older edition) Vol X, paragraph 405, describes discovery as follows:

> "*405. The term 'Discovery' is used to describe certain processes by which a party to a civil cause or matter (a) is enabled to obtain from the opposite party information in writing and on oath relating to the questions of fact (b) in dispute between them for the purpose of preparing for the trial of the cause and of obtaining a final judgment.....*"

Further down it is stated -

> "*The modes of discovery ..... are really three in number, namely, disclosure of the existence of documents, inspection of documents, and interrogatories, but the term 'Discovery' is often used as meaning disclosure and inspection considered as one.*"

[31] In paragraph 407 of that work, reference is made to the fact that the practice and procedure as to discovery is governed by the rules of court "*so far as such rules exist*". Where, however, "*no provision is made by the rules, the practice formerly obtaining in the Court of Chancery, and even the old common law practice, whether under the Common Law Procedure Acts or otherwise, so far as it does not conflict with that formerly obtaining in the Court of Chancery, may be resorted to or followed. Where there is a variance, rules of equity prevail*".

[32] Etymologically the word "*discover*" is derived from the old French word "*descovrir*" (see Oxford English Dictionary, page 431). The primary meaning

of "*discovery*" is the action of uncovering. A second meaning is the action of disclosing or divulging.

[33] Rule 333(a) of the old Cape rules dating back to the 19th century read as follows:

> "*It shall be lawful for the Court or a judge at any time during the pendency of any action or proceeding (b) to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding as the Court or Judge shall think right.*"

[34] Further subparagraphs of this rule provide for an application to a judge for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power. A form attached to those Cape rules prescribed the form of the affidavit. In that the deponent had to declare that he had in his possession or power the documents relating to the matters in question in the suit. He also had to state when the documents were last in his possession or power. The rules of the Transvaal Provincial Division a hundred years ago contained a similar provision.

[35] The Cape rules apparently came into force in 1880. As late as 1879 a discovery order was refused. See *Upington v Saul Solomon & Co* 1879 Buch 204.

[36] By 1882 the situation had changed and discovery orders were allowed. See *Biden v The French and D'Esterre Diamond Mining Company* 1882 Buch AC 95 (but in this case not before action was instituted).

[37] What emerges from this very brief historical excursus is that the underlying idea was that it was fair in litigation that both sides should make disclosure. The other point emerging from the equity origins of discovery is that it originally was not restricted to the disclosure of documents. It included interrogatories. That emerges from the description given by Halsbury quoted above. All this was to serve the aim of uncovering the truth in court proceedings.

> *Cf. Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W) at 1096A-B.

[38] Rule 35 of the Uniform Rules of Court now governs the discovery of documents only. Both Erasmus: Superior Court Practice, 2nd edition and Harms: Civil Procedure in the Supreme Court deal with this only on the basis of the disclosure of documents. This restricted approach to the term "*discovery*" is echoed in Herbstein & van Winsen: *The Civil Practice of the High Courts of South Africa*, 5th edition, page 777. The broader notion of discovery to which I have referred is probably covered in other court rules for instance, rule 21 (further particulars), rule 36 (inspections, examinations and expert testimony) and of course the right to ask questions at a pre-trial conference in terms of rule 37.

[39] I now turn to what is sought by the defendant in its application to compel. In order to comprehend the cogency or otherwise of the defendant's requests, it is perhaps necessary briefly to refer to what is claimed. Appended to the notice of amendment is a list of jewellery, watches, electronic accessories and equipment, phones and pens, bags and other perquisites, sunglasses and firearms. The value of these is said to be R3 103 239. They are the items said to belong to Mr. Loureiro. A second schedule lists jewellery, sunglasses and ladies' handbags and purses to a value of R9 673 098 said to belong to Mrs. Loureiro.

[40] iMvula initially sought discovery by the Loureiros of:

40.1 Mr. Loureiro's tax returns for 2001 to 2009 tax years.

40.2 Mr. Loureiro's financial statements for 2001 to 2009 financial years.

40.3 The financial statements of Combined Ceilings and Partitions CC for 2001 to 2009 financial years.

40.4 All wills prepared by Mr. and Mrs. Loureiro during the period 2001 to 2009.

40.5 All tax assessments by the fiscus in respect of Mr. Loureiro for the period 2001 to 2009.

[41] iMvula maintains that these documents are relevant. It says the documents relate to a matter in question. It is relevant, if it is reasonable to suppose that the documents contain information which may, not must, either directly or indirectly enable iMvula to advance its own case or to damage the Loureiros' case. A document can be said to have those qualities if it is a document which may fairly lead a litigant to a train of enquiry which may either advance his own case or damage the case of his adversary.

