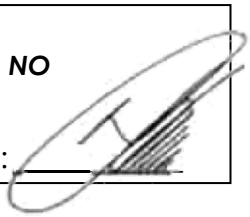
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***14th September 2020*** Signature: 

CASE NO: 22832/2019

DATE: 14th SEPTEMBER 2020

In the matter between:

LILAC MOON TRADE & INVESTMENTS 189 (PTY) LIMITED Plaintiff

and

131 NORTHRIDING CC First Defendant

KASSEL, HILLIARD FRANK Second Defendant

Coram: Adams J

Heard: 11 September 2020

Delivered: 14 September 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to *SAFLII*. The date and time for hand-down is deemed to be 11h00 on 14 September 2020.

Summary: Practice and Procedure – application to compel better discover – rule 35(3) discussed – the affidavit of a person against whom discovery is sought is *prima facie* conclusive – application dismissed.

ORDER

(1) The second defendant's application to compel the plaintiff to make better discovery in terms of rule 35(7) is dismissed with costs.

(2) The second defendant shall pay the plaintiff's costs of the application in terms of rule 35(7) to compel better discovery.

JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action.

[2]. Before me is an interlocutory application by the second defendant, who applies in terms of uniform rule of court 35(7) for an order compelling the plaintiff to comply with his rule 35(3) notice.

[3]. On 19 June 2020, the second defendant delivered his Rule 35(3) Notice, calling upon the plaintiff to make available for inspection further documents in its possession which documents the second defendant believes to be relevant to matters in question in the action. On 01 July 2020, the plaintiff replied by serving its affidavit in terms of Rule 35(3). With reference to most of the twenty one documents or sets of documents requested to be inspected by the second defendant (items 1, 2, 5, 12, 18 and 19 of the second defendant's Rule 35(3) notice), the plaintiff gave a response to the effect that these documents are not in its possession or that the documents requested are not relevant to the main action (items 6, 7, 8, 9, 10, 11, 20 and 21). As for the balance of the documents (items 3, 4, 13, 14, 16 and 17), the plaintiff states that these documents have already been discovered.

[4]. Rule 35(3) provides as follows:

'(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 him to make the same available for inspection in accordance with subrule (6), or to state under oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.'

[5]. As indicated, the plaintiff's formal response to the second defendant's notice in terms of 35(3) was in the form of an affidavit deposed to by the Chief Legal Advisor of the Holding Company of the plaintiff, who confirmed that the plaintiff does not have in its possession any of the documents mentioned above and furthermore expressed the view that other documents are not relevant to the main action.

[6]. The deponent goes on to explain in the said affidavit that the reason for this is the context in which the dispute between the parties arose. In particular, so it is explained, when the sale of land agreement was concluded between the plaintiff and the first defendant the plaintiff's shareholders were not the same persons as the present members. It is therefore not implausible that documents relating for example to the said agreement and drafts thereof are not in possession of the plaintiff.

[7]. The second defendant disputes the aforegoing and denies that the plaintiff is not in possession of the documentation requested. In the founding affidavit in support of this application in terms of rule 35(7), the second defendant expresses the view that it is unlikely that the plaintiff, now controlled by its Holding Company, which bought out the shareholding from the previous owner would not have taken possession and control of all legal documents of the plaintiff. This is exactly what the Chief Legal Advisor says, and in the context of this matter there is nothing implausible about that.

[8]. Therefore, as regards those documents, the plainitff opposes this application to compel inspection of the documents on the basis that the court cannot and should not go behind its affidavit and find, contrary to what is stated in the discovery affidavit, that the documents do in fact exist and are in the possession of the plaintiff. The opposition to the relief sought relative to documents requested as items 1, 2, 5, 12, 18 and 19 of the second defendant's

Rule 35(3) notice) that the plaintiff should be excused for the non – production thereof on the grounds that they are not in its possession is therefore well founded.

[9]. Sutherland J in the unreported judgment in *Dube v Member of the Executive Council for Health, Gauteng Province,* Case no: 6279/17 had occasion to consider a similar situation in this division. In that matter, the Judge held as follows:

'In my view the *de facto* position is deplorable and the idea of a breach of statutory obligations is on the probabilities in my view a plain fact. Notwithstanding these considerations, the ambit of rule 35 of the uniform rules is limited to imposing a duty on a litigant to discover what it has got.

In circumstances where it ought to have a document but cannot access it and may even confess to not knowing whether or not it still exists, and is still in its possession, the duty imposed by rule 35 requires a party merely to frankly declare what the true state of affairs is at the time that discovery is demanded. Ostensibly that is what the respondent has done. Assuming that the defendant / respondent is rightly to be rebuked for its poor record keeping it has not violated rule 35 by stating that it cannot lay its hands on the relevant documentation.

