

SOUTH AFRICA / JUDGMENT

Papadimos and Another v Old Mutual Property Proprietary Limited and Others (10395/2020) [2025] ZAWCHC 254 (20 June 2025)

[2025] ZAWCHC 254**COURT**

Western Cape High Court, Cape Town

BEFORE

Slingers

CASE / FILE NUMBER

10395/2020

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Source record**FLYNOTES:**

CIVIL PROCEDURE – Discovery – Relevance – Claims
of confidential information – Submissions lacked specific
factual links between documents and case – Failed
to
demonstrate how requested documents would substantiate claims –
Overly broad request – Lacking necessary specificity
to
justify compelling discovery – Irrelevant to core issue of
whether a legal duty existed – Approach amounted
to an abuse
of process – Application dismissed with costs –
Uniform Rule 35(3).
THE REPUBLIC OF SOUTH
AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
No.: 10395/2020
Before the Hon Madam
Justice Slingers
Hearing: 12 May 2025
Judgment Delivered: 20
June 2025

In the matter between:

CONSTANTINOS
PAPADIMOS
First
Plaintiff
NAV
EQUITY INVESTMENTS PROPRIETARY LIMITED
Second
Plaintiff
and
OLD
MUTUAL PROPERTY PROPRIETARY LIMITED
First
Defendant
OLD
MUTUAL GROUP HOLDINGS SA LIMITED
Second
Defendant
OLD
MUTUAL REAL ESTATE HOLDINGS COMPANY
PROPRIETARY
LIMITED
Third
Defendant
OMP
MANAGEMENT SERVICES PROPRIETARY
LIMITED
Fourth
Defendant
PETER
ASTON LEVETT
Fifth
Defendant
JACOBUS
HENDRIK SMIT
Sixth
Defendant
QUESTCO
PROPRIETARY LIMITED
Seventh
Defendant
This judgment is handed
down electronically by circulation to the parties' legal
representatives' email addresses. The
date of hand-down is
deemed to be 20 June 2025

JUDGMENT**SLINGERS J****Introduction – the Pleadings**

- [1] During August 2020 the plaintiffs instituted action proceedings against the defendants. Central to the plaintiffs' claim against the defendants was the investment opportunity purportedly the product of the first plaintiff's experience and knowledge of real estate in Central and Eastern Europe and shared with the defendants.[1]
- [2] This investment opportunity constituted valuable confidential information in which the plaintiffs held a protectable interest.
- [3] The plaintiffs averred that the investment opportunity and the properties constituting same, collectively and individually were not public knowledge, specifically within the Republic of South Africa. Therefore, the defendants were unaware of the investment opportunity, including the confidential information inherent therein and had not identified the investment opportunity and would not have become aware of or be in a position to properly evaluate the properties constituting the investment opportunity had it not been for the business activities and experience of the first plaintiff and the promotion of the investment opportunity by the plaintiffs to the defendants.
- [4] As such, the plaintiffs allege that the first to sixth defendants ('the defendants') were aware or ought to reasonably have been aware that the plaintiffs introduced them to the property and investment opportunity in order to benefit financially by participating in and being remunerated by the asset manager who would asset manage any investment made by Old Mutual who would in addition, as the investor, pay the plaintiffs a promoters fee.
- [5] The plaintiffs allege that it was contrary to the legal convictions of the community and wrongful for the defendants to intentionally and secretly pursue the investment opportunity and properties, which included Oregon Park properties without the plaintiff and to invest directly or indirectly therein and place them under asset management structures established by the defendants, in order to deprive the plaintiffs of a promoters fee and asset management stake / fee. The plaintiffs plead that the defendants' wrongful and intentional conduct caused them to suffer damages in the amount of thirteen million two hundred and seventy-three thousand and seventy-seven euros (€13 273 077). This amount of €13 273 077 is constituted of €5 100 000 and €8 173 077. In the alternative, the plaintiffs claimed the fair and reasonable or usual amount the defendants would have paid to the plaintiffs to transparently and lawfully exclude the plaintiffs from participating in the investment and asset management of the Oregon Park office properties, and the defendants investment and asset management structures established in pursuance thereof.[2]

