

SOUTH AFRICA / JUDGMENT

Samuel v Gosai and Another (10732/2013) [2015] ZAKZDHC 2 (22 January 2015)

[2015] ZAKZDHC 2

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Chetty

CASE / FILE NUMBER

10732/2013

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IN

THE HIGH COURT OF SOUTH AFRICA,

KWA-ZULU NATAL

LOCAL DIVISION, DURBAN

CASE NO: 10732/2013

In the matter

between:

SAVITHREE

SAMUEL.....Plaintiff

and

VINAY

JAYANTILAL VALLABH

GOSAI.....First

Defendant

RABIA

ABDUL WAHHAB

MOTALA.....Second

Defendant

JUDGMENT

Date of judgment delivered: 22 January 2015

CHETTY, J:

1. This matter relates to an interlocutory application brought by the first defendant against the plaintiff for an order in terms of Rule 35(14) of the Uniform Rules of Court compelling the plaintiff to furnish copies of her “bank statements for the period 1 December 2012 to 1 July

2013 and/or the bank accounts from which the plaintiff's alleged payments were made". The application is opposed on the grounds that the first defendant does not require, nor is he entitled, to the documents sought for the sake of pleading. The second defendant was not a party to this application, for reasons that follow.

2. It is appropriate to set out the brief factual background to the application, and to the action instituted by the plaintiff against the defendants, both of whom are practicing attorneys. In September 2013 the plaintiff instituted an action in which she claimed payment of R22 806 050, 00 against the first and second defendants, jointly and severally, the one paying the other to be absolved. The basis of the action is that in December 2012 the first defendant represented to the plaintiff that his law firm, together with that of the second defendant, comprised a consortium of firms who had obtained a tender from the Ethekeeni Municipality to develop certain housing projects. The second defendant allegedly made a similar representation in December 2012 to the plaintiff. The defendants led the plaintiff to believe that if she invested in these "projects", the investments would yield substantial profits within a short period.
3. On the basis of the representations made by the first and second defendants, the plaintiff allegedly made deposits into the first defendant's trust banking account from the period 31 December 2012 to 26 June 2013 for the total amount of R17 418 000. In addition, from the period 3 January 2013 to 14 June 2013, the plaintiff alleges that she deposited the amount of R8 338 050 into the trust account of the second defendant. Subsequent to these deposits being made, the plaintiff discovered that the housing projects did not exist, and that the first and second defendants were not part of a consortium of law firms as she had been led to believe. Accordingly the plaintiff contends that she was fraudulently induced into making the investments which she did. Prior to the institution of the action against the defendants, the latter are alleged to have paid the plaintiff an amount of R2 950 000, 00, leaving a shortfall of R22 806 050, 00 for which summons was issued.
4. The defendants' duly defended the action, after which the plaintiff applied for summary judgment. The first and second defendants thereafter filed their opposing affidavits in the application for summary judgment. On 29 November 2013 Kruger J refused summary judgment and granted the defendants leave to defend the matter. The second defendant subsequently filed a plea to the demand of the plaintiff, whereas the first defendant proceeded to file a notice in terms of Rule 35(14), in terms of which he sought copies of various correspondence and communication between the plaintiff and the second defendant, and pertinently, for the purposes of this application, copies of the plaintiff's bank statements for the period 1 December 2012 to 1 July 2013, or the 'bank accounts' from which the plaintiff allegedly made payments of the amounts referred to in the summons.

