



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 11407/2019

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

19/05/23

.....

.....

Date

ML TWALA

**ALF'S
APPLICANT**

TIPPERS

CC

And

**MARTHA
RESPONDENT**

SUSANNA

STEYN

Neutral Citation: *ALF'S TIPPERS CC v MARTHA SUSANNA STEYN* (Case No: 11407/2019) [2023] ZAGPJHC 527 (19 May 2023)

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 19th of May 2023.

Summary: *Uniform Rules of Court – Rule 35(1) and (3) – Documents requested are relevant - no prejudice meted against the respondent–the applicant is entitled to relief it seeks in terms of the notice of motion.*

TWALA J

[1] This is an application launched by the plaintiff to compel the defendant to discover certain documents in terms of Rule 35(1) and (3) of the Uniform Rules of Court. The plaintiff seeks the following orders:

1. The respondent is ordered to discover, in relation to MSR Plant and Equipment (Pty) Ltd, With registration number 2005/040214/07 And the period 2010 to 2020:
 - 1.1 Bank statements reflecting all transactions on account in relation to the hire out of plant and equipment and the outflow of funds previously paid into the bank account by the customer(s) In relation to the hire out of plant and equipment to

show if there had been any indiscriminate use of the bank account, both for the deposit of its own money and for paying major creditors such as the applicant;

- 1.2 all documentation made available by or on its behalf, to the South African Revenue Service (“revenue authorities”) Demonstrating or evidencing proof of income, there's lots of sources of income and the expenditure incurred by it;
 - 1.3 Document evidencing, setting forth and or supporting its income, the source or sources of its income and the expenditure incurred by it in the calculation of its income tax or VAT for the 2010 to 2020 tax years;
 - 1.4 any documents showing how the income derived directly or indirectly by it from the hire out of plant and equipment was declared by it to the revenue authorities and how that income was treated in its financial records;
 - 1.5 the IRP5 forms, IT 3(q) forms, IT 14 forms and supporting schedules, income tax reconciliation computations and schedules, directors’ remuneration schedules and trial balances, EMP201 monthly employer declarations, EMP501 employer reconciliation declarations and any spreadsheet oh calculation which show how it's determined the amount of PAYE to be deducted per month for the period 2010 to 2020, be they in draft or final form,
 - 1.6 share register and certificates.
2. If the respondent fails to comply with this order within 10 days from the date of service of this order upon the respondent’s attorneys, Alternatively in the event of the attorneys withdrawing from record, upon the respondent and the premises situated at Plot 22, Highlands

Estate, Ajax Road, Olympus, Pretoria (“the property”) or by attachment to the main entrance at the premises, the applicant is authorized to approach this court on the same papers, duly supplemented, for an order striking out the respondent’s defence in the main action and for judgment by default;

3. The respondent is ordered to pay the costs of the application

[2] The application is opposed by defendant who has filed her answering affidavit. For the sake of convenience, I propose to refer to the parties as applicant and respondent going forward in this judgment.

[3] It is common cause that the respondent was the sole director of MSR Plant and Equipment (Pty) Ltd (“MSR”). The applicant has instituted proceedings and obtained judgment against MSR which judgment has remained unsatisfied since the applicant received a nulla bona return. The applicant has furthermore instituted proceedings against the respondent and the pleadings have now been closed and have reached the discovery stage. It is further undisputed that the respondent placed MSR in voluntary liquidation on the 31st of March 2021, long after the applicant instituted this action on the 28th of March 2019. MSR used the residential address of the respondent as its business address.

[4] It is contended by the applicant that the respondent was the sole director of MSR and the documents required to be discovered for the periods mentioned are supposed to be in the possession of the respondent since the respondent also shared her premises with MSR. Furthermore, in response to the first request for discovery, the respondent discovered only the pleadings in the case that involved the MSR. However, later stated in her affidavit that she did not possess the requested documents but are in the possession of and

belong to a separate entity than herself. This is not true, so it was argued since the respondent was the sole director and shared the same premises with MSR. The respondent had the power and control of MSR and the possession of the documents requested.

[5] It is trite that the purpose of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. This is so to ascertain that the issues are narrowed and the debate on points which are incontrovertible is eliminated. Rule 35 allows the parties to an action to discover the documents that are or may be relevant to the issues in the matter and which the litigant is or expected to be in possession thereof. It further provides for mechanisms to enforce compliance therewith should a party fail to do so. Moreover, it is every party's right to be given a fair trial as enshrined in the Bill of Rights in the Constitution of the Republic of South Africa.

[6] In *Independent Newspapers (Pty) Ltd v Minister for Intelligence services and Another*; *In re: Billy Masetlha v President of the Republic of South Africa*; (Case No: CCT/38/07 [2008] ZACC 6 the Constitutional Court stated the following:

“Paragraph 25: Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because court take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a

reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial".

[7] It is apposite at this stage to mention the subsections of Rule 35 that are relevant in this case which are as follows:

"Rule 35. Discovery, Inspection and Production of Documents

(1) Any party to any action may require any other party there to, by notice in writing, to make discovery on oath within 20 days of all documents and table recordings relating to any matter in question in such action (whether such matter is 1 are rising between the parties requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of the judge, be given before the close of pleadings.