- [6] The amount of €5 100 000 is arrived at by calculating three percent (3%) of €170 000 000.[3] The amount of €8 173 077 is calculated by taking point five percent (0.5%) as an asset management fee, after expenses and multiplying same by fifty percent (50%). The property value was dealt with over a twenty (20) year period at an estimated annual growth rate of four percent (4%). A discount rate of 4% was applied.[4]
- [7] Therefore, the plaintiffs seek judgment in their favour for the payment of €13 273 077 by the first to sixth defendants jointly and severally.
- [8] In pleading to the plaintiffs' particulars of claim, the defendants invoked a special plea wherein they aver that either on the facts pleaded or on the correct facts, there was no legal duty in delict resting on the defendants to protect the plaintiffs from harm and there is no basis for extending the Aquilian liability to cover the plaintiffs' pleaded case.
- [9] Furthermore, the defendants denied that the investment opportunity constituted confidential information exclusive to the plaintiffs and denied that the plaintiffs had a protectable interest in the Oregon Park properties.
- [10] The defendants pleaded that the plaintiffs were not entitled to be involved in or to benefit from the commercial exploitation of the Oregon Park properties. Furthermore, that the information concerning Oregon Park properties was public knowledge or could readily be ascertained. Therefore, there was no legal duty or other legal obligation on the defendants to include the plaintiffs in any pursuit or exploitation of the Oregon Park properties. Consequently, the defendants' conduct was not wrongful and did not cause the plaintiffs any harm or loss which could be attributable to them.
- [11] Furthermore, the defendants deny that they placed any reliance on the information provided by the plaintiffs.
- [12] Thus, the disputed issues in the action proceedings between the parties are:
- (i) was the investment opportunity, the result of the first plaintiff's experience and knowledge of real estate in Central and Eastern Europe;
 - (ii) did the defendants rely on the information supplied by the plaintiff;
 - (iii) did the investment opportunity contain valuable confidential information;
 - (iv) did the plaintiff have a protectable interest in the Oregon Park properties;
 - (v) were the defendants under a legal duty to include the plaintiffs in the commercial exploitation of the Oregon Park properties;
 - (vi) did the plaintiffs have a protectable interest in the investment of the Oregon Park properties; and
 - (vii) the plaintiffs' damages of €13 273 077.

Discovery background

- [13] On 29 September 2022, the defendants delivered an unsigned version of their discovery affidavit. This was accompanied by a covering letter which informed the plaintiffs that items 32 to 40 of the first schedule to the discovery affidavit would not be delivered because they contained confidential and competitively sensitive information. The plaintiffs were informed that the sensitive items would only be delivered if they furnished a confidentiality undertaking.
- [14] The defendants delivered a signed discovery affidavit on or about 5 October 2022. However, this affidavit also failed and/or refused to deliver the documents which contained confidential and competitively sensitive information.
- [15] On 6 October 2022 the plaintiffs caused correspondence to be sent to the defendants which informed them inter alia that if the requested documents were not discovered, the requisite Rule 35(3) notices would be delivered.
- [16] Almost a year later, on 13 September 2023 the plaintiffs delivered six notices in terms of Rule 35(3), each notice calling upon the defendants to produce additional documents to those already discovered. The time for responding to the Rule 35(3) notice expired on 6 October 2023. The defendants were informed that if they failed to respond to the notices by 11 October 2023,

that the plaintiffs would launch the application to compel. The defendants requested an indulgence until the end of November 2023 to properly deal with and respond to the plaintiffs' request.

- [17] The defendants, after being granted an indulgence, duly responded on 30 November 2023 to the Rule 35(3) notice. They deposed to an affidavit which stated that they had made discovery of all the relevant documents in their possession and that the documents requested were not in their possession or under their control or relevant to the disputed issues. The defendants also stated that the Rule 35(3) request was impermissibly broad and lacked the requisite particularity and that it constituted a fishing expedition which amounted an abuse of process.

