Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 1830/2017

In the matter between:-

ELLIE MARIA DE BEER N.O — Plaintiff
As Executor in the late estate of WILLIAM P DE BEER

and

PETRUS JOHANNES JANSEN VAN RENSBURG N.O
As Executor in the late estate of WILLIAM P DE BEER

-and-

TRIFECTA TRADING 329 (PTY) LIMITED — 1st Defendant

VAN RENSBURG PROKUREURS — 2nd Defendant

JUDGMENT

FMM SNYMAN J

Introduction

[1] This is an application to compel the defendants to discover documents in terms of Rule 35(3) and Rule 35(6) of the Uniform Rules of Court (the Rules). Should the defendants fail to discover, the plaintiff requests authority to apply on the same papers, supplemented if necessary, for an order dismissing the defence's case with costs.

[2] The notice requesting recovery in terms of Rule 35(3) and Rule 35(6) requests specifically that the defendant discovers, or make available for inspection the following documents:

2.1. the bank account statements held by ABSA Bank on behalf of the 1st defendant with account number 9135505922 for the periods of respectively 1 December 2012 to 31 December 2012; and

2.2. the bank statements for the account held by First National Bank (FNB) on behalf of the 2nd defendant with account number 62427345419 for the period of 1 June 2016 to 30 June 2016.

[3] Adv Masike appeared on behalf of the applicant / plaintiff and Adv van Nieuwenhuizen appeared on behalf of the respondents / defendants. For ease of reference I will refer to the parties as they are cited in the main application.

Points *in limine*

[4] It is argued by Adv van Nieuwenhuizen that the Rule 35(3) notice and subsequent application is fatally defective as Rule 35 does not allow for discovery after the commencement of the trial and is specifically a pre-trial procedure.

[5] It is common cause that the evidence of the plaintiff in the matter has been heard before Gura J, on the basis that the plaintiff was terminally ill and passed away shortly after giving his evidence. For the purposes of this judgment, it is apposite to mention that the main proceedings (in summation) deal with the alleged conclusion or cancellation of a contract and specific payments made in terms of the contract.

[6] Perusal of Rule 35 of the Uniform Rules of Court (Rules) makes it clear that documents may be requested "*at any time*". At the commencement of the argument, Adv van Nieuwenhuizen wisely abandoned the point *in limine* and subsequently no ruling needs to be made on the point *in limine*.

Discovery process

[7] Uniform Rule 35 of the Rules of the High Court (Rules) deals with the discovery process during litigation in the High Court. Subsections (3) and (6) on which the plaintiff relies, reads as follows:

"35 Discovery, Inspection and Production of Documents

...

(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 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.

...

(6) Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver within five days, to the party requesting discovery, a notice in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of such party's attorney or, if such party is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection

shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise."

[8] The defendant opposes the application on the following 3 bases:

8.1. In the Rule 35 notice the plaintiff asked for inspection only, and not for an affidavit setting out where the documents can be;

8.2. The documents are not in the possession of the defendant;

8.3. The documents date back to 2012 and is irrelevant for the litigation proceedings;

8.4. The documents are privileged as the 2nd defendant is a firm of attorneys and their bank statements are privileged.

[9] Adv van Nieuwenhuizen argues on behalf of the defendant that it has been stated under oath in the opposing affidavit to this application that the documents are not in their possession, and the defendants need not state as such, again, in an answer to the Rule 35(3) and Rule 35(6) notice.

[10] The Rule 35(3) and 35(6) notice indeed do not specify, as required in the Rule, in the alternative to making the documents available for inspection, that the defendant

should state on oath within 10 days that such documents are not in its possession, in which event the party making the disclosure shall state their whereabouts, if known. The notice states as follows:

> *"**KINDLY TAKE NOTICE THAT** the plaintiff believes that there are, in addition to the documents or tape recordings already discovered by the first and second defendant, other documents (including copies thereof) which may be relevant to any matter in question in the possession or under the control of the first and second defendant as set out below and to make such documents available for inspection in terms of the provisions of the above rule and subrules..."*

[11] It has been stated in **Erasmus, Superior Court Practice**, D van Loggerenberg *et al,* Jutastat e-publications, CD Rom & Intranet: ISSN 1561-7467 Internet: ISSN 1561-7475 at RS 17, 2021, D1 – 472A that the "*(T)he intention of the subrule is to provide for a procedure to supplement discovery which has already taken place but which is alleged to be inadequate"* with reference to the matter of **The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd** 1999 (3) SA 500 C at 515D.

[12] The requirement to state the where-abouts of the documents under oath, is set out as follows in **Erasmus, Superior Court Practice**, D van Loggerenberg *et al,* Jutastat e-publications, CD Rom & Intranet: ISSN 1561-7467 Internet: ISSN 1561-7475 at RS 18, 2022, D1-475:

'State on oath . . . that such documents or tape recordings are not in his possession.' *This subrule concerns documents and tape recordings not yet discovered and contemplates an affidavit other than and additional to one made under subrule (1). (fn158) The objections to an attorney deposing to a discovery affidavit under subrules (1) and (2) are equally valid to his making an affidavit under this subrule. (fn159)*

Under the subrule a party is entitled to state in his affidavit that the documents or tape recordings referred to in the notice under the subrule are irrelevant to the issues in the action or that they are privileged from disclosure. (fn 160) A party's assertion that the contents of a document or tape recording are not relevant is not necessarily conclusive. (fn 161)

Footnotes (fn)

158 ***Rellams (Pty) Ltd v James Brown & Hamer Ltd*** *1983 (1) SA 556 (N) at 559C.*

159 ***Rellams (Pty) Ltd v James Brown & Hamer Ltd*** *1983 (1) SA 556 (N) at 558G–559D. See also* ***Richardson's Woolwasheries Ltd v Minister of Agriculture*** *1971 (4) SA 62 (E) where an affidavit by a director of a company which was the agent of the litigant was found not to be in compliance with the subrule.*

160 ***Chauvier v Selero*** *1980 BP 222 at 232A.*

161 ***Rellams (Pty) Ltd v James Brown & Hamer Ltd*** *1983 (1) SA 556 (N) at 560G; and see* ***Greenberg v Pearson*** *1994 (3) SA 264 (W)."*

[13] The nature of the documents are bank statements. In fact, it is the bank statements of 2 specific months: that of December 2012 at ABSA and that of June 2016 at FNB. The plaintiff would not have the necessary authority to summon those bank statements prior to the hearing, except with a

subpoena duces tecum. This could prolong the proceedings. The plaintiff requested, through the Rules of the Court, that the defendant provide him with these two bank statements.

[14] In the opposing affidavit to the application to compel, the defendant states that the bank statements do not exist at the time of the drafting of the affidavit, since it dates a decade ago (from 2012) and on that basis he cannot comply with the Rule 35 notice. In addition to that, the defendant denies that the bank statements are relevant to the issues at trial. The defendant also states that one set of the bank statements relate to the bank statements of the second defendant's trust account and is therefore privileged.

Findings

[15] The fact that the plaintiff's notice in terms of Rule 35 is defective in failing to specify that the defendant should state under oath the where-abouts of the documents, does not give the defendant *carte blanche* to give the plaintiff the run-around and answer the Rule 35 notice in the opposing affidavit of the application to compel.

[16] The fact that the plaintiff did not specify the confirmation of the whereabouts of the documents under oath in the notice in terms of Rule 35, has to be taken into account and will be considered in determination of the appropriate cost order.

[17] The plaintiff is entitled to a response to the notice in terms of Rule 35(3) and 35(6) and the defendants should answer the

notice in accordance with the Uniform Rules of Court, thus *in lieu* of making the documents available for inspection, 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.

[18] The mere fact that the second defendant is an attorneys firm does not bestow on them a blanket cover of privilege in as far as bank statements are concerned. The issue at stake is whether certain payments were allegedly made. The second defendant is not exalted from the Rules in litigation by being a firm of attorneys. Where transactions were conducted which is irrelevant or privileged to the trial proceedings, the privileged parts in the statements can be covered to preserve the privilege.

[19] On the basis of the above, I find that the plaintiff is successful in the application.

Costs

[20] The notice in terms of Rule 35(3) and 35(6) does not stipulate that the defendants should, in the event that they cannot discover the documents, state on oath that the documents are not in their possession, in which the defendant should state the whereabouts thereof, if known. The Rule specifies that this alternative should be stated in the notice.

[21] Since the alternative to the inspection of the documents were not stated in the notice at all, and the Rule 35 was not amended to include such alternative, the defendant is technically correct in their argument that the notice did not require them to do so and that the defendants now, in the opposing affidavit, reveals the status of the requested discovered documents.

[22] On a narrow application of the legal principles in terms of the notice, the plaintiff was wrong in not informing the defendant about the alternative in the notice, and the defendant was wrong in not answering to the notice under oath, despite not having been informed as such in the notice. The defendants are well aware of the process of discovery and the Rules as the 2nd defendant is a firm of attorneys.

[23] On this basis, I deem it just and fair to grant no party costs of the application, and order that each party should pay their own costs.

Order

[24] In the premises I make the following order:

i) The respondents (defendants) are ordered to furnish the applicant (plaintiff) with a reply to the applicant's notice in terms of Rule 35(3) and 35(6), within 10 (TEN) days from date of service of the court order on the respondent's attorneys.

ii) Leave is granted to the applicant that in the event that the respondents fail to comply with the order mentioned in paragraph (i) the applicant may apply on the same papers, supplemented if necessary, for an order dismissing the respondents' defence with costs.

iii) Each party is to pay its own costs.

FMM SNYMAN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

APPEARANCES:

DATE OF HEARING:	**25 MAY 2022**
DATE OF DELIVERY OF JUDGMENT:	**06 OCTOBER 2022**
COUNSEL FOR PLAINTIFF:	**ADV T MASIKE**
COUNSEL FOR DEFENDANT:	**ADV VAN NIEWENHUIZEN**
ATTORNEYS FOR PLAINTIFF:	**MAREE & MAREE ATTORNEYS** **11 8TH AVENUE** **RIVIERA PARK, MAHIKENG**
ATTORNEYS FOR DEFENDANT:	**LABUSCHAGNE ATTORNEYS** **19 CONSTANTIA DRIVE** **RIVIERA PARK** **MMABATHO**
INSTRUCTED BY:	**BOSMAN & BOSMAN ATTORNEYS**