IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised :

Date: 30/05/2024

[redacted]
A Maier-Frawley

CASE NO: 8279/2019

AFRICA WIDE INVESTMENT HOLDINGS (PTY) LIMITED Applicant

and

MIGANU INVESTMENT HOLDINGS (PTY) LIMITED Respondent

J U D G M E N T

MAIER-FRAWLEY J:

1. In these interlocutory proceedings, which are opposed:

   1.1. the applicant (plaintiff in the pending action) seeks to compel the respondent to comply with its combined notice in terms of Rule 35(3) and 35(12), delivered on 28 November 2022 (the 'Rule 35 Notice');

1.2. The respondent (defendant in the pending action) in turn seeks in terms of its notice delivered in terms Rule 6(15), the striking out of the last sentence in paragraph 5, paragraph 7.1; paragraphs 10 to 10.7 (inclusive) and paragraph 11 of the applicant's replying affidavit in the compelling application.

2. For convenience, I will refer to the parties as they are cited in the main action.

Compelling application

3. It is common cause that after the close of pleadings in the main action, the defendant filed two discovery affidavits, one in November 2021 and a supplementary affidavit in April 2022. Believing that there were further documents that ought to have been discovered, in November 2022, the plaintiff delivered the Rule 35 notice calling for the production of the specific documents listed in the notice.

4. In terms of the Rule 35 Notice,[1] the applicant seeks production of additional documents which it believes are in the respondent's possession

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[1] In terms of **Rule 35(3)**:

"If any party believes that there are, in addition to documents or tape recordings disclosed...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." (emphasis added)

In terms of **Rule 35(12)(a)**:

"Any party to any proceeding may at any time before the hearing thereof deliver a notice...to any other party **in whose pleadings or affidavits reference is made to any document** or tape recording to—

and/or under its control on the basis that such documents are relevant to matters in issue between the parties and/or were referred to in the defendant's pleadings (and annexures thereto) in the action.

5. Consequent upon the defendant's failure to respond either timeously or at all to the Rule 35 notice, in January 2023, the plaintiff launched an application to compel compliance therewith.

6. In March 2023, albeit late, the defendant delivered its response on oath to the Rule 35 notice. Having considered that such response was non-compliant, the plaintiff elected to press ahead with its application to compel compliance with the relevant Rule. The defendant elected to oppose such application on the basis that it had by then delivered its response to the Rule 35 notice and that the plaintiff could not and the court should not go behind the oath of the person who had deposed to the affidavit on behalf of the defendant.[2]

7. Prior to the delivery of the Rule 35 notice, on 8 September 2022, the court granted an order in terms of Rule 33(4) separating the issue of whether an oral agreement was concluded between the parties (as alleged in the particulars of claim) and determining such issue before the remaining

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(i) produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or

(ii) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or

(iii) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known." (emphasis added)

[2] In the Rule 35 notice, the plaintiff sought production of the documents mentioned in paragraphs 1 to 20 therein. The plaintiff seeks compliance with the request contained in paragraphs 5 to 20 of the Rule 35 notice.

issues in the matter. [3] It is common cause that the separation order was obtained by consent between the parties.

8. In these proceedings the defendant resists production on the basis that the documents sought *'are irrelevant to the separated issue as to whether an oral agreement was concluded during 2005 on the terms alleged."*[4] Why the documents sought were said to be irrelevant to the separated issue was not elucidated in the answering affidavit. The defendant maintained that it had *'provided responses to the Rule 35 Notice and produced responses and documents where they were relevant to the oral agreement issue and with reference to those specific paragraphs in the pleadings referred to in the separation order. Where the production of documents was requested relating to the special pleas and the remaining issues (which are irrelevant to the oral agreement issue),* ***the production of these documents was refused- at least at this stage — until the oral agreement issue has been determined.'*** (emphasis added)

9. The defendant proceeded from the premise that ***'Until the applicant has proved the*** *existence of the oral agreement — and* ***the right to claim the production of the various documents and financial information — the applicant cannot seek the production of these very documents and financial information using the mechanisms under Uniform Rule 35.'*** The defendant contends that such approach *'is consistent with the very purpose of the separation, namely to limit the issues to those that are relevant to the oral agreement issue in order to save both costs and time in the preparation and running of the separated issue'.* The defendant also avers that documents relating to issues beyond the

[3] The order directed that the separated issue would traverse paragraphs 3 to 7 of the particulars of claim, read with paragraphs 53 to 60 of the plea and paragraphs 13 to 14 of the replication filed of record.