Requested documents

- [18] The plaintiffs sought documents which could be categorized into fourteen categories. These were:
- (i) exchange control documents;
 - (ii) accounting records;
 - (iii) meeting resolutions and minutes;
 - (iv) various company documents;

- (v) shareholder records;
- (vi) audited or unaudited financial statements;
- (vii) year-end accounting packs;
- (viii) monthly management accounts;
- (ix) various written agreements and deeds;
- (x) registered title deeds;
- (xi) promotional and/or advertising material; bank statements;
- (xii) rental roll;
- (xiii) Bank statements; and
- (xiv) Correspondence.

[19] After the defendants filed their answering affidavit in the application to compel, plaintiffs abandoned some categories of the documents requested and at the hearing of the matter the list of requested documents had been reduced to the following:

- (i) for the period of May 2016 to date- all exchange control applications, notifications, approvals and correspondence regarding any investment by the first to fourth defendants or any subsidiary or entity under their control in and/or funding of OMP Investment Company (Pty) Ltd, Lion's Head Investments EAD, Lion's Head Management EAD, AG Capital AD and/or the Portland Trust and/or any subsidiary or associated companies of the aforementioned companies relating to the direct or indirect acquisition, or portion thereof, of Oregon Park, Soseaua Pipera 44, Bucharest Sector 2, 020112, Bucharest, Romania, or any portion or section thereof from Atenor. For the purposes of this notice, the indirect acquisition of Oregon Park would include, but is not limited thereto, the acquisition of any shares or similar interest in any company, trust or other type of entity (whether incorporated or not) which owns Oregon Park or any portion thereof;

(ii) without derogating from the above, all exchange control applications, notifications, approvals and correspondence regarding any investment by OMP Investment Company (Pty) Ltd or any subsidiary or entity under its control in and/or funding of Lion's Head Investments EAD, Lion's Head Management EAD, AG Capital AD and/or the Portland Trust and/or any subsidiary or associated

companies of the aforementioned companies relating to the direct or indirect acquisition of Oregon Park;

(iii) all resolutions and/or minutes of meeting of directors, committees and/or shareholders of the first to fourth defendants, OMP Investment Company (Pty) Ltd, Lion's Head Investments EAD, Lion's Head Management EAD, AG Capital AD and/or the Portland Trust and/or any subsidiary or associated companies of the aforementioned companies relating to the direct or indirect acquisition of Oregon Park or from Atenor. The aforesaid should include, but not limited to

- a. Business Campus from Atenor, including general ledger accounts reflecting each amount transferred in regard to the foregoing;
- b. all resolutions and/or minutes of meetings of directors, committees and/or shareholders of the first to fourth defendants, OMP Investments Company (Pty) Ltd, Lion's Head Management EAD, AG Capital AD and/or Portland Trust and/or any subsidiary of associated companies of the aforementioned companies relating to the direct or indirect acquisition of Oregon Park from Atenor. The aforesaid should include, but will not be limited to:
- c. all feasibility studies, investment proposals or similar or equivalent provided to the shareholders, board and/or the investment committee (or equivalent) relating to Oregon Park; and
- d. all excel spreadsheets and analyses and valuations prepared or obtained relating to Oregon Park

(iv) any and all deeds or documents or written agreements reflecting or relating to or giving effect to the transfer of ownership or Oregon Park;

(v) the registered title deeds or registered documents of title deeds reflecting the ownership of Oregon Park;

(vi) each and every written lease concluded with a tenant or Oregon Park;

(vii) the rental roll in respect of Oregon Park;

(viii) all correspondence, in any form including but not limited to emails, letters, SMS, WhatsApp messages and faxes between:

- a. representatives of OMP Investment Company (Pty) Ltd; and/or
- b. representatives of the first to fourth defendants; and/or
- c. fifth defendant; and/or
- d. sixth defendant; and/or
- e. representative of Lion's Head Investment EAD; and/or
- f. AG Capital; and/or
- g. Christo Iliev; and/or
- h. Dobrin Staikov; and/or

- i. Elitsa Tsenova; and/or
- j. Lori Collin; and/or
- k. Constantinos Papadimos; and/or
- l. Mandy Ramsden; and/or
- m. Marian Gaylard; and/or
- n. representatives of Questco (Pty) Ltd; and/or
- o. Robert Neale; and/or
- p. Portland Trust; and/or
- q. Victor Constantinescu; and/or
- r. Tim Wilkinson; and/or
- s. representatives of Atenor; and/or
- t. representatives of Colliers, in Bucharest or any other location involved in work in Eastern Europe,

(ix) relating to properties situated in Romania and Bulgaria, including but not limited to, Oregon Park.

