

SOUTH AFRICA / JUDGMENT

Cope and Another v Liversage (4151/2021) [2025] ZAMPMBHC 20 (5 March 2025) [2025] ZAMPMBHC 20

COURT

Mbombela High Court, Mpumalanga

BEFORE

Managa

CASE / FILE NUMBER

4151/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA DIVISION,****MBOMBELA****CASE NO: 4151/2021**

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO

DATE:

5/03/25

SIGNATURE

In

the matter between: PHILLIP
 DANIEL
 COPE
 FIRST APPLICANT
 HOVERCOZA
 CC
 SECOND APPLICANT
 and
 PAUL
 LIVERSAGE
 RESPONDENT

In re: PAUL
 LIVERSAGE
 PLAINTIFF
 PHILLIP
 DANIEL
 COPE
 FIRST DEFENDANT
 HOVERCOZA
 CC
 SECOND DEFENDANT

JUDGMENT

Managa AJ

- [1] The respondent, Paul Liversage, issued summons against the applicants for payment of R700 000.00 and R115 216.95. Both claims arise from the agreement of sale of the respondent's 50% shares in Hovercoza CC (the second applicant) to the first applicant, Phillip Daniel Cope, and the agreement to pay the respondent's commission that was paid by the second applicant to the first applicant.
- [2] The applicants served and filed a notice of intention to defend the action on 4 November 2021.
- [3] On 14 December 2021, the applicants proceeded to serve and file a plea to the respondent's particulars of claim. In the plea filed, the applicants deny the existence of the written agreement and state that the respondent was fully paid the purchase price.
- [4] On 6 October 2023, the applicants served and filed a notice in terms of Rule 35(3) read with Rule 35(14). The notice reads as follows:

“The Defendants believe that in addition to documents disclosed in discovery by the plaintiff, there are additional documents (including

copies thereof) or tape recordings which may be relevant to any matter in question herein, in the possession of the plaintiff or under his control or custody, which the defendants will inter alia require to amend their plea and apply for leave to institute a counterclaim against the plaintiff, such document in the following:

1. Copies of any and all records of sales made by the plaintiff and/or alternatively the entities known as ARCHIPAX 131 CC (with enterprise number: B[...]) as well as VMAX AEROSALES (with Registration number: 2022/253562/07) and/or alternatively, the business known as RITE MARKETING from 14 January 2021 to date hereof.
 2. Copies of bank statements of the plaintiff and/or alternatively the entities known as ARCHIPAX 131 CC (with enterprise number: B[...]) as well as VMAX AEROSALES (with Registration number: 2022/253562/07) and/or alternatively, the business known as RITE MARKETING from 14 January 2021 to date hereof, reflecting the proof of payments for the sales received by the plaintiff and/or alternatively the entities known as ARCHIPAX 131 CC (with enterprise number: B[...]) as well as VMAX AEROSALES (with Registration number: 2022/253562/07) and/or alternatively, the business known as RITE MARKETING.
 3. Copies of the income tax declarations and VAT declarations submitted to the South African Revenue Services by the plaintiff and/or alternatively the entities known as ARCHIPAX 131 CC (with enterprise number: B[...]) as well as VMAX AEROSALES (with Registration number: 2022/253562/07) and/or alternatively, the business known as RITE MARKETING.” (My emphasis.)
- [5] On 23 October 2023, the respondent served and filed a notice of objection to the notice in terms of Rule 35(3) and Rule 35(14). First, the respondent objects to the production of the record of sales on the basis that they are irrelevant to the current proceedings in that ARCHIPAX 131 CC, VMAX AEROSALES AND RITE MARKETING are not parties to the action and that the applicants’ plea does not set forth grounds for the relevance of these entities’ sale records. Second, the respondent objects to the production of bank statements in his personal capacity on the basis that the respondent does not hold any bank statements relevant to sales in his personal capacity. Third, the respondent objects to the production of bank statements of the entities and income tax declarations on the basis that they are irrelevant.

Are the applicants entitled to the documents requested in terms of Rule 35(14)?

- [6] As set out above, the Rule 35(14) notice, and the application to compel compliance with it, seek an order directing the respondent to produce its bank statements and the copies of the income tax declarations and VAT declarations submitted to the South African Revenue Services by the respondent. The applicants allege, in their founding affidavit, that they require these documents to amend their plea and apply for leave to institute a counterclaim against the respondent.