[4] Par 20, Answering Affidavit.

separated issue may never become relevant in the event that the plaintiff is unsuccessful in proving the alleged oral agreement.

10. If the defendant's approach were to be accepted as a basic proposition, it would mean that a party would not be entitled to the production of document until it has proved its claim (or defence), which would defeat the purpose of the mechanisms under Rule 35, which is to enable a party to prepare for trial by use of documents which may prove its case and/or disprove its opponent's case.

11. Rule 35(3) provides a procedure for a party dissatisfied with discovery made by the other party to call for the supplementation of discovery which has already taken place, but which is regarded as inadequate. The party called upon to supplement its discovery is required in terms of the subrule to make documents (or tape recordings) which may be relevant to <u>any matter in question</u> in the possession of any party thereto, available for inspection. The 'matter in question' is determined from the issues that have crystallized on the pleadings ie., the issues in dispute as delineated in the pleadings at the close of pleadings. *'Any matter in question'* refers or relates to the entire action.[5] The Rule ordinarily contemplates a full and

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[5] This is discernible from the provisions of subrule 35(1), which provides that "Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of <u>all documents</u> and tape recordings <u>relating to any matter in question in such action</u> (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party<u>. Such notice shall not, save with the leave of a judge, be given before the close of pleadings</u>." (Emphasis added)

The general principle applicable to discovery of documents was articulated in *Durbach v Fairview Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083 as follows:

forthright discovery of all documents in the parties possession and which are relevant to all issues in dispute.

12. The party from whom documents or recordings are sought must make the documents or recordings sought available or explain on oath why it cannot make same available.[6] If the party seeking supplementation is dissatisfied with the explanation as to why the documents or the recordings cannot be made available, such party may seek compliance with its Rule 35(3) Notice, by way of a formal application.[7]

13. Save for the documents listed in paragraphs 15 to 20 of the Rule 35 notice (which the defendant averred - in its affidavit filed in response to the Rule 35 notice - were not in its possession) the defendant does not state that the remaining documents requested are not relevant to *any matter in question*, nor does it state that they are not in its possession. The defendant relies on the agreement to separate issues as a basis to refuse disclosure and production of the documents requested *'at this stage'*,

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"A party is required to discover every document relating to the matters in question, and that means relevant to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it. The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage circumstances in which a party might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation." (emphasis added)

[6] *Mofokeng v Standard Bank of South Africa* (12998/2020) [2022] ZAGPJHC 49 (1 February 2022), par 23.

[7] Id, par 25.

contending that the requested documents are not relevant *'for present purposes'*[8] so as to determine the oral agreement issue.

14. The applicant contends that Rule 35 itself does not provide for deferred discovery, nor does it envisage a limitation of discovery in the action only to a separated issue. There is also no evidence in the papers that the parties' agreement to separate issues included an agreement to limit the ambit of the discovery process hitherto embarked upon by the parties in terms of Rule 35.

15. The doctrine of deferred discovery, as it applies in English law, was considered in the case of *Continental Ore,*[9] where the following was said:

"...once it is accepted that under Rule 35 (7) the Court has a discretion whether or not to enforce discovery or inspection, then there is good reason for applying, in a proper case, the same considerations of logic and of justice as are illustrated in the English cases of deferment of discovery of documents relative to a contingent issue. In those cases the justification for deferment has been recognised in an order for which the English Rules specifically provide. In our Courts justification for

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[8] Par 14, answering affidavit.