5. The plaintiff responded that she was not in possession of the majority of the documents sought by the first defendant. The response from the plaintiff that the first defendant did not require copies of her bank statements in order to plead to her claim, is what precipitated the application to compel the production of the said documents. It is therefore common cause that the plaintiff is in possession of the documents, but refuses to make them available.
6. In his affidavit in support of the application to secure copies of the plaintiff's bank statements the first defendant made reference to paragraph 6.2 of the plaintiff's particulars of claim in which it is averred that the plaintiff made payment of various monies into the first defendant's practice trust banking account. The first defendant contends that he requires the bank statements in order to determine whether the payments were made by the plaintiff herself or whether she was acting as an agent or third-party on behalf of others, alternatively as a cessionary. The first defendant further contends that the bank statements are pertinent to the plaintiff's entitlement to claim the monies and relates directly to the issue of her locus standi. Without the bank statements, the first defendant contends he is unable to prepare a special plea to challenge the plaintiff's standing to bring the action.
7. In support of each of the deposits which the plaintiff claims to have made into the practice trust accounts of the first defendant, the plaintiff attached to her summons documentary proof in the form of electronic banking receipts, bearing the names of the beneficiaries as "Gosai & Company Trust Acc" and "Vinay Gosai & Company". The deposits into the second defendant's account bear the name of the beneficiary as "Rabiah Motala & Assoc". In all of the transactions, the reference of the depositor is listed as "Mrs S Samuef". The first defendant contends that these documents only reflect monies being deposited by the plaintiff, and contain no details of the plaintiff's bank payment history and the source of the monies paid out. Mr Sion, who appeared for the plaintiff, correctly described the first defendant's intentions as being more directed as having a peep at the "in-coming's" into the plaintiff's bank account as opposed to the "out-goings".
8. The first defendant somewhat cynically suggests that it is improbable that the plaintiff, described in her particulars of claim as a businesswoman residing in the rather modest suburb of Chatsworth, Durban, would have R22 000 000,00 of her own money to deposit into the trust accounts of the first (and presumably second) defendants. The issue of where the plaintiff resides is irrelevant to the merits of the application. Her ability to have come into possession of that vast amount of money, without any further information of the business that she is involved in, I have no doubt will become a contentious issue when the matter proceeds to trial. The critical issue which the first defendant has to answer in his plea to the plaintiff's claim is whether he received the monies which the plaintiff alleges was deposited into his practice trust account and if so, the basis for his refusal to pay back.
9. Other than the acknowledgment of a deposit in December 2012 by "Mrs Samuels" in the amount of R500 000,00 the first defendant in his opposing affidavit to the summary judgment application simply fails to mention

the receipt of any further amounts from the plaintiff. Even then, the first defendant contends that he received a call from the second defendant informing him that the deposit of R500 000 was a direct deposit by a client of hers into the trust account of the first defendant. This was being done in order to avoid a delay in the transfer of funds which the second defendant was obliged to make to the first defendant, pursuant to an arrangement between the defendants for the liquidation of a debt owed by the second defendant to the first defendant's client. The first defendant denies having any knowledge of who the plaintiff is or of having met her at all.

10. In her opposing affidavit to the summary judgment application, the second defendant however states that both she and the first defendant met with the plaintiff on the first occasion in July 2013. The second defendant fails to make mention in her opposing affidavit or in her plea of any instruction to the plaintiff to make a direct deposit of monies into the practice account of the first defendant. It is therefore obvious that the truth as to whether the monies invested by the plaintiff were paid to the first or second defendants or both will only emerge at trial, and through the engine of cross-examination.
11. In his replying affidavit in the Rule 35(14) application, the first defendant failed to deal with the material averments made by the plaintiff, contending that he was not constrained to the defences set out in his opposing affidavit in the summary judgment application. The first defendant contends in his founding affidavit that the plaintiff was operating an unlawful financial scheme "by issuing the monies of third parties and does not possess the locus standi to institute action. The said scheme has now collapsed and I believe the plaintiff has assumed liability to recover the monies to which she has no lawful entitlement." On this basis, the first defendant contends that it is entitled to the bank statements of the plaintiff for the periods set out in the Rule 35(14) notice.
12. Rule 35 (14) provides that:

"After appearance to defend has been entered, any party to any 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 possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

In *Quayside Fish Suppliers CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) para 13 Traverso J (as she then was) noted that in order for a party to invoke the procedure set out in Rule 35 (14), the following preconditions must be met:

- '(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;

- (e) the documents must be relevant to 'a reasonably anticipated issue in the action.'
13. In considering whether to allow discovery in terms of Rule 35(14), the Court in *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992
- (1) SA 645 (T) at 647F held that the test is whether the document in question is essential, not merely useful, in order to enable a party to plead. Van Dijkhorst J at 648F held that the resort to the procedure in Rule 35(14) should be exercised with considerable caution and not to allow a party to ensnare an opponent.

