



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

CASE NUMBER: 2021/51099

[1]	REPORTABLE: YES/ NO
[2]	OF INTERENST TO OTHER JUDGES: YES/ NO
[3]	REVISED: 12 July 2023
	DATE SIGNATURE

In the matter between:

ISAACS MALCOLM

Plaintiff

And

MANGERA ATTORNEYS

Defendant

JUDGEMENT

T LIPSHITZ AJ

The matter was heard on 13 April 2023

Judgment Delivered on 12 July 2023

Introduction

1. This is an opposed application in terms of Rule 35(7) of the Uniform Rules of Court, whereby the applicant is seeking an order that the respondent complies with a Rule 35(3) notice to produce the following listed “document/s”:- **“Proof of the recipient’s details into which the defendant transferred the funds of R 2 Million”**.
2. The respondent has opposed this application and contends that the applicant is not entitled to the documents sought and has raised various challenges in this regard, including:-
 - 2.1. The documents sought are not relevant to the issues in dispute;
 - 2.2. The applicant has alternate remedies to source the documents sought;
 - 2.3. The documents sought are privileged both in terms of an attorney-client relationship and under the Protection of Personal Information Act 4 of 2013 (“Popia”);
 - 2.4. No documents have been requested; and

- 2.5. The request does not sufficiently describe what document the applicant seeks the respondent to produce, which would result in an ineffective order and exposing the defendant to possible contempt of court proceedings.

Issues for Determination

3. The first issue of determination is whether the plaintiff has made a case to compel the second respondent to produce documents listed in the Rule 35(3) Notice.
4. If the answer is affirmative, then whether the documents sought are privileged and, therefore, ought not to be produced.
5. For ease of reference, I will, from here on out, refer to the parties by their nomenclatures in the main action – the applicant is the plaintiff, and the respondent is the defendant.

FACTUAL BACKGROUND

6. The plaintiff's case against the defendant, as pleaded in the main action, is based in delict. It arises from the following set of pleaded allegations:-

- 6.1.** The plaintiff concluded an oral agreement with a certain Mr Sharma (“Sharma”) in September 2019 relating to the plaintiff acquiring certain distribution rights from Photonic Global (“the transaction”).
- 6.2.** To facilitate this transaction, the plaintiff elected to use the defendant’s services (as an attorney) to administer the funds for the transaction.
- 6.3.** In September 2019, the plaintiff transferred 2 Million Rand into the defendant's trust account.
- 6.4.** The money held in the trust account by the defendant was held for the plaintiff’s benefit.
- 6.5.** The defendant had a legal duty as an attorney to diligently deal with the money held in its trust, to retain the money on the plaintiff’s behalf and only transfer it to third parties on his instruction.
- 6.6.** The transaction between the plaintiff and Sharma did not materialise.
- 6.7.** The defendant informed the plaintiff on or about 12 May 2020 that the defendant had transferred the money to Sharma without the plaintiff’s instruction.
- 6.8.** The defendant was negligent and breached his legal duty by transferring the money to Sharma without the plaintiff’s instruction.

- 6.9.** The plaintiff recovered an amount of R 1 million from Sharma;
- 6.10.** Accordingly, the amount the plaintiff claims in delictual damages is R 1 million, with interest and costs.
7. The defendant filed a plea. He raises a special plea of non-joinder alleging that Sharma should have been joined to the proceedings. The defendant pleads that the monies paid into his trust account were a payment made towards Sharma. Accordingly, once the money was paid into his trust account, it was held for Sharma's benefit.
8. In the defendant's plea to the particulars of the claim:-
- 8.1. The defendant admits that the R2 million was paid into his trust account by the plaintiff in September 2020;
- 8.2. The plaintiff had represented to him that the funds being paid into his trust account were a payment to Sharma;
- 8.3. He admits that he released the funds to Sharma without the plaintiff's instruction;
- 8.4. The defendant pleads that the money was being held on behalf of Sharma and not on behalf of the plaintiff.

8.5. He denies that he owed the plaintiff a legal duty as the monies he held in his trust account were being held for Sharma's benefit;

8.6. The defendant pleads no knowledge of the remainder of the allegations contained in the particulars of claim.

9. Accordingly, the issues in dispute in the main action are:-

9.1. Whether the payment of R2 million by the plaintiff to the defendant was a payment to Sharma?

9.2. Whether the monies held in trust by the defendant were for the benefit of Sharma or the plaintiff.

9.3. If the funds were held on behalf of the plaintiff, then:- Whether the defendant owed a legal duty to the plaintiff to deal with the money held in its trust diligently, to retain the money on the plaintiff's behalf and only transfer the funds to third parties on the plaintiff's instruction and whether he acted contrary to this duty.

10. Both parties have both discovered.

11. On 03 August 2022, the plaintiff served a notice in terms of Rule 35(3) on the defendant wherein he sought that the defendant produces "**Proof of the**

recipient's details into which the defendant transferred the funds of R 2 Million".