[42] The ownership, value and loss of the items for which Mr. and Mrs. Loureiro have raised claims, remain in issue, iMvula argues. An enquiry into the financial means of Mr. Loureiro remained relevant as he "*allegedly acquired those goods*". The Loureiros had discovered documents which on the face of it related to the allegedly stolen items including valuation certificates, tax invoices and statements of account. However, iMvula points out, that there are no discovered tax invoices or other form of proof of purchase for 80 of the 96 jewellery items, said to be worth more than R11 million.

[43] Mr. Loureiro, in an affidavit, stated that apart from where documentary evidence, already discovered, showed otherwise, the stolen items were bought for cash. He says that the cash used for these purchases was not drawn from bank accounts. He knows of no tax return that he completed which included a list of assets reflecting any of the items that were stolen. He adds that, in any event, he has no tax returns or assessments for the period

2001 to 2009 in his possession. He does not know whether such documents are available elsewhere, but adds that his tax affairs are in order.

[44] Mr. Loureiro also says that no financial statements have ever been prepared for him personally during the period 2001 to 2009. He also confirms that neither he nor his wife completed wills during that period.

[45] Mr. Loureiro depicts himself as a "*high net worth individual*". He supports this by certain letters from his bankers. Such a "*high net worth individual*" would have an estate of more than R80 million. He adds that his insurers confirm that the cover afforded to him is only afforded to "*high net worth individuals*" who have estates worth in excess of R100 million.

[46] iMvula counters this by saying that what it should be allowed to investigate, is whether or not Mr. Loureiro had the buying power during the period in question to acquire the goods allegedly stolen worth more than R11 million (or now after the amendment some R12 million). In particular iMvula wants to ascertain whether Mr. Loureiro had the buying power "*not sourced in cash emanating from a bank account*".

[47] iMvula argues that if the financial statements, tax returns and assessments they seek, fail to demonstrate financial means capable of acquiring goods to the value in issue, this would enable iMvula to damage the Loureiros' case. It would want to demonstrate his estate was inadequate to have purchased and kept all the allegedly stolen items.

[48] iMvula submits that Mr. Loureiro knows that his tax returns were submitted to the South African Revenue Service. Mr. Loureiro could easily request SARS to release his tax information. Accordingly, the argument goes, the tax returns and assessments "*remain under his power and control, even if not in his physical possession*".

[49] On behalf of the plaintiffs it is argued that Mr. Loureiro cannot produce financial statements nor wills as they do not exist. The plaintiffs have further stated that they are not in possession of the financial statements of Combined Ceilings and Partitions CC. They also dispute the relevance thereof. Other than the fact that Mr. Loureiro has some interest in that close corporation, I am not informed as to the exact nature of his association.

[50] As regards the income tax documents which Mr. Loureiro says are not in his possession, reference is made to s 73 of the Tax Administration Act 28 of 2011. It reads:

> "*(1) A taxpayer or the taxpayer's duly authorised representative is entitled to obtain*
>
> *(a) a copy, certified by SARS, of the recorded particulars of an assessment or decision referred to in s 104(2) relating to the taxpayer;*
>
> *(b) access to information submitted to SARS by the taxpayer or by a person on the taxpayer's behalf;*
>
> *(c) information, other than SARS confidential information, on which the taxpayer's assessment is based; and*
>
> *(d) other information relating to the tax affairs of the taxpayer.*"

[51] The plaintiffs then refer to rule 35(1) which requires a litigant to make discovery of documents in that party's possession or under his control. Plaintiffs argue that rule 35(1) requires a litigant to make discovery only of documents which are or have been at any time in his possession or control. Rule 35(2)(a) requires such a litigant to specify documents in his possession or that of his agent or which he had but no longer possesses. It does not require, it is argued, the production of documentation which is in the possession or control of another.

[52] The plaintiffs further argue that rule 35(3) does not envisage a party making available for inspection documents which are not in his possession. They maintain that the rule does not require a person to obtain documents from a third party in order to permit inspection. I quote from plaintiff's heads of argument:

> *"To interpret the word 'control' as utilised in rule 35 of the Rules of Court, to mean that, because a party can request a document be made available to it, that therefore such document is under the party's 'control' would, it is submitted, simply cast a net of discovery to wide. It would also not be compatible with a proper interpretation of the Rule."*

In support of this contention plaintiffs refer to *Gering v Gering & Another* 1974(3) SA 358 (W).

[53] As regards the financial statements of Combined Ceilings and Partitions CC, plaintiffs argue that that close corporation is not contended to be the alter ego of Mr. Loureiro. Nor was it contended by iMvula that Mr.