[9] *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 595. The relevant facts of the matter in that case were noted, at 593, as follows: "*Other points made in Mr. Barrell's affidavit* [defendant's affidavit] *are that the first issue to be decided in the action will be whether the alleged oral agreement was concluded, and that even if it should be found that a method of determining the price was agreed, one of the issues will then be whether the defendant is under any obligation to disclose the price at which, during 1970, it was selling slag to its other customer or customers on the North American continent. Mr Barrell also says that the documents requested by the plaintiff contain highly confidential information relating to the business relationship between the defendant and Foote Mineral Co. and to the business carried on in vanadium by both of them, and that the disclosure of these documents would be highly prejudicial to the defendant's business relationship with Foote Mineral Co., in that it would reveal details of the latter's business in vanadium, and the plaintiff would thereby secure for itself a valuable competitive advantage over both Foote Mineral Co, and the defendant in a highly competitive market.* (Emphasis added)

deferment may, in a proper case, be recognised in an order permitted by the discretion conferred by Rule 35 (7).

Obviously deferment will only be justified in the exceptional case, where the Court will not oblige the defendant to contest the issue on which the discovery is claimed until the plaintiff has succeeded on the primary issue." (Emphasis added)

At p 596 of the judgment, the court held as follows:

"On the facts of the present case, as contained in the papers filed so far, the defendant would *prima facie* be entitled to seek an order under Rule 33 (4), whereby the question of its liability is to be determined before it is required to reveal the highly confidential information relative to prices. Such an order would appear to be justified on the grounds -

(a) that substantial prejudice would be suffered by the defendant through disclosure of that information to a possible competitor, should it thereafter be found that there was no contract obliging such disclosure; and

(b) that if the defendant is held liable on the main issue, no further trial of any complexity or length would be required on the remaining question of price - indeed that aspect could probably be resolved by an order of Court included in the order on liability.

I have accordingly come to the conclusion that, at this stage, the defendant has justified its contention that it ought not to be ordered to make discovery or allow inspection of such documents as are relevant only to the question of the price charged for slag to customers on the North American continent during 1970." (Emphasis added)

16. In *Makate v Vodacom,*[10] Spilg J held that, in respect of the question of whether or not discovery should be deferred in exceptional circumstances, regard should be had to broader considerations, amongst

[10] *Makate v Vodacom* 2014 (1) SA 191 GSJ, par 29.

others, those that may impact on the possibility of settlement and what best serves the interests of justice in a particular case. In finding that deferral was not justified in that case, Spilg J took into account that the settlement process 'would clearly be inhibited by precluding a genuine settlement if one of the parties withheld documents peculiarly within its possession which are not necessarily confidential, but which allow the other party to fairly appreciate the value of his claim if successful.'

17. What remains clear from the aforementioned authorities is that whether or not to defer discovery has to be considered on a case-by-case basis, with regard being had to factors such as (i) the substantial prejudice that would be suffered by the defendant through disclosure of its confidential information to possible trade competitors in circumstances where the separated issue may be determined in favour of the defendant; (ii) the potential for an applicant to abuse the discovery process; (iii) whether deferring discovery might impact on the possibility of a settlement; or (iv) having regard to the interests of justice in the particular case.

18. The defendant appears to have resisted the compelling application on the basis that it was entitled, as of right, to withhold production of documents which it considered were not relevant to the oral agreement issue as a result of the separation of issues in the matter. Its case in this regard is the following, which is worthwhile quoting verbatim:[11]

"The respondent duly provided responses to the Rule 35 Notice and produced responses and documents where they were relevant to the oral agreement issue and with reference to those specific paragraphs in the pleadings referred to in the separation order. Where the production of documents was requested relating to

[11] Answering affidavit in compelling application, paras 18 -21.

the special pleas and the remaining issues (which are irrelevant to the oral agreement issue), the production of these documents was refused- at least at this stage — until the oral agreement issue has been determined.

