

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



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, GQEBERHA]**

CASE NO.: 3619/2022

In the matter between: -

G[...] D[...]

APPLICANT

and

M[...] D[...] (born M[...])

RESPONDENT

JUDGMENT

ZONO AJ:

[1] The applicant instituted the instant proceedings pursuant to Rule 35(3) notice dated 8 September 2023 which, according to the applicant has not been complied with.

[2] After it became clear to the applicant that the respondent has not complied with the aforesaid notice, she resorted to the instant proceedings, with a view of compelling the respondent to comply with applicant's Rule 35(3)

notice dated 8 September 2023. In essence, the applicant seeks discovery and inspection of the document listed in the notice.

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

“(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 on oath within 10 days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.”

[4] It is apposite for present purposes to set out the documents the applicant seeks discovery of. They are clearly set out in paragraphs 1 to 7 of the notice aforesaid. The documents referred to therein are the following:-

1. *All invoices and proof of payments for hunting packages provided by T[...] V[...] S[...] CC to its clients/consumers for the period 01 March 2023 to 31 August 2023;*
2. *Bank statements, for the periods indicated and for the following accounts held by T[...] V[...] S[...] CC:*
 - 2.1 *FNB Business Cheque account [...] from 1 May 2023 to 31 August 2023;*
 - 2.2 *FNB Credit Card accounts [...] from 1 April 2023 to 31 August 2023; and*
 - 2.3 *FNB Agricultural loan account [...] for the period 1 July 2023 to 31 August 2023.*
3. *Bank account statements for the plaintiff's following personally held accounts and for the periods indicated:*
 - 3.1 *FNB account [...] for the period 1 May 2023 to 31 August 2023, and*
 - 3.2 *FNB credit card account [...] from 1 July 2023 to 31 August 2023.*
4. *All Value Added Tax returns for T[...] V[...] S[...] CC for the period 01 March 2023 to 31 August 2023.*
5. *Notwithstanding the request pertaining to 2 and 3 above, the plaintiff is specifically requested to provide:*
 - 5.1 *Statement No. 227 for plaintiff's FNB Private Cheque Account [...], and*
 - 5.2 *Statement No. 145 for T[...] V[...] S[...] CC FNB Business Cheque Account [...].*
6. *Notwithstanding the requests pertaining to the accounts mentioned in 2, 3, 4 and 5 above, the plaintiff is further specifically requested to provide full and*

complete banking statements for the period 1 September 2022 to 31 August 2023 for the following accounts held either by plaintiff personally or by T[...] V[...] S[...] CC:

- 6.1 *FNB Credit Card [...],*
- 6.2 *FNB Credit Card [...],*
- 6.3 *FNB Credit Card [...],*
- 6.4 *FNB Loan [...],*
- 6.5 *FNB Business Credit Card [...], and*
- 6.6 *FNB Private Credit Card [...].*

7. *All quotes requested, orders placed, or receipts for payments made by either the plaintiff or T[...] V[...] S[...] CC for period 1 July 2023 to 31 August 2023 towards or in respect of:*

- 7.1 *The purchase of game (wildlife) of any kind;*
- 7.2 *Erecting or maintaining the fencing on the Farm D[...];*
- 7.3 *The purchase of feed and the supply of veterinarian services, treatment or medicines for any game (wildlife) kept on the Farm D[...], and*
- 7.4 *The purchase of any other assets, of whatever nature, for the use, conduct or furtherance of the business activities of T[...] S[...] CC.”*

[5] It is clear from the closer scrutiny of those documents that the applicant does not only require respondent's personal documents relating to his finances. The applicant, by and large requires documents relating to financial affairs of T[...] V[...] S[...] CC, which is close corporation registered in terms of the Laws of the Republic of South Africa.

[6] The reason for the applicant to seek discovery of these documents from the respondent, so it is argued, is that the respondent is the sole director or member of the of the close corporation. The applicant further contends that there is interwovenness of respondent's business and personal accounts. That essentially constitutes the basis for seeking respondent to discover the documents which do not belong to his personal accounts, but also to the close corporation.

- [7] I will thereafter deal with the reason why such a contention cannot be sustained. The contention is unavailing. The close corporation is not joined in present proceedings.
- [8] A close corporation is a juristic person, distinct from its members. It has its own assets and liabilities distinct from those of its members. A close corporation can sue or be sued in its own name. That is trite principle of juristic personality.
- [9] This brings me to the question which was hotly debated in court, the issue of joinder. The court *mero motu* raised the question of joinder of T[...] V[...] S[...] CC as the majority of documents, if not all, sought to be discovered belong to the close corporation.
- [10] Firstly, the applicant seemed to take an issue with the fact that the point of non-joinder was raised *mero motu* by the court. It was contended that the court has no power to raise a point which the other party has not raised. I do not agree. In ***Cusa v Tao Ying Metal Industries and Others***¹ it was held that:

“67. *Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the Commissioner’s jurisdiction and to require argument thereon.*”

¹ 2009 (10 BCLR 1; 2009 (4) SA 204 para 67.

This put paid to applicant's complaint about court's powers to raise point of law *mero motu*.

[11] Upon requesting submission from the parties on this point, the applicant only relied on the submission she made that the respondent is a sole director or member of the close corporation and that the accounts of the close corporation and those of the respondent are interwoven. This submission was not substantiated. However, the applicant requested to be given time to reflect on the issue by filing supplementary written submissions. That request was granted and parties were requested to file their respective written submissions, if any, on or before 10h00 on 26 January 2024.

11.1 Only the applicant has filed the written submissions. The nub of applicant's submissions is that the respondent or close corporation will not be prejudiced by discovery of the documents in terms of Rule 35(3) notice and concludes that the close corporation is not a necessary party to be joined in the proceedings. Another submission made is that a plethora of divorce cases discovery of financial documentation of private companies, close corporation, Partnership and Trusts which parties may have a direct and substantial interest, orders were granted without joining those entities.

11.2 I may only comment that those orders, if they were granted under those circumstances, were not founded on sound legal principles affecting joinder, which have been celebrated for years. Subject to the merits of those cases, I find them to be clearly wrong if they were to be applied on the facts of this case.

[12] A party is a necessary party to be joined on the proceedings, if he has a direct and substantial interest in the matter. I find that the close corporation has legal interest in the matter as the order this court is requested to grant affects the disclosure of its financial records. The order sought seeks to invade the financial privacy of the close corporation. That stands to reason that the court order sought cannot be carried into effect without prejudicially affecting the interests of the close corporation. See ***Amalgamated Engineering Union v Minister of Labour***²

[13] I am, as a matter of law, precluded from even considering whether a case has been made out for the grant of the relief being sought. I have no discretion to exercise until all the necessary parties are before court. See ***Nyume & Another v Walter Sisulu University and Others***³.

[14] ***In Khumalo v Wilkins and Another***⁴ Milner J remarked as follows:-

“Once it is shown that a party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the court and his rights may be affected by the judgment of the court, the court will not deal with those issues without such a joinder being effected and no question of discretion nor of convenience arises.”

[15] In the result I make the following Order:

- 15.1 The application is, pending the joinder of T[...] V[...] S[...] CC, postponed *sine die*.**
- 15.2 The applicant shall pay costs occasioned by the hearing of 25 January 2024 on an opposed scale.**

² 1949 (3) SA 637 (A) at 651.

³ (580/19) [2019] ZAECHMHC 13 (20 February 2019) para 12.

⁴ 1972 (4) SA 407 (N) 457 A - B.

A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

Matter heard on : 25 January 2024

Judgment Delivered on : 30 January 2024

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