[20] The defendants opposed the application. As stated above, it is the defendants' case that the application to compel is characterized by a consistent pattern of overbreadth and lack of particularity and that the application constitutes an abuse of process.

[21] The defendants argue that the plaintiffs adopted an overly broad approach which constitutes a fishing expedition and that the plaintiffs have failed to show how each request relates to the alleged wrongful acts or the damages the plaintiffs seek to recover.

[22] Before turning to the specific documents requested, I set out the legal principles applicable to an application to compel discovery. These principles have been comprehensively set out in *Investec Bank Limited v O' Shea* NO (10038/2014)

[2020] ZAWCHC 71 (31 July 2020). These principles are:

- (i) the purpose of discovery is to assist in the ascertainment and proof of facts that are relevant to the determination of the disputed issues;
- (ii) the purpose of discovery is the clarification or settlement of issues to narrow the scope of disputes and to facilitate the more efficient conduct of the trial;
- (iii) honesty and good faith are foundational to discovery. Therefore, the onus is on the party who demands better discovery to establish mala fides or to demonstrate that the party has failed or refused to make additional discovery is misguided as to the relevance of non-discovered material;

- (iv) the lack of particularity in a request for discovery may indicate that the process is being abused;
- (v) the party seeking further discovery in respect of a document the existence of which is in doubt ordinarily bears the onus of proving the existence before a court will grant an order compelling its discovery;
- (vi) the oath of a party alleging non-relevance is prima facie conclusive unless it is shown that the court ought to go behind the oath; and
- (vii) the onus of proving relevance where same is denied is on the party seeking discovery or inspection.

[23] In *The MV URGUP: Owners of the MV URGUP v Western Bulk Carriers (Australia) (Pty) Ltd and Others*[5] it was held that Rule 35(3) is intended to cater for those situations where a party knows or believes that there are documents in his/her opponent's possession or under his/her control which may be relevant to the issues and which he/she is able to specify with some degree of precision. The objective of Rule 35(3) is not to give a litigant a licence to undertake a fishing expedition.

Specific documents requested

[24] The plaintiff requested for the period May 2016 to date:

- (i) all exchange control applications, notifications, approvals and correspondence regarding any investment by the first to fourth defendants or any subsidiary or entity under their control in and/or funding of OMP Investment Company (Pty) Ltd, Lion's Head Investments EAD, Lion's Head Management EAD, AG Capital AD and/or the Portland Trust and/or any subsidiary or associated companies of the aforementioned companies relating to the direct or indirect acquisition, or portion thereof, of Oregon Park, Soseaua Pipera 44, Bucharest Sector 2, 02112, Bucharest, Romania, or portion or section thereof ('Oregon Park'). Indirect acquisition of Oregon Park will include, but is not limited thereto, the acquisition of any shares or similar interest in any company, trust or other type of entity (whether incorporated or not) which owns Oregon Park;
 - (ii) without derogating from the above, all exchange control applications, notifications, approvals and correspondence regarding any investment by OMP Investment Company (Pty) Ltd or any subsidiary or entity under its control in and/or funding of, Lions Head Investments EAD, Lion's Head Management EAD, AG Capital AD and/or the Portland Trust and/or any subsidiary or associated companies of the aforementioned companies relating to the direct or indirect acquisition of Oregon Park.
- [25] The plaintiffs justified this request on the ground that they demonstrate the defendants' commitment to investing in Romania and relate to the extent to which the first plaintiff's protected skill, knowledge and expertise was exploited without his benefit or knowledge.