12. The defendant did not reply to the notice under Rule 35(3).

13. The plaintiff thereafter launched an application in terms of Rule 35(7) to compel the defendant to comply with his notice in terms of Rule 35(3), which application the defendant opposed on the grounds listed above.

14. The defendant filed his answering affidavit late and sought condonation for the late filing thereof. The plaintiff took issue with the condonation sought.

Defendant's Condonation Application

15. The application in terms of Rule 35(7) was filed on 16 September 2022. It is trite that there are no provisions in the rules relating to periods for filing of answering affidavits in interlocutory proceedings and that same should be filed within a reasonable time, which is *prima facie* no longer prescribed by Rule (6)(5)(d) of the Uniform Rules of Court¹.

16. Accordingly, at the latest, the defendant should have filed his answering affidavit on 21 September 2022. The defendant filed his answering affidavit on 19 October 2022 - approximately one month late.

¹ Gisman Mining and Engineering Co (Pty) Ltd (In Liquidation) v LTA Earthworks (Pty) Ltd - 1977 (4) SA 25 (W)

17. The defendant's explanation for his delay in filing his answering affidavit stems from his view that the documents sought by the plaintiff are protected in terms of attorney-client privilege owing by the defendant to Sharma, and such privilege can only be waived by Sharma. He accordingly sets out that he attempted to set up a meeting to discuss with Sharma to ascertain whether Sharma would waive his privilege and permit the defendant to disclose this information. Sharma received independent legal advice, and his attorneys informed the defendant on 13 October 2022 that Sharma does not waive his privilege. He contends that he had to wait for Sharma's instruction before responding to the application in terms of Rule 35(7).

18. As an aside, I am not convinced that the documents sought by the plaintiff attract attorney-client privilege, as this privilege only extends to communication between the client and his legal advisor for the purposes of obtaining legal advice.² It was not sufficiently explained how the document sought, namely, proof of the recipient of the R2 million, constituted communication for the purposes of obtaining legal advice. That being said, I am persuaded that the defendant genuinely believed that he needed to elicit Sharma's instructions in this regard, and he was awaiting his instruction before knowing how to respond to the application.

19. I am therefore persuaded that the defendant has provided an explanation for the delay, which is bona fide and was not made with the intention of delaying the finalisation of the application. Moreover, I am satisfied that the defendant has a bona fide defence to the application, which will be dealt with more fully below. He

² Amabuhungane Centre for Investigative Journalism NPC V Minister of Justice and Correctional Services 2021 (3) SA 246 (CC) at paragraph 115 - 119

has therefore shown good cause as he is required to do to succeed in a condonation application.³

20. Accordingly, I am inclined to grant condonation to the defendant for the late filing of his answering affidavit with no order as to costs.

Legal Principles relating to Rule 35(3) notices.

21. Rule 35(3) sets out that:- *“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 on 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.”*
(underlining my emphasis)

22. In *Swissborough Diamond Mines (Pty) Ltd V Government of the Republic of South Africa* 1999 (2) SA 297 (T) at 320F-H, Joffe J held that the party seeking to go behind the discovery affidavit bears the onus before explaining on what that party may rely on discharging that onus:

³ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E–G

“Accepting that the onus is in the party seeking to go behind the discovery affidavit, the Court, in determining whether to go behind the discovery affidavit, will only have regard to the following:-

- (i) The discovery affidavit itself; or*
- (ii) The documents referred to in the discovery affidavit; or*
- (iii) The pleadings in the action; or*
- (iv) Any admissions made by the party making the discovery affidavit; or*
- (v) The nature of the case or the documents in the issue.¹⁴*

23. Before a party can be entitled to the documents sought, it must show that they may be relevant to any matter or question. The issues raised in the pleadings need to be considered for the Court to determine relevance⁵.

24. In *Rellams (Pty) Ltd V James Brown & Hamer Ltd* 1983 (1) SA 556 (N) on page 560, it was held as follows:-

“It is, generally speaking, no doubt true that, whilst the Court should not and would not go behind a party's affidavit that the contents of a document are not relevant, such affidavit is nevertheless as far as the Court is concerned not conclusive. After an examination and consideration of the recognised sources as well as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant

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⁵ *Schlesinger V Donaldson and Another* 1929 WLD 54 at 57

and disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit.

25. Relevancy is determined from the pleadings and not extraneously therefrom⁶.

The test for determining relevancy has been set out in the *locus classicus* case of **Compagnie Financiere et Commerciale Du Pacifique V Peruvian Guano Co (1882) 11 QBD 55 (“Compagnie case”)**, which has often been accepted and applied in our Courts and which sets out *“It seems to me that every document relates to the matter in question in the action, which it reasonable to suppose, contained information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words ‘either directly or indirectly’ because it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the cause of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences”*. It is furthermore held in the *Compagnie* case that it is desirable to give a wide interpretation to the words *“a document relating to any matter in question in the action”*.