Loureiro was a majority member of the close corporation. Accordingly, it is argued, documents in possession of the close corporation are not in Mr. Loureiro's possession.

[54] Plaintiffs also dispute the relevance of the tax documentation. This is disputed on the basis that Mr. Loureiro's taxable income as disclosed in his tax returns cannot be equated to his purchasing power. This, it is contended, is supported by the fact that Mr. Loureiro is a so-called "*high net worth individual*".

[55] The plaintiffs also raise the point that there is some form of documentary evidence relating to some 90% of the jewellery forming the subject matter of the claims. They then submit that it is unreasonable for iMvula to contend that it requires discovery of the documentation to challenge the first plaintiff's financial means "*in circumstances where the vast majority of the goods both in number and in quantum are supported by discovered documents.....*" Only "*R1 045 570.00*" was undocumented. (This figure should be R1 054 570,00.) That list includes 27 one ounce Kruger Rand gold coins and a Rolex 18 carat yellow gold watch. Both are supported by certificates dated after the date of the robbery. But the documents to which plaintiffs refer are not all invoices or equivalent documents reflecting purchases.

[56] It is, in my view, somewhat remarkable that a "*high net worth individual*" should not be in possession of financial statements, or copies of

his tax assessments and tax returns. When Mr. and Mrs. Loureiro instituted this action in 2009 they could reasonably have expected that such information may become relevant in the action. At that stage the five-year period for retention of documents under s 73A of the Income Tax Act 58 of 1962 had not yet expired.

[57] Be that as it may, the question here is whether Mr. Loureiro, under the rules of discovery, can be required to approach SARS to obtain his tax assessments and tax returns, so as to make them available to iMvula. iMvula accepted that it could not obtain the other documents it had sought.

[58] Both parties agree on the test for discovery. Documents which may, not must, advance a party's own case or which damage the case of his adversary, must be disclosed. See *Rellams (Pty) Ltd v James Brown & Hamer Ltd* SA 1983 (1) SA 556 (N) at 564A and *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 597A. Such documents would include documents which may fairly lead a party to a train of enquiry which may have either of the consequences referred to.

[59] These authorities are based on a statement by Brett L.J. in *Compagnie Financiére et Commerciale du Pacifique v Peruvian Guano Co* 11Q BD 55 at 63. This has been followed in many of our decisions, and need not be repeated here.

[60] Where the parties differ however, is whether documents which Mr. Loureiro can procure from SARS are under his control or power or can be said to be in his possession.

[61] The words "*control*", "*possession*", "*power*" and "*custody*", occur in the various subsections of Rule 35 and in the related Form 11. The first two words occur in Rule 35(1), while only "*possession*" appears in Rule 35(2)(a) and 35(3). The words "*power*" and "*custody*" appear in Form 11, in addition to "*possession*".

[62] Form 11 requires a litigant to state on oath the documents he has in his "*possession or power*". He is further required to specify what documents were, but are no longer, in his "*possession or power*". He is further required to state that he does not have in his "*possession, custody or power*" or that of his attorney or agent or any other person on his behalf, any document other than the documents disclosed.

[63] The words "*control*" and "*power*" have a wide connotation. "*Control*" obviously means something different to "*possession*". "*Power*" suggests an even wider scope than "*control*". "*Control*" includes the function or power of directing. "*Power*" includes the ability to effect something. See also the discussion of "*control*" and "*power*" by Coetzee J. in *The Unisec Group Ltd and Others v Sage Holdings Ltd* 1986 (3) SA 259 (T), especially at 274I and *Brits Investment (Pty) Ltd v Commissioner for Inland Revenue* 1938 CPD 146 at 151, regarding "*potential control*".

[64] The plaintiffs submit that "*possession*" and "*control*" have a meaning something which is more than "*mere detention*". There had to be, it is argued, sufficient power or authority over the document to render the document discoverable in the hands the party which holds it or has it under his power. Plaintiffs rely on the judgment of Goldstein J reported as *MIP Holdings (Pty) Ltd v Dawkins* [2003] JOL 12373 (W). In that matter Goldstein J relied on a *dictum* of Diemont J in *R v Seeiso* 1958 (2) SA 231 (GW) at 233G-H. That matter related to the interpretation of a particular statute regulating *furtum usus* and is perhaps not useful here.

