

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 64482/2020

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

..... **13 June 2024**
SIGNATURE **DATE**

In the matter between:

ARTHUR CHANNON

Applicant

(In his capacity as the legal agent and on behalf of the late estate of
NAMANYANE PONTSHO MONAMA (identity number: [...]
) Master Nr. (010983/2019)

And

MPYANA ROSEMARY MONAMA

First respondent

Identity number: [...]

MOYAHABO NAOMI MONAMA

Second Respondent

Identity number: [...]

MMAKGALA RELEABETSWE MONAMA

Third Respondent

Identity number: [...]

MMANKOKWANE MONAMA

Fourth Respondent

Identity number: [...]

MOTSIRI OFENTSE MONAMA

Fifth Respondent

Identity number: [...]

MASTER OF THE HIGH COURT, JOHANNESBURG

Sixth Respondent

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 13 June 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 13 June 2024.

MNISI AJ

INTRODUCTION:

[1] This is an opposed application made in terms of Rule 35(3) of the Uniform Rules in which the applicant is seeking the following relief:

1. *The first to fourth respondents be ordered to comply with the applicant's request to properly and comprehensively respond to the Applicant's Rule 35(3) Notice dated 1 March 2023 within 10 (TEN) days of service of this order on the First to Fourth Respondents' attorneys of record.*
2. *That the First to Fourth Respondents be ordered to pay the costs of this application;*
3. *Further and/or alternative relief.'*

[2] This application is only opposed by the first to fourth respondent.

RELEVANT FACTUAL BACKGROUND:

[3] The applicant has applied in terms of the provisions of Rule 35(3) of the Uniform Rules of Court that the respondents be compelled to discover in respect of certain specified documents.

[4] This application comes before this Court pursuant to certain issues in the main application, which involves a determination of the deceased's ownership of a liquor shop under the above case number having been referred for oral evidence through a court order dated 23 August 2022.

[5] On 1 March 2023, the applicant issued a Notice in terms of Rule 35(3) of the Uniform Rules on the first to fourth respondents' attorney of record as she believed that there are certain documents or tape recordings in their possession which are relevant for determination of the matter.

[6] It is apparent that in the applicant's notice in terms of Rule 35(3), the applicant has listed various specified documents which include *inter alia*:

1. Financial statements for the years ending between 2010 and 2022;

2. Copies of all stocktaking reports for the financial years ending between 2010 and 2022;
3. Copies of the bank statements for all accounts held in the name of Tshwane Liquor Store, for the financial years ending between 2010 and 2022; and
4. General ledgers for the financial years ending between 2010 and 2022.

ISSUES FOR DETERMINATION:

[7] The issue for determination is simply whether or not the applicant has made out a case to compel the respondents to discover documents listed in the Rule 35(3) Notice.

SUMMARY OF THE EVIDENCE:

[8] The applicant in her founding affidavit in support of this application, averred the respondents have failed to properly and comprehensively respond to her Rule 35(3) Notice dated 2 March 2023.

[9] On 15 March 2023, the applicant issued a follow up letter to the respondents' attorneys of record informing them that they have failed to discover properly in terms of the Rule 35(3) Notice. The aforesaid letter also states that the respondents had 5 (five) days from the date thereof to discover. The *dies* has since expired and this prompted the applicant to bring this application.

[10] The second respondent filed an answering affidavit dated 23 May 2023, deposed by the Moyahabo Monama and averred that the statements and the required documents have already been provided to the applicant and that the same was already in the applicant's possession. She also avers that she fails to see that the required statements are relevant for the purposes of the main application. The second respondent then sought for the dismissal of this application with costs.

[11] In her replying affidavit, the applicant averred that the documents are relevant in order to fully prepare for the hearing of oral evidence in which the Court will be tasked with determining amongst other things, the extent of the ownership which the second respondent holds in an entity known as Tshwane Liquor Shop. She also states that the dispute regarding the ownership of the liquor shop emanates from as far back on or during 2010 which is during or about the period which the deceased took over the ownership of the liquor shop from the second respondent.

[12] On 12 September 2023, the second respondent filed and served a response to the applicant's Notice in terms of Rule 35(3). In her response, the second respondent simply denies being in possession of the information required by the applicant in terms of the Notice.