- [26] The plaintiffs also argue that the documents requested are relevant as it concerns the extent to which the investment opportunity was relied upon and will provide a timeline of the applications and approvals which will reveal the defendants' intent and investment strategy in relation to the properties.
- [27] The plaintiffs aver that a comprehensive view of the investment structure adopted by the defendants is directly relevant to the plaintiffs' claim.
- [28] The plaintiff's do not set out how or why the requested documents will reveal the defendants' intent and investment strategy in relation to the properties. Nor why this is relevant to the disputed issues. Secondly, the plaintiffs state that a comprehensive view of the investment structure adopted by the OMP defendants is directly relevant to the plaintiff's claim

and that facts and details regarding the acquisition of the properties, as well as the involvement of the defendants' subsidiaries, will necessarily relate to the investment structure that was adopted. It has not been shown how the investment structure is relevant to the plaintiffs' claim which is based on the existence of a legal duty which was contravened when the defendants excluded the plaintiffs from the investment opportunity and the wrongful reliance by the defendants on the plaintiff's alleged confidential information.

- [29] A common thread in the plaintiffs' case is that it presents conclusions pertaining to relevancy but fails to set out the facts on which that relevancy is based.
- [30] It is common cause that the defendants invested in Oregon. It has not been shown that the requested documents will do no more than confirm this. Moreover, it has not been set out how or why the requested documents will support the plaintiffs'

case that the defendants wrongfully relied upon the first plaintiff's alleged protected skill, knowledge and expertise without his benefit or knowledge.

- [31] Therefore, the plaintiffs have not discharged the onus to show that the requested documents are relevant.
- [32] Furthermore, the defendants have stated under oath that these requested documents are not in their possession or under their control and they do not know the whereabouts thereof. The plaintiffs have not discharged their onus to show that the requested documents exist and in the defendants' possession or under their control.
- [33] The plaintiffs justified the request for the documents listed in paragraph 19 (iii) above by stating that:

'In general, these records are relevant as they will shed light on the decision-making process of the OMP defendants and their subsidiaries. They will reveal how decisions regarding the transaction were made, and by whom.'[6]

- [34] The plaintiff alleges that these documents will show that the corporate resolutions and meeting minutes will show the 'decision making process of the OMP defendants and their subsidiaries' and how the 'decisions regarding the transaction were made, and by whom'.
- [35] The decision-making process of the defendants is not relevant based on the pleadings and issues in dispute. Who, how and when the decisions regarding the decisions were made are irrelevant to whether the first plaintiff had a protectable interest, to what extent, if any the defendants relied on the first defendant's alleged protected skill, knowledge and expertise without his benefit or knowledge and whether the defendants had a legal duty to include the plaintiffs in the business transactions.
- [36] The plaintiffs allege that these documents provide insight into the expected profitability, risk and strategic importance of the investment in the property. The plaintiffs go on to state this is directly relevant to the plaintiffs' claim that they were excluded from the investment opportunity and that their protected interests were unlawfully exploited. However, the plaintiffs do not provide the basis or grounds on which the expected profitability, risk and strategic importance of the investment in the property will be relevant to the plaintiffs' claim that they were excluded from the investment opportunity and that their protected interests were unlawfully exploited.
- [37] In requesting the excel spreadsheets reflected in paragraph 19(iii)(d) above, the plaintiffs allege that the requested documents are cardinal to understanding the financial expectations and valuations of the transactions and that they aid in clarifying the factual matrix of the case and directly relevant to the claim and will assist in the determination of damages.
- [38] However, as shown above, the plaintiffs are claiming a fixed amount of damages calculated in terms of a specific formula with an alternative quantum being the fair and reasonable or usual amount the defendants would have paid to the plaintiffs to transparently and lawfully exclude the plaintiffs from participating in the investment and asset management of the Oregon Park office properties.
- [39] The plaintiffs have not set out how or why these excel are relevant to the damages or in clarifying the factual matrix.
- [40] Furthermore, the defendants have deposed that these requested documents are not in their possession or under their control and they do not know the whereabouts thereof.
- [41] The plaintiffs have not shown that these documents do exist and in the possession or under the control of the defendants or that the defendants know their whereabouts.
- [42] The documents requested in paragraph 19(iii)(c) above are allegedly necessary to understand the basis on which the joint venture was formed, including insights into the expected profitability, risks, and strategic importance of the investments in the properties.
- [43] It has not been shown how/why this is relevant to the disputed issues in the pleadings.

[44] The request for the documents set out in paragraph 19(iv) and (v) are justified by alleging that they are relevant to the process by which the property was transferred and reflecting the ownership of the property. The averment is made that these

issues

are central to the plaintiffs' claim. The affidavit does not explain the reason for this averment nor how these documents would advance its own case or weaken the defendants' case.

