



THE HIGH COURT OF SOUTH AFRICA, SOUTH GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 43345/2018

(1)	REPORTABLE: <i>no</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>no</i>
(3)	REVISED.
03 November 2021	<i>[Signature]</i>
Date	Signature

In the matter between:

MOROKA PHALANE

PLAINTIF

and

KELIANA MANAGEMENT COMPANY

DEFENDANT

Transmitted by email to the parties' legal representatives. The judgment is deemed to have been delivered on 03 November 2021.

Summary: Application in terms of rule 35(14) of the High Court Rule to compel disclosure of invoices relating to the alleged profit made by the respondent in facilitating the UN COP- 17 Conference.

JUDGMENT

Introduction

[1] The issue in this application is whether the applicant is entitled to an order compelling the respondent to make available for inspection and copying of documents in terms of rule 35 (14) of the Uniform Rules of the High Court (the Rules).

[2] The request for discovery arises from action proceedings instituted by the applicant. He claims payment of 50% profit made from preparing the conference bid, for the United Nations COP-17 (the UN conference), which was hosted by the City of Johannesburg Metropolitan (Johannesburg Metro).

[3] The applicant avers that he and the respondent concluded an oral profit-sharing agreement regarding a tender invitation for professional services in preparation of the UN conference. The claim is further based on the averment that the applicant complied with the terms of the agreement between December 2015 and January 2016. The applicant alleges that he complied with the terms of the oral agreement by providing the defendant with the relevant bid documents required to support the submission by the Johannesburg Metro for the UN conference. The documents were submitted on 21 January 2016.

[4] The respondent does not dispute the applicant's involvement in the project but contends that he was remunerated R120 000,00 as agreed between the parties for the services rendered.

[5] It is common cause that the Johannesburg Metro was in May 2016 awarded the tender to organise the conference, which was completed on 1 October 2018.

[6] The plaintiff's case is that the defendant made a profit from the payment it received from the Johannesburg Metro. For this reason, he contends that in terms of the oral agreement, he is entitled to 50% of the profit.

[7] In his affidavit the applicant avers that the estimated profit made from the projects is R27 000 000.00 and his share of the profit is R1 350 000.00 less the R120 000.00 already paid to him.

[8] The defendant having failed to enter appearance to defend, the plaintiff successfully applied for default judgment which was granted by Carelse J on 16 April 2019. After that the respondent successfully rescinded the default judgement and was granted leave to defend the claim.

[9] Following the above, the defendant delivered the plea on 8 November 2019, and thus the applicant was expected to deliver replication if any, by 29 November 2019 in terms of rule 25 of the Rules.

[10] As indicated above, the applicant seeks an order compelling the respondent to discover certain documents in terms of rule 35(14) of the Rules. The test for determining whether the requested document/s should be discovered is whether it is

essential to enable the requesting party to plead.¹ The court in *Capricorn Makelaars (Edms) Bpk and others v. EB Shelf Investment No 79 (Pty) Ltd and Others 79 (Pty) Ltd and others*,² held that the document/s requested in terms of rule 35 (14) should be "reasonably required in the circumstances."

[11] In *Ingledeu v Financial Services Board*,³ the application to invoke the provisions of rule 35 (14) was refused because the applicant had failed to satisfy the court that the information required was necessary for him to plead.

[12] In *Quayside Fish CC v Johnson & Johnson 200*,⁴ the application to invoke rule 35 (14) was refused because the applicant sought to establish whether the defendant had a counterclaim.

[13] In general, the court adopts a cautionary approach when dealing with an application in terms of rule 35 (14) of the Rules.⁵ The application of the rule is seen as providing for a limited right to request for discovery of documents relevant to an issue anticipated in litigation.

[14] Rule 35 (14) provides that:

"After appearance to defend has been entered, any party to an action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his

¹ See *Cullinan Holdings Limited v Mamelodi Staadsraad* 1992 (1) SA 645 (T) at 647F.

² [2005] ZAEHC 25.