This approach is consistent with the very purpose of the separation, namely to limit the issues to those that are relevant to the oral agreement issue in order to save both costs and time in the preparation and running of the separated hearing.

But this is not all. In this action the plaintiff (the applicant herein) seeks an order for the production of various documents and financial information which the applicant alleges it is entitled to based on the terms of the alleged oral agreement. However, the existence of the oral agreement is the very issue separated for determination at the separated hearing. Until the applicant has proved the existence of the oral agreement — and the right to claim the production of the various documents and financial information — the applicant cannot seek the production of these very documents and financial information using the mechanisms under Uniform Rule 35. These documents are irrelevant to the separated issue as to whether an oral agreement was concluded during 2005 on the terms alleged.

The request for these documents and financial information therefore constitutes an abuse of process..."

19. The defendant's approach is not supported by the authorities referred to above. The ordinary rule, as discussed earlier in the judgment, is that discovery must be made of every document relevant to any issue raised on the pleadings, which is in the possession of the defendant. The case of *Continental Ore*, on which the defendant relies in its heads of argument, held, in effect, that deferment of discovery will only be allowed as an exception to the ordinary rule if justified on the facts of the case. The issue of whether or not exceptional circumstances are shown to exist, as also recognised in *Makate,* is case-specific and involves considerations

such as, *inter alia*, the prejudicial nature of the information if it is revealed to party seeking discovery, as discussed above.

20. On my reading of the authorities quoted above, If the defendant wished to persuade this court to exercise its discretion to defer discovery of documents until the oral agreement issue has been decided, it had to show that the present case was of the type of exceptional case that has been recognised by the courts as such, or that other exceptional circumstances exist that warrant the exercise of the court's discretion in favour of granting deferment. Stated differently, the necessary prerequisite for the exercise of the court's discretion is the existence of exceptional circumstances. The existence of exceptional circumstances requires a factual basis. The factors relevant to the exercise by the court of its discretion to defer discovery (mentioned in paragraph 17 above) were not addressed by the defendant at all in its answering affidavit. The defendant has not averred that that it would suffer prejudice in the sense envisaged in *Continental Ore,* nor that the interests of justice require deferment of discovery by reason of facts or circumstances peculiar to this case. Nor did the defendant state in its answering affidavit that the documentation sought in the Rule 35 Notice is highly confidential - relating to its business relationships - so that disclosure would be prejudicial to it, as had been done in the Continental Ore case. It follows that this court cannot exercise a discretion to defer discovery absent exceptional circumstances. And none have been shown to exist on the papers before me.

21. All the defendant did was to state in an affidavit filed in support of the striking out application, that if no oral agreement is found to exist, then

discovery of documents relating to quantum and other issues will constitute an invasion of the defendant's privacy for no good reason. But that statement presupposes that the separated issue will be decided in its favour, which is by no means a *fait accompli*.

22. In order to determine whether or not an oral agreement came into existence on the express, alternatively implied, alternatively tacit terms, as pleaded in the particulars of claim, court will have regard to the subsequent conduct of the parties[12] which would indicate whether an agreement was operating between them, as well as supporting evidence as to the implementation of the agreement.

23. It is trite that the issue of the relevancy of the documents sought to be produced is to be determined by reference to the pleadings and not extraneously.[13]

24. In terms of the oral agreement pleaded in the particulars of claim, as amended, the plaintiff (including the other consortium members) was entitled to be a consortium member/shareholder of the Miganu Property Consortium ('MPC') and entitled to hold a 11% interest in MPC, which

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[12] Whether an oral agreement was concluded between the parties is established by an inference to be drawn from the conduct of the parties. *Cell C (Pty) Ltd v Zulu* 2008 (1) SA 451 (SCA), par 9, quoting *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC* 2002 (1) SA 822 (SCA) 825 para 4.

In *South African Railways and Habours* v *National Bank of South Africa* 1924 Ad 704 at 715, the court stated:

"The law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestations of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement."

