

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 20709/2022

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

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SIGNATURE

DATE: 20 September 2023

In the matter between:

KHATHUTSHELO NETHAVHANI

Applicant

and

NUWE SA EIENDOMME EN VERHURING CC

1ST Respondent

**JOMAR PROPERTIES (PTY) LTD
t/a HARCOURT MARITZ**

2ND Respondent

BERT SMITH ATTORNEYS AND CONVEYANCERS

3RD Respondent

JUDGEMENT

MOOKI AJ

- 1 The applicant seeks to compel the third respondent to produce documents for inspection. The documents are referenced in the third respondent's discovery affidavit.
- 2 The applicant says the third respondent failed to comply with the Rule 35(6) notice by not producing the following documents:
 - 2.1 Investment statements for the periods January 2019 to February 2019, September 2019 to April 2020, and March 2022 to August 2022 ("the investment statements"); and
 - 2.2 "Transaction reports" for the period 2017 to August 2022.
- 3 The third respondent sent the applicant e-mails on 10 June 2022 and 26 July 2022. The e-mails included the investment statements, except the investment statements for September 2019 to April 2020.
- 4 It is averred on behalf of the third respondent that there were no investment statements for the period September 2019 to April 2020 because no money was invested during that period.

- 5 There are peculiarities to this application. The third respondent served its discovery affidavit on 6 September 2022. This was after the applicant had served her notice in terms of Rule 35(6) on 21 July 2022. Neither party addressed the court on how the third respondent got to be compelled to produce documents for inspection before the third respondent had served its discovery affidavit.
- 6 The third Respondent's discovery affidavit is dated 21 August 2022. Item 4 of the first schedule to the affidavit references "All Investment Statements & Transaction Reports for the period 2017 – 2022." The statements and reports referred to are the subject of the application.
- 7 The third respondent produced some of the requested documents as annexures to its affidavit opposing the application. This is another odd feature to the application. That is because the affidavit on behalf of the third respondent was not a response to the Rule 35(6). It is an affidavit to oppose the application to compel production of documents for inspection.
- 8 The applicant specified documents that he wanted produced for inspection. Of those documents, only one was not produced. The third respondent says it did not produce the document because no money was invested during that period, resulting in the absence of an investment statement for the indicated period.
- 9 The applicant denies that investment statements for the period September 2019 to February 2020 cannot be produced. That is because, according to the applicant, the statements are referenced in the discovery affidavit. The

applicant also contends that the third respondent acted unilaterally in withdrawing the whole capital amount from the investment account in September 2019.

Analysis

- 10 It is said on oath on behalf of the third respondent that there is no investment statement for the period September 2019 to February 2020.
- 11 The applicant cannot oblige the third respondent to produce a non-existent document. The applicant, in the replying affidavit, indirectly accepts that there is no investment statement for the period September 2019 to February 2020, in the applicant saying the third respondent acted unilaterally in withdrawing the whole capital amount from the investment account in September 2019. There would be nothing to invest if the whole capital amount were withdrawn.
- 12 The third respondent contends that the application is unmeritorious, and that the applicant launched a voluminous application to generate fees. The application hardly merits the volume of documentation that makes up the application. There was no need for the applicant to have padded the application.
- 13 The applicant launched a Rule 35(6) application before the third respondent had filed its discovery affidavit. The third respondent replied to the request once the applicant made the application, as opposed to replying as specified in the rules. Both litigants conducted themselves in a less than exemplary manner.

14 The third respondent produced what was available of the required documentation. The documents were produced before the matter was argued. The applicant is notionally successful in the application. I find, however, that the conduct of the applicant; despite being notionally successful, does not merit an award for costs.

15 The substance of the relief sought had been discharged when the matter was argued. The court cannot make an order compelling the third respondent to produce documents which are said, on oath, not to exist. The applicant was provided with the rest of the requested information.

16 I make the following order:

16.1 The application is struck from the roll.

16.2 There is no order as to costs.

Omphemetse Mooki

Judge of the High Court (Acting)

Heard on: 11 August 2023

Delivered on: 20 September 2023

For the Applicant: V Mukwevho

Instructed by: Nethavhani Attorneys Inc.

For the first Respondent: M Viljoen (Attorney)

Instructed by: Marius Viljoen Attorneys