³ 2003 (4) SA 584 (CC)

⁴ 2000 (2) SA 529 (C)

⁵ See *Mamelodi Staadsraad* 1992 (1) SA 654 (T). *MV Urgrup: Owners of MV Group v Western Bulk Carrier (Australia) (Pty) Ltd* 1999 [3] SA 500 (C) at 515 (C-1).

possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

[15] The requirements to invoke the procedure set out in rule 35 (14) are summarised in paragraph 13 of *Quayside Fish Suppliers CC v Irvin & Johnson Ltd*,⁶ as follows:

- "(a) he/she must discharge the *onus* of persuading a Court that an order should be made in terms of the rule;
- (b) an appearance to defend must have been entered;
- (c) the document must be required for purposes of pleading;
- (d) the documents must be clearly specified.

[16] Rule 25(2) of the Rules provides:

"(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary, and issue shall be deemed to be joined, and pleadings closed in terms of paragraph (b) of rule 29."

[17] The stage at which the pleadings are regarded as closed is dealt with in Rule 29 of the Rules which provides as follows:

"Pleadings shall be considered closed-

- (a) . . . ;
- (b) if the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed.

⁶ 2000 (2) SA 529 (C).

[18] In the answering affidavit, the main point raised by the respondent is that the applicant is barred from invoking the provisions of rule 35(14) because he did not comply with the time frame set out in rule 26,⁷ and was thus *ipso facto* barred from replicating. It was further contended that the pleadings have consequently closed. This point was, however, not pursued in the heads of argument nor during the hearing.

[19] It is common cause that the applicant filed the notice in terms of rule 35(14) of the Rules prior to the expiry of the time he was supposed to have filed the replication. Thus the respondent's argument that the applicant was *ipso facto* bared for lateness would not have been sustainable.

[20] The applicant's Counsel argued that the applicant is entitled to the discovery because the respondent did not admit or deny the existence of the profit-sharing agreement. The issue of profit-sharing is not in dispute, so the applicant's Counsel argued. She further contended that granting the request for discovery would avoid further issues being raised, including the request for further and better particulars.

⁷ Rule 26 provides: "Failure to Deliver Pleadings - Barring any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred. If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof; any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and *ipso facto* barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.)"

[21] Rule 22(2) provides:

The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.

[22] It is apparent from the reading of the pleadings that the applicant is been put to prove the existence of oral profit sharing agreement.

[23] The applicant contends that the respondent will suffer no prejudice if the discovery requested is granted.

[24] On the other hand, the respondent argued that the applicant failed to provide the reason for the request for discovery in the founding affidavit and, in the heads of argument, simply avers to the need to discover documents in terms of rule 35(14). It is not, the respondent argued, stated that the discovery is required for replication.

[25] The applicant seeks the information for use in his pending action proceedings. In this respect, I am not persuaded that he will suffer any prejudice if his present application is refused. Should he still be of the view that the information is still required after the closure of the pleadings and issues for trial are crystallised, he can invoke the discovery procedure under rule 35 (12) of the Rules.

[26] The central allegation upon which the applicant based his cause of action is the oral agreement concluded with the defendant. The claim is thus for the enforcement of the said agreement.

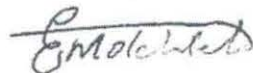
[27] As concerning the issue of quantum related to the alleged profit to be shared, the applicant stated in his papers what the amount of the profit is in terms of the agreement.

[28] In my view, the applicant is seeking early discovery of documents that ordinarily can be discovered under other provisions of rule 35. That is an approach that was never intended to apply in the case of rule 35 (14) of the Rules.

[29] In the circumstances, the applicant has failed to make a case to invoke the provisions of rule 35 (14) of the Rules.

Order

[30] In the premises the applicant's application is dismissed with costs.



E Molahlehi

Judge of the High Court of
South Africa,
Gauteng Local Division,
Johannesburg.

Representation

For the applicant: Adv. Nosisa Kekana

Instructed by: Mathopho Moshimane Mulangaphuma Incorporated

For the Respondent: Adv. Awie du Plooy

Instructed by: Lawley Shein Attorneys

Heard: 27 July 2021

Delivered: