REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 15724/2021

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

26 MAY 2023 .....

In the matter between:

MERCURIA ENERGY TRADING SA (PTY) LTD	**First Plaintiff/Applicant**
MERCURIA ENERGY TRADING SA	**Second Plaintiff/ Applicant**

and

OMANG TRADING & LOGISTICS (PTY) LTD	**First Defendant/ Respondent**
BUNGANE MAWELISI WILFRED KAKANA	**Second Defendant/ Respondent**
SIPHO WISEMAN MOFOKENG	**Third Defendant/ Respondent**

Neutral Citation: *Mercuria Energy Trading SA (Pty) Ltd & another v Omang Trading & Logistics (Pty) Ltd & 2 others* (Case No: 15724/2021) [2023] ZAGPJHC 577 (26 May 2023)

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 26 May 2023

Summary: *Civil procedure – Discovery of documents – Refusal - Uniform Rules of Court* – Rule 35(3) – *Where a party is dissatisfied with the discovery of another party, it can seek discovery of documents "which may be relevant to any matter in question" – The issue in question is determined from the pleadings, and a determination of the question of relevancy - rule 35(3) discussed - law restated*

Order: Application granted with costs.

JUDGMENT

MUDAU, J:

[1] This is an opposed application by the plaintiffs in terms of Rule of 35(7) of the Uniform Rules of Court for an order compelling the defendants to comply with the plaintiffs' Rule 35(3) notice. The parties have a pending action in this court. The Rule 35(3) notice required of the defendant to discover some documentation. The defendants oppose the application to compel further and better discovery, based on the allegations that the documents sought are not relevant and are privileged.

Background facts

[2] On 30 March 2021, the plaintiffs launched the action against the defendants, claiming payment of R 17 149 377.54. The defendants defended the action and brought a counterclaim. The plaintiffs have pleaded to the counterclaim and pleadings are closed. The plaintiffs and the defendants concluded a written "*FOR Coal Sale and Purchase Agreement*" in May 2017. The terms of the written agreement are common cause.

[3] The particulars of claim alleges further that the plaintiffs and the defendants, in May 2017, concluded an oral agreement in terms of which the parties would enter into an unincorporated joint venture in terms of which the first plaintiff and / or other members of the plaintiffs' group of companies, would procure coal from inland South Africa, and the

first plaintiff would sell the coal to the first defendant, whereas the first defendant would then on-sell the coal to the second plaintiff on a deliver at place ("DAP") basis.

[4] The disputed facts in the action, relevant to this application, are, inter alia, whether, in terms of the oral agreement, the first defendant agreed and undertook to submit and obtain VAT refunds from SARS in respect of the transactions that the parties concluded in terms of the oral agreement; Immediately pay over to the first plaintiff an amount equal to any and all VAT refunds which the first defendant received from SARS; Immediately share with the plaintiffs any information it received from SARS or any other party in connection with the VAT refunds and update the plaintiffs monthly on the status of the VAT; Whether the parties agreed, in terms of the oral agreement, whether the first defendant would be liable to make payment of the full amount of any and all VAT refunds which the first defendant received from SARS, to the first plaintiff and the terms of such payments.

[5] It requires determination whether the documents sought may be relevant to the determination of the issues between the parties. The requested material, which is the subject of this application, is contained in paragraphs 4 to 7 of the notice (annexure JS1) in which the plaintiffs sought the following:

> "4. All internal memoranda and / or documents and / or e-mails and / or correspondence exchanged between employees of the first defendant and / or between the first defendant, the second defendant and third defendant and / or between the second defendant and third defendant relating to the submission and / or filing of the application for the 2018 VAT refunds, during the period between 1 February 2018 and 31 August 2020.'
>
> 5. All correspondence and / or e-mails and / or documents exchanged between any of the defendants and / or employees of the defendants and SARS pertaining to the submission and / or filing of the application for the 2018 VAT refunds, during the period between 1 February 2018 and 31 August 2020.
>
> 6. All correspondence and / or e-mails and / or documents exchanged between any of the defendants and / or employees of the defendants and SARS pertaining to the payment of the 2018 VAT refunds, during the period between 1 February 2018 and 31 August 2020. And

7. All bank statements of the first defendant evidencing payment of the 2018 VAT refunds by SARS for the period between 1 February 2018 and 31 August 2020".

[6] The plaintiffs allege in the founding affidavit that the documents sought are relevant in determining whether the parties concluded the agreement in respect of the VAT refunds in the terms that the plaintiffs allege; whether the first defendant complied with its obligations in terms of such an agreement and whether the first defendant received payment of the VAT refunds from SARS.

[7] In their plea, the defendants state that they are "*exercising their right of retention*" over the VAT refunds, which implies that the VAT refunds have been paid to them. However, the defendants deny in pleading, that they have been paid the VAT refunds by SARS, meaning that it remains a disputed issue, which is the basis of this application. The defendants allege that correspondence and e-mails exchanged between the defendants and its employees, and SARS, are privileged. If privilege is claimed to parts of a document, it should be asserted by redacting the information to disclose those parts of the document that are not subject to the privilege and covering up those that are.[1]

[8] As the plaintiffs contended and correctly in my view, when a litigant claims privilege in respect of documents sought in discovery, it must confirm that the documents in respect of which privilege is claimed, exist, and it must also set out the grounds on which privilege is claimed so that a court can, if called upon, decide whether a document is in fact privileged from production or not. The defendants have failed to set out any grounds to justify why they allege the documents are privileged, as they claim.

[9] Rule 35(3) 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 under

[1] *A Company and Others v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 570E-F.

oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him."

[10] It is trite that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the court is not entitled to go behind the oath of that party unless it is reasonably satisfied that the denial of relevancy is incorrect. The affidavit denying relevance is generally taken as conclusive, and the court will not reject it unless a probability is shown to exist that the deponent is either mistaken or false in his assertion.[2]

[11] From a proper construction however, Rule 35(3) does not require that a document sought be relevant, but that it may be relevant to any matter in question. Discovery affidavits are very important documents in any trial and the party requesting discovery is entitled, in terms of the Rules, to have a full and complete discovery on oath. Rule 35 must be given a wide interpretation and will include any document which may lead to a train of enquiry, which may ultimately serve to advance the case of the party seeking discovery or to damage to case of his adversary.[3] The subrule is not intended to "*afford a litigant a licence to fish in the hope of catching something useful.*"[4] Ultimately, it is for the trial court to resolve whether a document is relevant and admissible during the trial proceedings. It is thus not open for a litigant to withhold a document that may be relevant, if it has no valid reason to do so.

[12] As the plaintiffs contended and correctly in my view, when a litigant claims privilege in respect of documents sought in discovery, it must confirm that the documents in respect of which privilege is claimed, exist, and it must also set out the grounds on which privilege is claimed so that a court can, if called upon, decide whether a document is in fact privileged from production or not. The defendants have failed to set out any grounds to justify why they allege the documents are privileged or irrelevant. From the pleadings in the action, and the nature of the case or the documents in issue, there are reasonable grounds for supposing that the defendants have other relevant documents in

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[2] *Continental Ore Construction v Highveld Steel & Vanadium Corp Ltd* 1971 (4) SA 589 (W) at 597E-F.
[3] *Ferreira v Endley* 1966 (3) 618 (E) at 622B.
[4] *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C) at 515D.

their possession or power. It is clear to me that they have misconceived the principles upon which the affidavit resisting the application was made. I am accordingly satisfied that the plaintiffs request is not a fishing expedition as the defendants allege, nor is it an abuse of process.

[13] ***Order***

1. The respondents shall comply with the applicants' Notice in terms of Rule 35(3) ("the notice") served on 11 August 2022 within five (5) days from the date of service of this order on the respondents or the respondents' attorneys of record, by permitting the applicants and/ or their representatives to inspect and copy the documents described in items 4, 5, 6 and 7 of the notice.

2. The respondents shall pay the costs of this application.

T P MUDAU

Judge of the High Court

Date of Hearing:	28 April 2023
Date of Judgment:	26 May 2023
APPEARANCES	
For the Applicants:	Adv. CJ Bekker
Instructed by:	Bowman Gilfillan Inc.
For the Respondents:	Adv. B D Stevens
Instructed by:	Boshoff Smuts Inc.