[45] The plaintiffs furthermore allege that these requested documents are necessary to determine ownership of the properties and to understand the process by which these properties were transferred. The ownership of the properties and the transfer thereof have not been shown to be relevant to the disputed issues.

[46] The documents requested in paragraphs 19(vi) and (viii) are requested on the basis that they would assist in the damages calculation.

However, the plaintiffs' damages, as pleaded, is quantified by reference to specific formulae which is linked to the properties'

values. It is not dependent nor linked to the actual tenants or rent rolls of the properties[7].

[47] The plaintiffs allege that these documents are requested and are relevant because it tests the plaintiffs' assertion that the transaction utilized the investment opportunity, along with the plaintiffs' protected experience, knowledge and skill. It is unclear how every written management agreement (including asset management and/or performance agreements in respect of Oregon Park would support the plaintiffs' claim.

[48] The defendants stated that all written agreements in respect of the Oregon Park properties have already been discovered and that they are now aware of any further relevant documents pertaining thereto.

[49] The plaintiffs failed to make out a case for the court to go beyond the discovery affidavit.

[50] The plaintiffs allege that these documents will provide information on the income generated from the properties and provide some context in respect of the tenant relationships, which is necessary for the assessment of damages. As shown above, the calculation of the plaintiffs' damages are not dependent on nor based on the income generated from the properties not on the tenant relationships.

[51] The plaintiffs seek the documents in paragraph 19 (viii) as it will provide insight into the decision-making process and to understand

the background and interpretation of the written agreements[8].

- [52] The plaintiffs state that the defendants had dealings with the plaintiffs and hold vital information about the transactions. The court is not told the nature or content of the vital information. In the absence of this detail, the court is unable to properly evaluate the relevance of the requested documents.
- [53] The court is simply told that the requested correspondence presents a direct window into the defendants' intentions and the use of the investment opportunity. The court is not told what the correspondence contains nor why or how it is relevant, simply that it is.
- [54] The founding affidavit is peppered with superficial allegations and conclusions pertaining to relevancy which is insufficient to discharge the plaintiffs' onus.
- [55] An example of the superficiality of the allegations is contained in paragraph 60.9 of the founding affidavit. The court is requested to compel discovery in respect of correspondence pertaining to Robert Neale and the Portland Trust as they were involved in the management of the property and engaged with the plaintiffs. The court is told that:

'Their correspondence is highly relevant to amongst others, issues regarding the exploitation of the plaintiffs' protected knowledge, skill and expertise.'

However, the court is not told the nature of the engagement with the plaintiffs, nor why it is alleged that the correspondence would be relevant issues regarding the exploitation of the plaintiffs' protected knowledge, skill and expertise.

- [56] A simple allegation that the correspondence is relevant to the dispute does not render it so. More is required as an allegation of relevance does not discharge the burden needed to succeed in an application to compel discovery.

Legal Duty

- [57] The plaintiffs persisted that the requested documents were relevant as they would, among other things, enable the plaintiffs to test the defendants' assertion that they bore no legal duty towards the plaintiffs.
- [58] In the founding affidavit deposed to in support of the application to compel, the plaintiffs state that:

'The claim at the heart of these proceedings is neatly captured in paragraph 15 of the particulars of claim, and in relevant part states that the OMP defendants –

“were entirely unaware of the properties and investment opportunity collectively, and were also unaware of each component property

thereof, individually, including the confidential information inherent therein and had not identified the investment opportunity of any component property thereof for investment purposes and asset management and would not have been in a position to properly evaluate them, recognize their protentional, and pursue an investment (therein

and/or asset management thereof, but for the business activities of the first plaintiff ...”

[59] Furthermore, the plaintiffs state that

‘When read together, the particulars of claim and the OMP defendants’ plea demonstrate that the requested documents are of significant relevance to the resolution of the dispute. They will, amongst other things, enable the plaintiffs to:

37.1 Test the OMP defendants’ assertion that they bore no legal duty to towards the plaintiffs.

37.2 Verify the claim made by the OMP defendants that the investment opportunity and/or the substance of the Confidential Information Memorandum and/or the plaintiffs protected interest as it relates to the first plaintiff’s knowledge, skill, and expertise, was publicly known or ascertainable.