26. In the unreported decision of **Louw v Grobler**⁷ it is set out that the purpose of presenting evidence during trial is *“to establish the probability of the facts upon which the success of a party’s case depends in law”*. The meaning of relevance

⁶ *Swissborough Diamond Mines (Pty) Ltd V Government of the Republic of South Africa* 1999 (2) SA 297 (T) at 311A and

⁷ *Louw V Grobler* (unreported FB Case No 3074/2016 dated 28 September 2021) at paragraph 21

has been the subject of many cases, and the definition of relevance is a matter of degree. It has been found as follows "*The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with the other facts proves or renders probable the past, present or future existence of non-existence of the other*". The facts and the issues in dispute of the particular case before the court will decide the question of relevance. Therefore, relevance cannot be resolved in a vacuum.

Are the documents sought relevant to the issues in dispute in the main action?

27. The documents sought relate to the payment made by the defendant of R2 million, which he was holding in his trust account either for the benefit of the plaintiff or for the benefit of Sharma.

28. In this regard,

the plaintiff pleaded as follows:-

"3.7. The defendant verbally informed the plaintiff on or about 12 May 2020 that the amount that was transferred into the trust account of the defendant had already been transferred to Mr Sharma."

3.8 *Accordingly, the defendant transferred the funds out of their trust account and into the bank account of Mr Sharma, without receiving a formal, alternatively, express, further alternatively implied instruction from the plaintiff.”*

The defendant pleaded as follows:-

“ AD PARAGRAPH 3.7.

The contents hereof are admitted.

AD PARAGRAPH 3.8 – 3.10

The contents hereof are denied as if specifically traversed, and the plaintiff is put to the proof thereof.”

29. It is apparent from the pleadings that it is common cause between the parties that the defendant transferred the funds from his trust account to Sharma. Accordingly, the payment of the funds by the defendant to a third party other than the plaintiff is not an issue in dispute. A party cannot seek the other litigant to produce documents related to common cause issues. This is so as the wording of the rule is unambiguous in that the documents which can be sought under the subrule are documents which may be relevant to any matter in question.

30. Counsel for the plaintiff argued that the defendant's denial of paragraph 3.8 of its particulars of claim renders the payment an issue in dispute. I don't see it that way. From a reading of the pleadings as a whole, it is clear that the defendant admits transferring the funds to Mr. Shwarma but denies requiring the plaintiff's instruction to transfer the monies as the defendant contends that he was holding the money on Shwarma's behalf, which was he alleges was in terms of the plaintiff's representations made to the defendant. This is what the defendant was conveying that it was denying. The pleadings need to be read as a whole.

31. Counsel for the plaintiff also argued that the defendant had provided contradictory versions. He expands on this and argues that, on the one hand, the plaintiff admits that he transferred the funds out of the trust account without an instruction from the plaintiff, as the plaintiff represented to him that the monies held in trust were for the benefit of Sharma, and yet in direct contrast on the other hand, the defendant admitted in a letter annexed to the plaintiff's application in terms of rule 35(3) dated 27 July 2021 that the plaintiff expressly instructed the defendant to release the payment. That may be so. However, this has no bearing on the relevancy of the documents sought, as relevancy is determined from the pleadings and not extraneous evidence. Secondly, this contradictory version does not deal with the issue of payment but rather with the central issue in the action, which will be ventilated at trial and the plaintiff will have his opportunity to cross-examine the defendant.

32. Counsel for the plaintiff could not answer how this document would advance the plaintiff's case or damage the case for the defendant. At best, he alleged that it

may show that the monies were paid to a third party other than Sharma. The defendant's counsel argued that this in and of itself demonstrates that the request is nothing short of a fishing expedition to obtain this information for an ulterior purpose: establishing further facts to seek to recover the monies from some third party. He further explained by example that even if funds were paid to a third party, this may have been at Sharma's request and would be tantamount to payment to Sharma. Counsel for the defendant correctly asserted that the identity of the recipient of the money is irrelevant to this matter. The difficulty for the plaintiff is that it is not his case that funds were paid to a third party, and this is not an issue per the pleadings.

33. Accordingly, I find that the documents sought in Rule 35(3) are irrelevant to the issues in dispute, and consequently, the plaintiff is not entitled to them. As I have already found that the plaintiff is not entitled to the documents sought, I don't need to deal with the defendant's other challenges to the Rule 35(7) application.

34. I find no reason to deviate from the ordinary rule that costs follow the result.

35. Consequently, I make the following order:

Order

The application is dismissed with costs.

T Lipshitz AJ

Acting Judge: Gauteng Division

Johannesburg

(electronic signature appended)

11 July 2023

Attorneys for the Applicant

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