[65] In further support of their argument, plaintiffs referred to a recent decision in the Free State High Court namely *G.G. Ramakarane v Centlec (Pty) Ltd* (4907/2006) [2016] ZAFSHC. In that matter Pienaar A.J. held that a litigant not in possession of income tax assessments could not be obliged under Rule 35(3) to procure them. He referred to *Tooch v Greenaway* 1922 CPD 331. There Watermeyer A.J. refused to issue an order authorising the Receiver of Revenue, Cape Town, to allow a party's attorney "*to inspect and make copies*" of the other party's income tax return. Pienaar A.J. found, in effect, that a document with SARS to which a litigant had access, was not in that litigant's "*possession*".

[66] Section 34 of the Constitution provides that "*everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court ....*" I would like to stress the word "*fair*".

[67] Section 173 of the Constitution provides that High Courts have the "*inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*". I have underlined the words regarding the development of the common law, as, in my view, rule 35 is based on the common law.

[68] Section 69 of the Tax Administration Act 28 of 2011 deals with the secrecy of taxpayer information. Taxpayer information is in terms of s 67(1)(b) "*any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information*". That clearly includes a tax return and a tax assessment.

[69] Section 69(1) of the TAA obliges a current or former SARS official to observe the secrecy of taxpayer information.

[70] Section 69(2) lists a number of exceptions to that obligation including if disclosure is ordered by a High Court. If such an order is sought, SARS must be given notice of at least "*15 business days*".

[71] Section 69(5) provides as follows:

> "*The court may not grant the order unless satisfied that the following circumstances apply –*
>
> *(a) the information cannot be obtained elsewhere;*
>
> *(b) the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results;*

(c) the information is central to the case; and

(d) the information does not constitute biometric information."

[72] But s 69(6) provides that the obligation of a SARS official to observe secrecy would not prohibit the disclosure of information to the taxpayer or to someone else "*with the written consent of the taxpayer*".

[73] A taxpayer can thus require his taxpayer information from SARS. Such a taxpayer can also authorise the taxpayer's information to be made available to someone else. This lies within his "*power*". Section 73 quoted above establishes the taxpayer's entitlement.

[74] In *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA), the Supreme Court of Appeal said in [9] the following:

> *"Rules of Court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right (s 34 of the Constitution; ....."*

The Court there was dealing with rule 54. In my view however, the same approach should apply to rule 35.

[75] A "*fair*" trial means that parties to litigation should enjoy level playing fields. This includes disclosure of all information that is relevant to the matter.

[76] Here Mr. Loureiro has said that he bought millions of rands worth of jewellery for cash which did not come from a bank account. iMvula wants to know whether in fact Mr. Loureiro disposed of such large amounts of unbanked cash. If in fact Mr. Loureiro did dispose of large amounts of cash, he must have received that from somewhere. As a law abiding citizen, which I assume he is, he would have disclosed the receipt of such cash in his income tax returns. If he did not, iMvula could reasonably question the existence and acquisition of the jewellery in question. If on this ground Mr. Loureiro fails to discharge his *onus*, plaintiffs' claims would accordingly be reduced.

[77] Plaintiffs principally argue that rule 35(3) refers only to documents in a party's possession. SARS cannot be said to be Mr. Loureiro's agent. I believe that this is too narrow an approach to rule 35 and Form 11. In my view the rule must be read as a whole. *Cf Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd* (formerly *GDC Hauliers CC*) 2000 (3) SA 181 (W). Secondly, the general considerations I have referred to above regarding fairness are overlooked by such literalism.

[78] As far back as 1866 an English judge rejected a discovery affidavit by directors of a bank who said they did not have documents in their "possession or power", other than what the bank had. Page Wood V.C. commented:

> "*... these documents, though in substance they may be the property of the bank, are in the possession or power of the directors, who are the only persons who can give an order for their production.*"

Parties had to give all information in their power.

See *Clinch v Financial Corporation* (1866) Eq 271 at 273.

[79] Section 68(6) of the TAA creates that power. Mr. Loureiro can request SARS to make his tax returns and assessments available. SARS cannot refuse him. It is thus within his power to procure the documents iMvula seeks. He can potentially control those documents.

[80] In my view, Mr. Loureiro must procure those documents and discover them on oath. If SARS does not have them, then so be it.

[81] I therefore make the following order:

81.1 Mr. Loureiro is ordered within 30 days of this order, to obtain copies of his income tax returns and income tax assessments for the period 2001 to 2009 from the South African Revenue Service, to the extent SARS has such information which can be reproduced in documentary form.

81.2 Mr. Loureiro is ordered to discover on oath any document he may so obtain from SARS within 10 days after he receives it.

81.3 Mr. Loureiro must pay the defendant's costs of the application to compel, including the costs consequent upon the employment of two counsel.

Stephan du Toit

STEPHAN DU TOIT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING - 25 May 2016.

DATE OF JUDGMENT - 8 July 2016.