In the absence of facts from which I can on these papers infer the affidavit of the defendant is untruthful, the plaintiff in such circumstances must unhappily accept the position as described, however disgraceful the conduct of the respondent, objectively, may be. Rule 35 itself plays no role in the disciplining of state officials to perform their statutory duties. There may indeed be other remedies in order to compel compliance with those statutory duties but they do not fall within the ambit of rule 35.

In the circumstances I have taken the view that there is no useful purpose in granting the relief which is sought, which would achieve no more than to provoke a contempt application which would be readily answered by the same explanation which is proffered now. In the circumstances, therefore, the application must be dismissed.'

[10]. I respectfully agree with the sentiments expressed and the findings made by Sutherland J in the above quoted passage. *In casu* a probability has not been shown to exist that the deponent to the plaintiff's affidavits are either mistaken or false in his assertions that the required documents are not in the possession of the plaintiff. In that regard see: *Richardson's Woolwasheries v*

Minister of Agriculture, 1971 (4) SA 62 (ECD) at 67 D-F. It would therefore amount to a *brutum fulmen* to grant to the second defendant the relief sought in this interlocutory application relative to items 1, 2, 5, 12, 18 and 19.

[11]. As far as those documents are concerned which the plaintiff contends are not relevant to the action, a similar principle applies. In that regard, see *Richardson's Woolwasheries Ltd v Minister of Agriculture* (supra) 67C-D. See also Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa: Fifth Edition* by Cilliers, Loots & Nel, Vol I page 815.

[12]. In *Caravan Cinemas (Pty) Ltd v London Film Productions and Others* 1951 (3) SA 671 (W), the court held as follows at 676C-D:

'This importance attached to the affidavit relates not only to the matter of privilege, but also to that of relevancy. In *Robinson v Farrar and Others*, supra at p 743, the following words appear in the judgment of Bristowe J: "According to a case to which I have been referred, decided by Mr Justice Wessels – *May & Co v Meyer Ltd* 1904 TS 278 – the affidavit of a person against whom discovery is sought is *prima facie* conclusive, and it is for the parties who seek further discovery to show the court some facts which make it plain or at all events raise a strong possibility that that is a mistake, and that the documents are relevant".'

[13]. As rightly pointed out by Mr Rademeyer, Counsel for the plaintiff, the second defendant thus bears the onus to prove the existence of a strong possibility that the plaintiff has made a mistake and that the documents sought are relevant. I do not think that the second defendant has discharged that onus. The bulk of the requested documents falling into this category are documents which relate to a 'main agreement' between the plaintiff's Holding Company and the previous shareholder of the plaintiff in terms of which agreement the Holding Company purchased from the previous shareholder two private schools. As part of this 'main agreement' the shareholding in the plaintiff was also acquired by the Holding Company. The plaintiff questions the relevance of documents relating to the main agreement to the sale of land agreement concluded between the plaintiff and the first defendant, which agreement the second defendant alleges to be a fraud perpetrated by the members at the time of the

plaintiff and the first defendant. I agree with the plaintiff that there is no relevance demonstrated by the second defendant.

[14]. In any event, whist the plaintiff maintains its stance that the main transaction is irrelevant and immaterial to this action, in order to show that it has nothing to hide the Plaintiff discovered the main agreement, consisting of multiple step agreements, all of which were included in the discovery. The step agreement dealing with the Holding Company's acquisition of the plaintiff (Step 9) is part of the documents discovered. That, in my view, is the end of the second defendant's case in this application to compel further and better discovery.

[15]. In the circumstances, I am not satisfied that the second defendant has made out a case for the relief sought in this interlocutory application. Accordingly, the second applicant's application to compel inspection of the documents listed in its rule 35(3) should fail.

Costs

[16]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

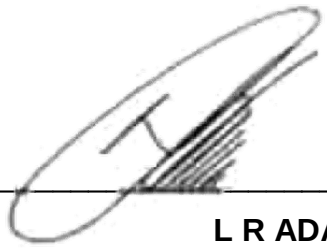
[17]. I can think of no reason why I should deviate from the general rule in this matter. I therefore intend ordering the costs in the application to follow the suit.

Order

In the result, I make the following order:

(1) The second defendant's application to compel the plaintiff to make better discovery in terms of rule 35(7) is dismissed with costs.

(2) The second defendant shall pay the plaintiff's costs of the application in terms of rule 35(7) to compel better discovery.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	11th September 2020
JUDGMENT DATE:	14th September 2020
FOR THE PLAINTIFF:	Advocate Henk Rademeyer
INSTRUCTED BY:	De Klerk & Van Gend Incorporated, Cape Town
FOR THE FIRST DEFENDANT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE SECOND DEFENDANT:	Adv Grant Quixley
INSTRUCTED BY:	Barry Aaron & Associates, Cape Town