



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4975/2020

In the matter between:

**WATERKLOOF HOLDINGS (PTY) LTD**  
**FG JANSE VAN RENSBURG**  
**D F PRINSLOO**

1<sup>st</sup> Applicant  
2<sup>nd</sup> Applicant  
3<sup>rd</sup> Applicant

and

**DANIEL FRANCOIS VAN TONDER N.O.**  
**JOHAN DIEDRICK VAN WYK N.O.**  
**PAULINE VAN TONDER N.O.**  
**KALINKA JANSE VAN VUUREN N.O.**  
**DANIEL FRANCOIS VAN TONDER**

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent  
5<sup>th</sup> Respondent

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**CORAM:** KHOOE, AJ

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**JUDGMENT BY:** KHOOE, AJ

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**HEARD ON:** 25 AUGUST 2022

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII.

The date and time for the hand-down are deemed to be 09:00 on 24 November 2022.

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- [1] The Parties are entangled in litigation following a cancelled deed of sale that came into existence on 26 January 2018. Waterkloof Holdings (Pty) Ltd (“the Company”) who are the plaintiffs in the main claim, bought five (5) immovable properties and movable property from Waterkloof trust (“the trust”) defendants in the main claim. On or around February 2020, the trust cancelled the deed of sale and around October 2020 the immovable property was transferred back to the name of Trust.
- [2] The parties exchanged their respective discovery affidavits, then the applicants delivered a Rule 35(3) notice. The applicants, dissatisfied with the answer thereto, approached the court to compel the respondents to comply with their Rule 35(3) with specific reference to paragraphs 2 to 8 and 13 to 15 of the Rule 35(3) notice.
- [3] The respondents contend that the applicants failed to provide the court with facts that make it plain or raise a strong possibility, that further documents requested are relevant and necessary for fairly disposing of the main matter and that the applicants are merely on a fishing expedition.
- [4] The applicants’ request is based on allegations in the respondent’s plea and their counterclaim that there was a Joint Venture and that some of the movable property which is material to the main claim had been sold to a company called Barren Energy.

- [5] The issue to be decided by this court as the respondents framed it is as follows: *“Is there a basis to go behind the defendants’ discovery affidavit and/or the Rule 35(3)? The answer must surely be no.”*
- [6] The applicants contend that the documentation in paragraphs 2 to 8 is relevant because the respondents denied that the sale agreement between the Joint Venture and Barren Energy came into existence and further that the respondents did not submit that the documents are irrelevant to the dispute, averring instead that the information is subject to the Personal Information Act 2013 (“POPI Act”).
- [7] The applicants further requested WhatsApp messages of the 5<sup>th</sup> respondent on the Prickly Pear Association WhatsApp group. According to the applicants, the WhatsApp messages are relevant insofar as proving that the 5<sup>th</sup> respondent informed the Prickly Pear Association that the immovable properties which are the subject in the main claim were sold to Barren Energy.
- [8] The applicants also requested a resolution of the trust authorizing the 5<sup>th</sup> respondent to enter into the alleged joint venture, bank statements of the trust and the income and expenditure of the trust as well as that of the 5<sup>th</sup> respondent.

## APPLICABLE LAW

[9] The main objective of the discovery process is to ensure that all parties are aware of any documentary evidence that is available, to narrow down issues, and to eliminate the element of surprise or as some may say, to guard against trial by ambush.

[10] Rule 35 (3) provides:

*'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 him to make the same available for inspection in accordance with subrule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts if known to him.'*

[11] Courts are reluctant to go behind a discovery affidavit, which is prima facie taken to be conclusive unless a probability is shown to exist that the deponent is either mistaken or false in his assertion.<sup>1</sup> The Court, in determining whether to go behind the discovery affidavit, will only have regard to the following: the pleadings in the action, the discovery affidavit itself, the documents referred to in such affidavit as well as admissions of the party evidenced elsewhere.

[12] In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa*,<sup>2</sup> it was said it is also

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<sup>1</sup> *Marais v Lombard* 1958 (4) SA 224 at 227 G.

<sup>2</sup> 1999 (2) SA T at 323 B-C.

particularly significant that the rule refers specifically to documents which may be relevant to the action, and that relevance is determined having regard to the issues taken at face value as defined in the pleadings.

## **SUBMISSIONS AND ANALYSIS**

- [13] The Respondents' reply to the Applicants' Rule 35(3) notice regarding the documents in question, in particular the documents referred to in paragraphs 2 to 7 thereof, revolved around the documents being subject to the POPI Act. Before counsel for the respondents could make a submission, counsel for the applicants informed the court that the respondents would no longer be pursuing that in argument, and counsel for respondents confirmed that as correct.
- [14] Counsel for the respondents submitted that the documents requested should not have been sought through the Rule 35(3) procedure as it is not in contention on the pleadings that an offer to purchase and sale agreement was entered into with Barren energy. Even though this may be so, it does not take away from the fact that the sought documents may be relevant in the litigation which is the whole reason why the applicants requested them. Had the respondent discovered them, it would not have been necessary for the applicants to have delivered the Rule 35(3) notice.

- [15] As far as the bank statements sought in paragraph 8 are concerned, Counsel for the respondents argued that the bank statements from 1 December 2019 to 18 December 2020 are not relevant as payment had already been made and that that is not in contention therefore the applicants were not entitled to them. Counsel for the Applicants conceded part of the submission and contended that they only seek statements until the date of issue of summons. This request will be read to relate to statements from 1 December 2018 until 12 December 2020.
- [16] Counsel for the applicants further conceded that the audited financial statements of the 5<sup>th</sup> respondent as requested in paragraph 9 were not relevant to the action, therefore the respondents did not have to discover them. As far as the audited financial statements of the trust are concerned, the respondents' counsel submitted that these would be discovered when they are available. This is the correct approach as a party cannot be compelled to discover that which he does not have.<sup>3</sup>
- [17] As far as the WhatsApp messages are concerned, counsel for the applicants conceded that the request was too wide and all-inclusive and suggested that the messages be confined to the messages on the group by the 5<sup>th</sup> respondent on the sale regarding Baren Energy/Ensign Pty Ltd.
- [18] Regarding the audio-visual recording of the Prickly Pear Association meeting requested in paragraph 12 of the Rule 35(3)

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<sup>3</sup> Dube v Member of the Executive Council for Health, Gauteng Province 6279/17 (Unreported).

notice, counsel for the applicants conceded that the respondents do not have to provide that as it does not exist.

[19] Counsel for the respondents submitted that the resolution sought by the applicants in paragraph 14 of the Rule 35(3) notice was non-existent. The only resolution in existence had been made available for inspection and the applicants never took the opportunity to inspect it, therefore the respondents should not be compelled to provide the resolution as they already provided what they have in their possession.

[20] I am satisfied that the items referred to in this order are relevant and necessary for the fair disposal of the main matter.

## **ORDER**

[21] WHEREFORE, the following order shall issue;

- 1) The respondents are ordered to comply with the applicants' Rule 35(3) dated 30 September 2021 by –
  - a) Making available for inspection in accordance with Rule 35(6) all the documents listed in paragraphs 2, 3, 4, 5, 6, and 7. Documents in paragraph 8 only statements on the date of sale until the date of issue of summons.
  - b) make available for inspection documents in paragraphs 9 and 10 when they are available.

- c) make available for inspection 5<sup>th</sup> respondent's WhatsApp messages on the Prickly Pear Association WhatsApp group regarding the sale of Baren Energy.
- 2) Costs to be costs in the action.

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**NJ KHOOE, AJ**

On behalf of the Applicant:

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On behalf of the respondent:

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