[13] On 12 December 2023, and despite the second respondent's response to the applicant's Rule 35(3) Notice, the applicant proceeded to seek allocation for the adjudication of this application. The matter was finally enrolled for 4 March 2024.

APPLICABLE LEGAL PRINCIPLES:

[14] This current application to compel a proper and comprehensive discovery is preceded by Rule 35(3) Notice which is premised on the applicant's belief that the respondents have the required documents. Rule 35(3) Notice reflects that the applicant believes that there are other documents which may be relevant to the matter in possession of the respondents (presumably the second respondent).

[15] Rule 35(3) of the Uniform Rules provides as follows:

'if any party believes that there are, in addition to documents or tapes 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 sub-rule (6) or to state on oath within 10 days that such document are not in his possession, in which event he shall state their whereabouts, if known to him.' Rule 35 (3) does not authorise or sanction a fishing expedition. See ***MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd*** [1999 \(3\) SA 500 \(W\)](#) at 515 where it was held 'Rules 35(3) and (14) do not afford a litigant a licence to fish in the hope of catching something useful.'

[16] It is clear that the object of discovery is to ensure that before the trial, both parties are made aware of all the documentary evidence at the disposal of the parties which in turn assist not only the litigating parties but the court to discover the truth.¹ Discovery affidavits are regarded as *prima facie* conclusive save where it can be shown that there are reasonable grounds for believing that the other party has the relevant documents or that the other party is false in his or her assertions. See ***Federal Wine and Brandy Co Ltd v Kantor*** [1958 \(4\) SA 735 \(E\)](#) at 749H.

[17] In ***Swissborough Diamond Mines and Others v Government of the Republic of South Africa*** [1999 \(2\) SA 279 \(T\)](#) at 320F-H it was held 'Accepting that the onus is on 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

¹

See ***Durbach v Fairway Hotel Ltd*** [1949 \(3\) SA 1081 \(SR\)](#) at 1083.

- (iv) Any admissions made by the party making the discovery affidavit; or
- (v) The nature of the case or the documents in issue.’

[18] It is a well-established legal principle that where there is failure by the other party to discover despite the request and notice, the provisions of Rule 35(7) may be utilized. Rule 35(7) provides:

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

[19] Over the years, the courts have made it clear that there is no absolute right to discovery. The court has a discretion whether or not to order compliance with the Rule 35.² The words “*If any party fails to give discovery*” must be interpreted to mean that Rule 35(7) applies in circumstances where the party that is required to make discovery but fails to do so. Discovery is for the court to decide and does not depend on the parties’ views on the matter.³ Discovery allows for the proper ventilation of issues and any document that is relevant to the issue is discoverable.⁴

EVALUATION:

[20] It is clear that following the Rule 35 (3) Notice, the second respondent filed a discovery affidavit in response thereto and she avers that she is not in possession of the documents as set out in the applicant’s notice.

²

See *Continental Ore Construction v Highveld Steel & Vanadium Corporation Lts* [1971 \(4\) SA 589 \(W\)](#) at 594H.

³ See *Swissborough* on para [18]

⁴

See *Quintessence Co-Ordinators (Pty) Ltd v Government of the Republic of Transkei* 1991(4) SA 214 (Tk) at 216B-F.

[21] Adjudicating on the merit of the current application, the applicant in her practice Note, concedes that the second respondent has responded to the applicant's Rule 35(3) Notice. However, she argues that the response does not comply with the said Rule and that the second respondent ought to be ordered to comply comprehensively with the prescripts of Rule 35(3).

[22] This begs question, if the second respondent did comply with the Rule 35 (3) Notice then what is the basis for this application to compel? In this matter, even on the applicant's version there was compliance. It appears to me that what the applicant truly seeks is further and better discovery which can be achieved by invoking other rules provided in the Uniform rules of the Court. It follows that the contention by the second respondent's Counsel that the applicant ought to make use of Rule 35(3) is correct.

[23] It follows that the applicant has failed to make out a case for the relief she is seeking. Simply put, my finding is that there is no merit to the present.

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

1. The applicant's application is dismissed.
2. Costs shall be costs in the course.

J Mnisi
Acting Judge of the High Court

Date of hearing: 4 March 2024

Date of Judgment: 13 June 2024

For the Applicant: Adv C Barreiro

Instructed by: Arthur Channon Attorneys

For the Respondents: Adv ASL Van Wyk

Instructed by: Hefferman Attorneys