(2).....

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

(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.”

- [8] I do not agree with the respondent that the applicant has adopted a wrong procedure in terms of the rules in launching this application. The applicant filed a rule 35 (3) notice which the respondent insufficiently replied thereto. The applicant filed the second rule 35(3) notice and the respondent insufficiently and inadequately replied thereto by saying that she never had in her possession the requested documents and that the documents belong to a separate entity which has been liquidated. The applicant should approach the liquidator or the Master for such documents.
- [9] There is a plethora of authority that litigation is not a game where the one party takes advantage of the other. It is undesirable for a party to raise technical points against the other and if such technical points are raised, the Court has a discretion on whether to refuse or allow the hearing of the matter as a result of the technical error. However, the discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. The court is entitled to overlook in proper cases any irregularity which does not work to substantial prejudice to the other party. Again, prejudice is the overriding factor in such cases.

[10] In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) which was quoted with approval in the case of *Life Healthcare Group (Pty) Ltd v Mdladla & Another* (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014) the court stated the following:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

[11] It is trite that when a party to an action refuse to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of the relevancy is incorrect. However, it is for the party who seeks discovery or production of the documents to establish that the documents are or may be relevant as prescribed by the rule.

[12] Even if it was, for a moment, accepted that the procedure adopted by the applicant is incorrect, it does not take away the fact that the applicant seeks an order that the respondent produce and or furnish it with the documents that are relevant to its case against the respondent. The respondent was the sole director of MSR and at the time when a resolution was passed to voluntary liquate MSR, the respondent was aware of a judgment against MSR in favour of the applicant. Moreover, the respondent was aware of the present proceedings when MSR was placed into voluntary liquidation. The period for which the documents are requested dates far back as 2010 and the

respondent was sharing her premises with MSR and the nulla bona was returned from the premises of the respondent.

[13] I can find no prejudice that is meted against the respondent in this case because of the procedure adopted by the applicant. I therefore find that there is no merit in the points in limine raised by the respondent. If the respondent was honest in her reply to the rule 35 notices, she would not have discovered the pleadings of the case against MSR and later in her discovery affidavit state that she is not in possession of the requested documents since they belong to a separate entity, which is MSR. She had the power and control over MSR and was in possession of all documents of MSR in her capacity and in the exercise of her fiduciary duties as the sole director over the period for which the documents are requested. These documents are relevant to prove or disprove how moneys flowed between herself and the entity and other creditors of the entity.

[14] It does not assist the respondent to ascribe a narrow interpretation to rule 35 and make the operative word to be 'possession'. The plain interpretation of rule 35 is that the person who had the power and control over and or possessed the documents, should comply with the request under the rule. In terms of her fiduciary duties as the sole director of MSR, the respondent had the power and control over and possessed the documents as specified in the notice of motion and should comply with the rule. The answer provided by the respondent that the documents belonged to a separate entity is correct. However, the answer is inadequate since the separate entity was under the power and control of the respondent and she owed a fiduciary duty to keep its records.

[15] I hold the view therefore that the answers provided by the respondent are insufficient since the documents requested are relevant for the purposes of the rule 35. The respondent had the power and control over MSR and was duty bound to possess and or keep all its financial records. The unavoidable conclusion is therefore that the applicant is entitled to relief it seeks in terms of the notice of motion.

[16] In the circumstances, I make the following order:

1. The respondent is ordered to discover, in relation to MSR Plant and Equipment (Pty) Ltd, With registration number 2005/040214/07 And the period 2010 to 2020:
 - 1.1 Bank statements reflecting all transactions on account in relation to the hire out of plant and equipment and the outflow of funds previously paid into the bank account by the customer(s) In relation to the hire out of plant and equipment to show if there had been any indiscriminate use of the bank account, both for the deposit of its own money and for paying major creditors such as the applicant;
 - 1.2 all documentation made available by or on its behalf, to the South African Revenue Service (“revenue authorities”) Demonstrating or evidencing proof of income, there's lots of sources of income and the expenditure incurred by it;
 - 1.3 Document evidencing, setting forth and or supporting its income, the source or sources of its income and the expenditure incurred by it in the calculation of its income tax or VAT for the 2010 to 2020 tax years;
 - 1.4 any documents showing how the income derived directly or indirectly by it from the hire out of plant and equipment was

declared by it to the revenue authorities and how that income was treated in its financial records;

- 1.5 the IRP5 forms, IT 3(q) forms, IT 14 forms and supporting schedules, income tax reconciliation computations and schedules, directors' remuneration schedules and trial balances, EMP201 monthly employer declarations, EMP501 employer reconciliation declarations and any spreadsheet or calculation which show how it's determined the amount of PAYE to be deducted per month for the period 2010 to 2020, be they in draft or final form,
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 3. The respondent is ordered to pay the costs of the application

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 15th of May 2023

Date of Judgment: 19th of May 2023

For the Applicant: Advocate C van der Merwe

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