



Reportable:	YES / <b>NO</b>
Circulate to Judges:	YES / <b>NO</b>
Circulate to Magistrates:	YES / <b>NO</b>
Circulate to Regional Magistrates:	YES / <b>NO</b>

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION – MAHIKENG**

CASE NUMBER: 109/2016

In the matter between:

**LEKGOTLA PAUL CHIRWA**

**APPLICANT**

**AND**

**IKEMELENG BAGAEISHO CONSTRUCTION**

**AND PROJECTS CC**

**RESPONDENT**

**ORDER**

Consequently, the following order is made:

1. The application is dismissed.
2. The Applicant is ordered to pay costs of the application from the date delivery of the replying affidavit.

## JUDGMENT

### DJAJE ADJP

[1] The applicant brought an application to compel the respondent to comply with the notice in terms of Rule 35(3) of the Uniform Rules of Court. The notice was issued after the respondent had delivered its discovery affidavit on **12 September 2019**. The applicant's case is that the discovery affidavit by the respondent, did not include any document of substance.

[2] The applicant issued summons against the respondent for services rendered to the respondent as chairperson and project manager. The applicant claims that he is entitled to a *pro rata* distribution of profits of the respondent as a percentage holder member of the respondent. The applicant's claim is as laid out in the amended particulars of claim and summarised in the applicant's heads of argument as follows:

- “2. *The circumstances giving rise to both claims, including the alternative to the first claim, emanate from the Respondent, through the Moses Kotane Local Municipality, obtaining rights of ownership and development in respect of property formally described as Portion 22 of the Farm Olivenboom 62, Registration Division JQ, North West Province (“the property”).*
3. *Pursuant to the securing such rights over the Property, the Applicant was appointed to facilitate the sale or development of the Property, and the*

*Applicant contends that he is entitled to compensation emanating from his successful efforts in securing the developmental potential of the Property.*

*4. Through this intervention, the Respondent secured Sashqia Beleggings CC as a purchaser and developer of the Property. Through the conclusion of a deed of sale concluded with Sashqia Beleggings CC ("Sashqia"), the Respondent would receive significant sums of money. The Applicant contends that he is entitled to share in such proceeds in terms of the aforementioned agreement (as related to services rendered) in addition to in his capacity as a member of the Respondent."*

[3] The applicant seeks an order compelling the respondents to discover the documents as stated in the notice in terms of Rule 35(3). It is the applicant's case that the said documents are relevant and he will not be in a position to proceed with trial without them. These documents will be dealt with hereunder.

### **Bank statements and agreements with Sashqia**

[4] The applicant abandoned the argument as it relates to the bank statement as the respondent indicated that these are not in their possession. It was argued that the respondent concluded a sale agreement with Sashqia and as such the individual sale agreements is evidence of the applicant's efforts for which he should be compensated. The applicant as a member of the respondent is entitled to share in the proceeds of the money paid to the respondent by Sashqia. In contention the respondent argued that based on the claim by the applicant, it is completely irrelevant whether the respondent was paid by Sashqia.

[5] Rule 35 makes provision for the discovery and inspection of documents before trial by the parties in civil litigation. This process is crucial as it ensures that issues can be narrowed before trial and parties are aware of the all the documentary evidence which is available. **See: Durbach v Fairway Hotel Ltd 1949 (3) SA 1081.**

[6] Parties are therefore under a duty to discover all documents which may *“either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.”*(**Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and others 1999 (2) SA 279 (T)** at 316-317).

[7] The applicant in this matter is required to show that the documents requested are relevant and will advance his case directly or indirectly. As submitted by the respondent the applicant has not done that. In the amended particulars of claim the applicant’s claim 1 is as follows:

*“19. Applicant's main claim 1, as set out in the amended particulars of claim”, is simply based upon the following grounds:*

*19.1 Applicant is entitled, based upon the provisions of a written agreement, to payment of R1 '500'000.00 as Project Manager;*

*19.2 Payment of this amount to the applicant should be made by an agreed "escrow agent". Du Plessis van der Westhuizen Inc ("DupWest"), from funds paid by the purchaser (Sashqia) to Dupwest;*

19.3 *Payments will be made to the relevant parties in their proportionate share of the purchase price as the funds become available.”*

[8] The said claim does not require any proof of payment by Sashqia to the respondent. It is entirely based on what payment should be made to the applicant. The same applies to claim 2 in the amended particulars of claim. The claim does not require any proof of payment from Sashqia to the respondent. The discovery of the sale agreement as required by the applicant is not relevant and cannot be granted.

#### **Proof of payment by Sashqia**

[9] The applicant argued that such payments have a direct bearing on the share in *pro rata* portion that he is entitled to as a member of the respondent. The respondent argued that from the pleadings it is clear that no payment would be received by the respondent from Sashqia and as such the respondent cannot discover documents that are not in their possession. The applicant on this point as well had to prove that the documents required are in the possession of the respondents. Failure to do so does not entitle him to an order.

#### **Statement of account of the transferring attorney**

[10] According to the applicant, the transferring attorney accounts to the respondent in relation to any monies paid. Therefore, the attorney's accounts are under the control of the respondent as a client. Again with this point the applicant must prove that these documents exist and are in the control of the respondent. The

respondent argued that the transferring attorneys are not its legal representatives and they have never been in possession of the transferring attorney's statement of account. Those documents are in possession of the attorneys and that is a fact known by the applicant. It is indeed correct that the court cannot order a party to discover documents that are not in their possession. These are documents that cannot be in the possession of the respondent and to order that they be discovered by the respondent would result in an ineffectual legal order.

### **Minutes of the meetings and correspondence pertaining to ownership and development of property.**

[11] The applicant argued that these documents are relevant as they are proof that he was appointed as project manager and the remuneration he is entitled to. In this instance as well, the applicant must prove the existence of these documents and that they are in the possession of the respondent. There is no such proof and as such the point stands to fail.

### **Contents of the attorney's file**

[12] The argument in relation to the statement of accounts was repeated herein. These are not documents in the possession of the respondent and the order to have them discovered by the respondent would not be competent.

### **Costs**

[13] It is trite that costs follow the event and it was argued that the applicant should pay the costs of this application from the date of the delivery of the replying affidavit as the applicant became aware in the answering affidavit that the respondent was not in possession of the documents requested. This submission was correctly made as the applicant persisted with this application despite the answering affidavit indicating that the respondent was not in possession of the requested documents.

### **Order**

[14] Consequently, the following order is made:

1. The application is dismissed.
2. The Applicant is ordered to pay costs of the application from the date delivery of the replying affidavit.

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**J T DJAJE**  
**ACTING DEPUTY JUDGE PRESIDENT**  
**NORTH WEST HIGH COURT**

### **APPEARANCES**

**DATE OF HEARING : 28 OCTOBER 2022**  
**JUDGMENT RESERVED : 28 OCTOBER 2022**  
**DATE OF JUDGMENT : 14 NOVEMBER 2022**

**COUNSEL FOR THE PLAINTIFF : MR KEENY**  
**COUNSEL FOR THE DEFENDANT : MR ESTERHUYSE**