37.3 Vitally, the records will enable the ventilation of the key issue in dispute: being the manner and the means by which the OMP defendants concluded the transaction and acquired the properties.’

[60] The plaintiffs’ case is that

‘...it was contrary to the legal convictions of the community and accordingly wrongful, for Old Mutual and Levett and Smit to intentionally and secretly pursue the investment opportunity and properties (or any component property thereof), without and excluding the plaintiffs, to invest, directly or indirectly therein and place them under asset management structures established by the defendants, behind the plaintiffs’ backs in order to deprive the plaintiffs of a promoters fee and asset management stake/fee, and Old Mutual,

Levett and Smith were under a duty not to do so.[9]

[61] As seen from the above extracts of the plaintiffs’ particulars of claim, the existence and breach of a legal duty is central to the plaintiffs’ case against the defendants. This legal duty is not founded in statute or in terms of a contractual relationship between the parties.

[62] It is trite that the plaintiffs bear the onus to establish that the defendants owed them a legal duty which they breached.[10]

[63] As held in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*[11] South African law does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations favouring such an extension. When a court is asked to accept, as it is in this case, the existence of a legal duty in the absence of a precedent, it is actually asking the court to extend the principles of delictual liability.[12]

- [64] In *Country Cloud Trading v MEC, Department of Infrastructure Development*, the Constitutional Court held that in a wrongfulness enquiry the focus is on the harm causing conduct and whether the policy and legal convictions of the community, constitutionally understood, regard the conduct as acceptable. The enquiry is based on the duty not to cause harm and to respect rights; and questions the reasonableness of imposing liability.
- [65] Therefore, the enquiry in an application to compel which relies on a legal duty is whether the requested documents will not only be relevant to the harmful conduct but also to the policy and legal convictions of the community and the reasonableness of imposing liability.
- [66] The plaintiffs do not set out how or why the requested documents are relevant to the alleged harmful conduct or to ascertaining the legal and policy convictions of the community. The plaintiffs want the court to come to this conclusion without providing it with the facts and/or circumstances to do so.
- [67] In the circumstances, the plaintiffs have not made out a case to compel discovery based on the breach of a legal duty owed by the defendants to them.

Conclusion

- [68] When the plaintiffs instituted the application, they sought 14 categories of documents which were described in general terms. After the defendants filed their answering affidavit, the plaintiffs abandoned the majority of the documents sought without any explanation or reasons therefore being furnished.
- [69] In persisting with the application pertaining to the revised and shortened list of documents the plaintiffs presented general conclusions of relevancy without furnishing the facts to support these conclusions.
- [70] The plaintiffs requested the court to disregard the defendants' statements under oath pertaining to relevancy and the existence of documents without providing any satisfactory or cogent reasons therefore in the founding papers.
- [71] Therefore, in my view, this application constituted an abuse of process.
- [72] Consequently, I make the following order:
- (i) the application is dismissed with costs, which costs shall be on an attorney client scale, including the costs of counsel.

SLINGERS, J

- [1] See paragraph 13 of the plaintiffs' particulars of claim for a full definition of the 'investment opportunity'.
- [2] The alternative claim is set out in the particulars of claim but not in the prayers where the amount of € 13 273 077 is claimed.

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- [3] POC 6
- [4] POC 7
- [5] 1999
- (3) SA 500 (C)
- [6] Paragraph 44 of the founding affidavit
- [7] Paragraphs 29 to 39 of the particulars of claim
- [8] See paragraph 30 (viii).
- [9] Paragraph 28 of the plaintiffs amended particulars of claim
- [10] Old Mutual Unit Trust Managers Ltd v Living Hands (Pty) Ltd and Others 2024 (6) SA 85 (SCA)
- [11] 1985 (1) SA 475 (A); C. W v G. T (867/2021)
- [2023] ZASCA 23 (13 March 2023)
- [12] Trustees for the Time Being of Two Oceans Aquarium Trust & Templer (Pty) Ltd 2005 JDR 1375 (SCA)
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