"Myns insiens skep Reel 35(14) nie 'n metode waardeur 'n gedingsparty deur gebruikmaking van generiese omskrywings 'n

net kan knoop waarmee vir halfbekende dokumente gevis kan word nie. Dit is 'n remedie wat vir besondere omstandighede geskep is."

14. In interpreting the provisions of Rule 35(14), Van Dijkhorst J appears to have ascribed to it a meaning that the documents sought to be discovered must be 'necessary' for the purposes of pleading - "Die dokumente is nie noodsaaklik ten einde te kan pleit" (at 647E). In *Capricorn Makelaars (Edms) Bpk & others v EB Shelf Investment No 79 (Pty) Ltd & others* (ECJ 050/2005) [2005] ZAECHC 25, Froneman J appeared to favour an interpretation that the documents sought should be "reasonably required in the circumstances". In doing so, he considered the dictum of the Supreme Court of Appeal in *Clutchco (Pty) Ltd v Davis* 2005
- (3) SA 486 (SCA) where Comrie AJA sought to give meaning to the word "required" as used in the legislative provision "required for the protection of any other rights...". In interpreting a similar provision in English Law which provides for discovery before pleadings, in *Rome and another v Punjab National Bank* [1989] 2 All ER 136 at 141 it was held that the court will only exercise its powers under this heading very rarely, and would require the "clearest possible demonstration from the party seeking discovery that it is necessary for the fair disposal of the application." On the other hand, in *Smith Myers Communications Ltd v Motorola Ltd* [1991] FSR 262 it was held that an applicant must show that there was a substantial and genuine issue to be tried, and that inspection was essential for the proper determination of the case. This decision was subsequently departed from in *Dun & Bradstreet Ltd v Typesetting Facilities Ltd* [1992] FSR 320 where doubt was expressed as to whether the plaintiff needed to satisfy the test of showing that such discovery was 'essential'. See *Documentary Evidence*, 4th ed, C Style and C Hollander, at 11-12 and the authorities cited therein, where the learned authors note that while the test to secure the discovery of such documents is high, it would appear to be wrong to place reliance on the documents being "essential".
15. In as much as the first defendant seeks access to the plaintiffs bank statements from December 2012 to July 2013, I enquired from Mr Gunase, who appeared for the first defendant, what purpose would be served by the first defendant having access to the record of payments made to the first defendant. True enough, the bank statements will reflect not

only what was paid out by the plaintiff, but will also reflect the origin of any deposits into her account. More than that though, bank statements are inherently private documents and their disclosure may result in the first defendant acquiring access to information which may neither be relevant for the purpose of pleading, alternatively, which is of a private and confidential nature and unrelated to the subject matter of the litigation.

16. The first defendant is correct when he states in paragraph 6 his replying affidavit, that the plaintiff will be obliged “at some stage to produce these documents as they will be essential when the Plaintiff’s Discovery Affidavit is filed”. If that is the case the first defendant will be entitled to access the bank statements in the normal course of pre-trial discovery. The issue remains whether the first defendant has made out a case for acquiring access to the bank statements prior to him pleading. In other words, and having regard to the case authority referred to above, has the first defendant demonstrated that these documents are ‘reasonably required’ to enable him to plead? See *Firststrand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd & others* 2013
- (5) SA 238 (GSJ) para 31 where the Court opted for the standard of an applicant under Rule 35(14) having to show “exceptional circumstances” to justifying the granting of an order.
17. The defences alluded to by the first defendant are that the monies deposited into his account purportedly by the plaintiff only amount to R500 000. These were monies which the second defendant informed him were actually being paid on her behalf. Even in respect of this amount, there is a dispute in the versions of the first and second defendants. At a factual level, the first defendant (if he relies on this ground) could simply deny liability and admit only to having received one deposit into his account. The onus of proving the claim at all times resides on the plaintiff. Turning to the remainder of the claim of approximately R22m, the first defendant states that he intends challenging the locus standi of the plaintiff to institute the action. In my view, there is no need for the first defendant to have access to the plaintiff’s bank statements to raise such as a defence. He is perfectly entitled to raise the issue of locus standi by way of a special plea if he is of the opinion that the monies invested with him and deposited into his practice trust account either belonged to someone else, or was deposited by someone else other than the plaintiff. He does not need access to the bank statements to make out such a defence. Again the onus rests on the plaintiff to prove her claim. The same situation applies if the first defendant wishes to take an exception to the plaintiff’s particulars of claim as not disclosing a cause of action.
18. In my view to grant the order sought by the first defendant would be to reward the first defendant’s fishing expedition which is contrary to the purpose of the Rule. As Traverso J stated at para 16 in *Quayside Fish Suppliers CC v Irvin & Johnson Ltd supra*:

‘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.’

19. While the first defendant contends that he is not constrained to the defences set out in his affidavit opposing summary judgment, what appears to be firmly established in our law is that one party cannot fish among the books and documents of the opposing party to 'test the waters' as to the strength of a particular defence or claim. The views expressed by Van Winsen J in *Priday v Thos Cook & Son (SA) Ltd* 1952

- (4) SA 761 (C) at 764 are relevant:

'I was, however, unable to find any authority for the proposition that one person is entitled to obtain the production for inspection of the books and documents of another, and in which he has no proprietary interest, in circumstances where litigation is neither pending between such persons nor even certain to eventuate.

On the other hand there are decisions in our Courts which tend to show that it is not the policy of our Courts to encourage a person to search amongst the books and documents of another in order to find out whether or not he has an action against such other. Thus for instance in *Rogers v Sanitary Board of Johannesburg* 1 O.R 65 the Court refused to grant an application for discovery which was made

"to obtain evidence for the purpose of seeing if he (applicant) really has a case and not with the object of using the evidence in an action already begun".

20. I am accordingly not persuaded that the possibility of further defences to be raised by the first defendant constitutes a basis for the discovery of the plaintiff's bank statements. Moreover, during the course of argument, Mr Gunase was unable to provide a satisfactory explanation when I raised with him that the first defendant would only have to look at his own bank statements to ascertain the identity of the payee of certain monies into his practice trust account and compare those to the details furnished by the plaintiff in his particulars of claim. The easiest manner to ascertain the identity of the payee of monies one's account is to look at your own bank statements. The first defendant's use of Rule 35(14) in my view is nothing more than a fishing expedition aimed at constructing possible defences that he is presently unable to do. In *ingledew v Financial Services Board* In re *Financial Services Board v Van der Merwe & another* [2003] ZACC 8; 2003

- (4) SA 584 (CC) the applicant sought an order compelling the Financial Services Board to furnish him with certain information before pleading in an action instituted against him by the Board relating to contraventions of the Insider Trading Act, 1998. He brought an application under Rule 35(14) which was dismissed on the grounds that he had not satisfied the Court that the information was necessary for him to plead. In addition, he relied on his right to information in order to defend his right to a fair trial, guaranteed in terms of section 9, 34 and 35 of the Constitution. The Constitutional Court at para 15 approved of the interpretation of Rule 35(14) given by Traverso J in *Quayside Fish Supplies* supra, with Ngcobo J (as he then was) noting the following :

‘Both s 32(1)(a) and Rule 35(14) confer a right to obtain information. However, s 32 confers a general and an unqualified right to information. By

contrast, the subrule confers a limited right. It can only be invoked during litigation by a litigant only after appearance to defend an action has been entered and its terms unequivocally limit the nature of the documents and tape recordings covered by the Rule to those ‘relevant to a reasonably anticipated issue in an action’ and further limits the documents in question to those required ‘for purposes of pleading’. There is no reasonable constitutional construction of the Rule that could broaden such purpose to accommodate the construction of it contended for by the applicant. Accordingly, the subrule grants a right to information that is narrower, to that extent, than the right in s 32(1)(a).’

