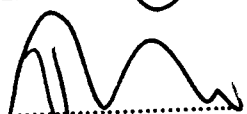


IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



3/5/2016  
CASE NUMBER: 39808/2013

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES <u>YES</u> / NO
(3)	REVISED. <u>3/5/2016</u> DATE
	 SIGNATURE

In the matter between:

**BRETT LEIGH PRAWDE**

**AND 3 OTHERS**

and

**SHAWN WILLIAMS N.O. AND ANOTHER**

First to Fourth Applicants

First and Second Respondents

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**JUDGMENT**

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**BRENNER AJ**

1. This is an application to compel further discovery in terms of rule 35 (3) of the Uniform Rules of Court, following a notice served on 10 September 2014. ("the rule 35 (3) notice").
2. The applicants are the first to fourth defendants in the main action, while the respondents are the first and second plaintiffs. The fons et origo of the respondents' claims against the applicants is an alleged pyramid scheme operated by the late Dorothy Teale during her lifetime. It appears that the respondents were appointed as joint trustees to her insolvent deceased estate post her death.
3. When the rule 35 (3) notice was first served, the respondents failed to serve an affidavit to address whether the documents in question were in their possession and failing this, whether their whereabouts were known to them. It is also established practice to serve an affidavit where the relevancy of the documents sought is challenged. The respondents failed to do this, resorting instead to correspondence.
4. The applicants brought a compelling application on 6 March 2015, enrolled for 20 April 2015. The application was opposed, but culminated in the respondents serving an affidavit replying to the notice, on 4 August 2015. In the interim, the trial, enrolled for 1 June 2015, was postponed.
5. The application was removed from the roll, with costs reserved. In a letter dated 11 September 2015, from the applicants' attorneys to the respondents' attorneys, the former intimated that the applicants would not proceed as the respondents had provided the answers sought. In the same letter, however, confirmation is requested as to whether the respondents possessed the documents and refused to provide them. In a reply dated 15 September 2015, the respondents' attorneys refer the applicants to the answering and supplementary affidavits in the first application to compel.
6. It merits mention that the first applicant, qua plaintiff, had sued the respondents, qua defendants, in the South Gauteng High Court, sometime in 2015. On 30 October 2015, the same Court granted leave to transfer this case to the North Gauteng High Court, so as to consolidate same with the

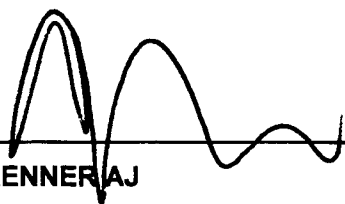
action in casu. In the result, therefore, there were claims and counterclaims amongst the parties.

7. The respondents having persisted in their refusal to provide the documents called for, the applicants launched a second compelling application by notice served on 24 November 2015, and this was likewise opposed. It is this application which is before the Court.
8. The rule 35 (3) notice calls for production of the following documents, namely:-
  - a. List of each and every debtor and creditor of the estate of Dorothy Teale;
  - b. Status report in respect of collections relating to the estate of Dorothy Teale;
  - c. List of all parties against whom the estate of Dorothy Teale has instituted legal action and the status of such litigation;
  - d. Detailed statements of accounts rendered by the plaintiffs' attorneys to the estate of Dorothy Teale, and reconciliation of payments with regard to such invoices;
  - e. Copies of all and any correspondence between the offices of the Plaintiffs and the office of the Master, and;
  - f. Copies of the estate bank account since same was opened by the Plaintiffs until the most recent date.
9. In essence, the respondents contended that the documents were not relevant to the issues in the action. In a rather bizarre move, however, they confirmed that the documents were in their possession, but said that the applicants were only entitled to them "in their capacity as creditors of the insolvent estate with approved claims". They invited the applicants to approach them, qua trustees of the estate, to this end. In argument before Court, it was stated that the fourth applicant had proved a claim, but had never approached the respondents directly for the documents.

10. The focal issue in this application was whether the documents described in the rule 35 (3) notice were relevant to the issues raised in the action.
11. The operative provision of rule 35 (3) provides: *"If any party believes that there are, in addition to documents ..... disclosed as aforesaid, other documents (including copies thereof) ..... 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 same available for inspection..."*
12. The onus of proving potential relevancy, on the probabilities, is squarely that of the applicants.
13. In casu, the applicants addressed the issue as follows. The respondents had accused the applicants of involvement in a "pyramid scheme". The applicants had no knowledge of this. The documents would enlighten the applicants as to whether this allegation was true or not, and as to the legal and financial ramifications this would cause. The applicants, believing the estate owed them "huge amounts of money", had sued the respondents. They did not know if they were the only creditors who had sued the respondents. The documents would "put things in perspective". The applicants had been told that the respondents had reached a compromise with certain creditors, which was impermissible in the face of a "pyramid scheme", but which might take the estate out of its insolvent position and affect their stance on the pursuit of the counterclaim against the estate.
14. This is the sum total of the justification given for relevancy. The pleadings in the action were not annexed to the application. The pleadings were not made available to the Court in advance of the hearing. Nor was any attempt made to analyse the issues raised by the particulars of claim, the plea, and the counterclaim, and to traverse the evidence required therefor. No effort was made to draw any nexus between the triable issues and the documents sought.
15. Save for mention being made of an alleged "pyramid scheme", in bald terms, the Court was left in the dark about the issues raised and how the documents would serve as important evidence in advancing the applicants' case or damaging that of the respondents'.

16. The starting point in the enquiry is the reluctance of Courts to throw the net too wide in matters involving discovery, absent compelling grounds.
17. Reasonable grounds for departure from this principle are adduced with reference to the discovery affidavit, the documents contained therein, the pleadings, admissions made by the adversary, or the nature of the case or documents in issue.
18. The "matter in question" is determined from the pleadings. The test for relevance, set out in **Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55**, has been approved and applied by our Courts. *"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary."* Vide **Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999(2) SA 279 (T)**, which referred to the above case with approval.
19. In the final analysis, the applicants have failed to discharge their onus of making out a case to justify further discovery under rule 35 (3). The applicants were dilatory in the launch of their second application to compel, which resulted in same being argued a few days before the next trial date on 9 May 2016. The applicants failed abysmally in motivating the nexus between the triable issues, and the documents required by them.
20. Relevance was the critical issue and they were cavalier in their approach to addressing same. This gives cause for a special order for costs.
21. Regarding the first application to compel, the respondents were obliged to serve an affidavit in reply to the rule 35 (3) notice, in conformity with established practice, therefore the applicants are entitled to their costs herefor.
22. The following order is made:

- 17.1 the application to compel further discovery by the respondents, in reply to the applicants' rule 35 (3) notice, served on 10 September 2014, is dismissed;
- 17.2 the respondents are directed to pay the costs of the first application to compel, launched on 6 March 2015, on the party and party scale;
- 17.3 the applicants are directed to pay the costs of the second application to compel, launched on 24 November, 2015, on the attorney and client scale.



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**BRENNER AJ**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**3 May 2016**

**Appearances**

Counsel for the applicants : Advocate A J Venter

Instructed by : JNS Attorneys

Counsel for the respondents : Advocate K Potgieter

Instructed by : Kern & Partners :