- [7] In respect of these submissions, Ms Boonzaaier, counsel for the applicants, relied on the unreported judgment of *Mercuria Energy Trading SA (Pty) Ltd and Another v Omang Trading and Logistic (Pty) Ltd and Others*,^[1] which states the following:

“As the plaintiffs contended and correctly in my view, when a litigant claims privilege in respect of documents sought in discovery, it must confirm that the documents in respect of which privilege is claimed, exist, and it must also set out the grounds on which privilege is claimed so that a court can, if called upon, decide whether a document is in fact privileged from production or not. The defendants have failed to set out any grounds to justify why they allege the documents are privileged or irrelevant. From the pleadings in the action, and the nature of the case or the documents in issue, there are reasonable grounds for supposing that the defendants have other relevant documents in their possession or power. It is clear to me that they have misconceived the principles upon which the affidavit resisting the application was made. I am accordingly satisfied that the plaintiffs request is not a fishing expedition as the defendants allege, nor is it an abuse of process”

- [8] Ms Boonzaaier submitted that a party to the litigation has the right to request the documents in terms of Rule 35(14) for the purpose of pleading. Further, the fact that the party decided to file a plea does not divest it of the right to request the documents in terms of Rule 35(14). I do not agree with this legal proposition. The purpose of Rule 35(14) is clearly set out. It is for the purpose of pleading, and once it is done, the rule finds no application as it will amount to fishing expedition.

- [9] Rule 35(14) permits a party to call for discovery after they have entered appearance to defend “for the purposes of pleading”. Such documents must be necessary for pleading, not merely useful or relevant. In this case, it is common cause that the applicants have pleaded their defence as set out above. It is clear that the applicants do not require the documents to plead because they have already pleaded. The horse has bolted already. In this regard I refer to *Kgamanyane and Another v ABSA Bank Limited*,^[2] where the Court stated as follows:

“What then to make of Potpale’s statement, in paragraph 23, that it is open to a defendant who has elected to plead to avoid a bar ‘to apply to compel delivery of the documents and, if so advised, to thereafter seek to amend his plea’? Does it permit that defendant to compel compliance with an earlier Rule 35(14) notice after they have elected to plead? In my view, it does not. A party faced with bar can defeat it either by pleading as best they can, or by compelling discovery under Rule 35(14) read with Rule 30A and simultaneously seeking an extension of the period within which to plead. Where the former course of action is followed, the party elects to waive insistence on compliance with its Rule 35(14) notice, and the notice falls away. The ordinary process then takes its course. Once pleadings close, that party can pursue discovery in the ordinary course under Rules 35(1) to 35(12). If the discovered documents disclose a basis for it, that party can later seek to amend its pleadings. But the election to plead precludes such party from continuing to rely on Rule 35(14) to compel early discovery; the very fact of its pleading means that the documents sought are not necessary to enable it to plead.”^[3] (My emphasis.)

- [10] The purpose for which the documents are required also falls outside the provisions of Rule 35(14). The rule does not confer a right on the applicants to request the documents for the purpose of amendment of the plea or to bring a counterclaim. It is only meant for pleading to the claim and the applicants have already exercised that right. Furthermore, the applicants do not take the court into confidence regarding the nature of the defence it seeks to raise in the said amendment.
- [11] Having said the above, paragraph 15 of the applicants' founding affidavit states that the documents sought "are relevant and could possibly lead to a counterclaim that needs to be instituted on behalf of the defendant/applicant". Paragraph 18 of the applicants' founding affidavit again states that the documents "will enable the applicant to ascertain whether it has a counterclaim that it can institute".
- [12] Ms Boonzaaier referred me to paragraph 4.3.3 of the applicants' founding affidavit which indicates that the second applicant would be entitled to claim from the respondent, and the respondent would be liable towards the second applicant to the extent of 35% of all profit shared in respect of any future aircraft sales concluded by the respondent as from the date of this resignation from the second applicant ad infinitum.[4]
- [13] It is clear that the purpose for which the documents are requested is to enable the applicants to formulate a counterclaim and amendment of the plea which is not covered by the rule.
- [14] I therefore do not agree that an application to compel discovery can be brought in terms of Rule 35(7) where a party has failed to comply with a notice in terms of Rule 35(14). Rule 35(7) permits a party to apply for an order compelling discovery where its counterparty has failed to discover "as aforesaid", to wit, in terms of the earlier provisions of Rule 35 – or pursuant to a notice in terms of Rule 35(6). It does not, on its terms, apply to discovery sought in terms of Rule 35(14).[5]
- [15] A party seeking to compel compliance with the Rule 35(14) notice must do so by invoking Rule 30A. The latter requires a party to serve a notice calling for compliance with the rules and, if it is not forthcoming within 10 days, thereafter, to apply to court to compel its production. The applicants' application to compel ought to have been preceded by a notice in terms of Rule 30A(1), calling upon the respondent to comply with Rule 35(14) and their notice issued under it.
- [16] Lastly, based on the reasons proffered by the applicants, it is clear that the applicants' request amounts to a fishing expedition. On this point, I was correctly referred to Quayside Fish Suppliers CC v Irvin & Johnson Ltd,[6] wherein the Court held as follows:

"[16] Rule 35(14) is limited in application and is aimed at operating only in the very specific circumstances set out in the Rule. To interpret it more widely would make inroads into the general principle that prior to the institution of an action a party cannot snoop around other people's books. See, too, The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others 1999

(3) SA 500 (C) at 515B-I. In my view, the issues pending between the parties are those reflected in the pleadings. What the applicant is asking me to do is to permit it to search amongst the documents of the respondent to find out ..."[7]

[17] In conclusion, I find that the applicants are not entitled to the documents under Rule 35(14) of the rules.

Are the applicants entitled to the documents requested in terms of Rule 35(3)?

[18] 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 such party to make the same available for inspection in accordance with subrule (6), or to state an oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known to him."

[19] It is clear that a party to an action can only claim production of additional documents not disclosed by the other litigating party where such documents are "relevant" to any "matter in question".

[20] Apart from the applicants' intention to institute a counterclaim, it is not clear how these documents are relevant to the matter in question. The issue, as the pleadings stand, is whether the first applicant paid the purchase price of the respondent's stake in the second applicant and the commission. There is no relevance or causal link between the issues in question and the documents requested.

[21] If the applicants paid the purchase price and the commission as indicated in the plea, it is incumbent on them to furnish the proof

of payment. They do not require the statements and the income tax declaration to prove payment to the plaintiff. This principle is set out in the judgment of Pillay v Krishna,[8] wherein the court indicated the following:

"It may be true that, even in the case of a promissory note, a plaintiff must initially allege that the debt remains unpaid. Not only do the majority of the forms (though not all) given by Bullen and Leake, Precedents of Pleading (8th ed., pp. 133 et seq.) make the allegation, but on page 115 the learned authors state specifically: 'The fact that the bill is unpaid, or that the amount claimed is due, should be shown in the body of the Statement of Claim or in the particulars.' Yet, however that may be, it is clear law that, when the defendant denies this allegation and pleads payment, the onus of proving payment at the close of the pleadings is on him. (And it is with the position as it stood at the close of the pleadings that we must deal.) The reason, I think, is to be found in the third general rule, which I set out earlier in the judgment, that a person is not usually required to prove a negative. If A claims from B an amount of money which is admitted to have been due originally, and if B alleges that he has paid it, it is as a rule extremely difficult for A, save by his own evidence, to establish the fact of non-payment. On the other hand, B could have demanded a receipt when he paid, the efficacy of which, certainly in

the Roman Dutch Law, was exceptionally great.” (My emphasis.)

[22] In the circumstances, the application to compel is dismissed. I see no reason to depart from the ordinary approach that costs follow the result

Order

[23] I accordingly make the following order:

The application to compel is dismissed, with costs.

P MANAGA

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISIO, MBOMBELA

Appearances

For the Applicants: Ms Boonzaaier Instructed by: WDT Attorneys For the Respondent: Adv Jaco Lindthout instructed by: Pearson Attorneys

[1] Mercuria Energy Trading SA (Pty) Ltd and Another v Omang Trading and Logistic (Pty) Ltd and Others

[2023] ZAGPJHC 577 para 12.

[2] Kgamanyane and Another v Absa Bank Limited [2024] ZAGPJHC 68 para 19.

[3] Ibid at 19.

[4] Updated Index bundle, p94.

[5] Kgamanyane and Another v Absa Bank Limited [2024] ZAGPJHC 68.

[6] Quayside Fish Suppliers CC v Irvin & Johnson Ltd 2000

(2) SA 529 (C) para 16.

[7] Quoted with approval in Ingledew v Financial Services Board [2003] ZACC 8; 2003

(4) SA 584 (CC) in paragraph 15 thereof.

[8] Pillay v Krishna 1946 AD 946 at 955.

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