21. Our courts have traditionally adopted a cautious approach to allow pre-plea discovery or discovery outside of its usual setting,

illustrated by Thring J’s comments at 513G-I in *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* supra that:

‘Discovery has been said to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for it can be, and often is, a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. It seems to me that, generally speaking, its employment should be confined to cases where parties are properly before the Court and are litigating at full stretch, so to speak. It is not intended to be used as a sniping weapon in preliminary skirmishes, such as the main application in this matter is, unless there are exceptional circumstances present.’

Mindful of the views expressed in *MV Urgup*, Froneman J in *Capricorn Makelaars* supra favoured an approach underpinned by transparency of litigating parties in an action. Froneman J held at para 10 that:

‘The trend in current civil procedure is, as far as I can discern, away from secrecy and withholding of information until the last moment. Pre-trial procedure is increasingly geared towards laying one’s cards on the table before actually going to trial. The purpose is to ensure a quicker and more effective resolution of the real disputes between the parties. If discovery is indeed a ‘mighty engine for exposing truth’ then the purpose of rule 35 (14), to expose the truth earlier rather than later, would be undermined by restricting its ambit to ‘necessity’ instead of “reasonably required in the circumstances” as explained in the *Clutchco* case.’

The Court in *Capricorn* permitted the discovery of specified documents (invoices) sought by the applicants relating to the sale of computers. In that case, the invoices were sought to enable the defendants to admit or deny the plaintiff’s claim of ownership or right to possession of the goods. Despite allowing early discovery of the documents, the Court cautioned at para 11:

'This does not mean that the rule should become the gateway for a generalised earlier discovery process. Parties invoking its use will need to show that discovery is reasonably required in the particular circumstances of their case in accordance with the limiting requirements of the rule itself. That implies a certain openness on their part as well. They will have to demonstrate a "substantial advantage or an element of need" for the purposes of pleading, in addition to the specificity of the documents and relevance to reasonably anticipated issues required by the rule. Each case, as usual, will depend on its own circumstances and facts, so further generalisation would serve no purpose. But the facts and circumstances of the present matter illustrate the point.'

22. As the nature of the application in terms of Rule 35(14) falls within the discretionary powers of the Court, I am required to consider whether the applicant (the first defendant) will be prejudiced in any way in defending the action instituted against him, if the application is refused. I am of the view that no prejudice will be sustained. As set out earlier, the first defendant is seeking access to documents prior to pleading. He concedes in his replying affidavit that he may be entitled to the information he presently seeks at "some stage". The views expressed by Ngcobo J in *Inglelew* supra as to prejudice (or lack thereof) suffered as a result of refusing to entertain the appeal are relevant:

[33] The applicant seeks information for use in his pending insider trading trial. He will not be prejudiced if leave to appeal is refused. Once the pleadings are closed, the issues will become crystallised and the issues for trial will be defined. If the

applicant feels that the information presently sought is relevant to the issues for trial, he can utilise the pre-trial discovery

procedures set out in the rest of Rule 35. It was contended on behalf of the applicant that there is potential prejudice in obtaining the information later. As I understand the submission, such prejudice derives from the fact that pre-trial discovery is limited to issues for trial and such information will not only be narrow but it will come too late for him to broaden the issues for trial.

- [34] The submission rests on the assumption that the information held by the respondent might yield further defences of which the applicant might not be aware. If regard is had to the nature of the allegations against the applicant, it is difficult to fathom what other possible defences, of which the applicant himself has no knowledge, could emerge from information held by others. The complaint against him is that at the material time he used inside information, which he had obtained as a director to make profit out of buying the securities of Skills. Whether that is so is a matter that is manifestly within his subjective knowledge. He does not require information about what other interrogatees said in order to determine his defence. Counsel for the applicant was invited to indicate the type of defence she had in mind, but not surprisingly, she was unable to suggest any.'

23. I accordingly find no basis for the application to succeed.

Order

24. In the result I make the following Order:

The application is dismissed with costs.

M R CHETTY

JUDGE OF THE HIGH COURT

DURBAN

Appearances:

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Date of hearing: 30 October 2014

Date of judgment: 22 January 2015

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