[13] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 326E.

entity was yet to be incorporated in a company.[14] Pending such incorporation, the defendant was to be the lead member of MPC and was mandated to secure for the plaintiff (and the other consortium members) a participation in the Growth point BBBEE transaction, which consisted of acquiring shares in Growthpoint Properties Ltd. The plaintiff avers that the defendant was obliged in terms of the oral agreement to provide the plaintiff and other members of MPC and/or the consortium with documents and financial information relating to the financial affairs of MPC and/or the consortium, including dividends received by the defendant in respect of the BBBEE transactions, including dividends declared and/or paid by the defendant and/or on behalf of the consortium and/or by the consortium and/or MPC. It is specifically alleged in paragraph 4.5 of the Particulars of Claim, as amended, that the defendant would conclude the BBEE transaction on behalf of, and for the benefit of, the members as a consequence of the fact that the MPC had not yet been incorporated as a company at the time of the conclusion of the BBEE transaction agreements. It is apparent from the pleadings that Miganu Property Consortium (Pty) Ltd was subsequently registered as the corporate vehicle in which members of MPC would hold rights in respect of the envisaged Growth point BBEE transaction.

25. It is further alleged that pursuant to the conclusion of the oral agreement, on 25 August 2005, the defendant (and other entities referred to in paragraph 5 of the Particular of claim, as amended – which excluded the plaintiff) entered into a relationship agreement with Growthpoint Properties Ltd ('Growthpoint'), *inter alia*, to regulate the beneficial shareholding in Growthpoint held by a consortium (as defined in that

[14] As is apparent from the pleadings, MPC was subsequently incorporated into a company known as Miganu Property Consortium (Pty) Ltd.

agreement) of which, *inter alia,* the defendant was a member. Each of the consortium members referred to in the Relationship Agreement, including the Defendant, warranted and undertook that as at the closing date, the shareholding structure as disclosed to Growthpoint and as set out in Appendix 6 thereto, was true and correct in all respects and reflected all its current shareholders. Appendix 6B, *inter alia*, evidenced that the Plaintiff would hold an 11'% stake in MPC, whilst a subsidiary of the defendant, namely, Miganu Management Company, would hold a 75% stake in MPC.

26. Annexed to the Relationship Agreement was a shareholders agreement. Paragraph A3 of the Preamble to the shareholders agreement records that it was envisaged that the interests of shareholders in the Growthpoint BBBEE transaction (excluding certain named shareholders referred to therein) was to be held in Miganu Property Consortium (MPC), but because the Miganu Property Consortium could not be registered before the conclusion of the Growthpoint transaction, the investment was left in the defendant (i.e.,was registered in the name of the defendant) with all shareholders taking their proportionate share in the defendant.

27. The documents requested in paragraph 5-6; 8-10; 12-14 and 16-20 of the Rule 35 notice relate to what has been referred to by the defendant in its plea. The remaining requests for documents described in paragraphs 7; 11; and 15 relate in to MPC, which are thus relevant *ex facie* the pleadings. Save for the documents requested in paragraphs 9 and 15-20, which the defendant states are not in its possession, production of the documents referred to in the remaining paragraphs of the Rule 35 notice was refused *'at this stage'* on the basis that they are not relevant to the oral agreement issue.

28. In *Democratic Alliance v Mkhwebane*[15] Navsa ADP discussed the requirements of Rule 35(12). The court held that relevance in relation to Rule 35(12) is assessed not on the basis of issues that have crystallised, as they would have had pleadings closed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings (or affidavits) and possible grounds of opposition or defences that might be raised and, on the basis that they will better enable the party seeking production to assess its position or that they might assist in asserting a defence or defences. The question to be addressed is whether the documents sought might have evidentiary value. Thus, where there has been reference to a document within the meaning of the expression (as set out above), and it is relevant, it must be produced.

29. The documents requested in paragraphs 5-6; 8-10; 12-14; and 16-20 of the Rule 35 notice pertain to documents that are referred to or named in the defendant's plea, which documents the plaintiff contends ought reasonably thus to be in the possession of the Respondent. The plaintiff points out in its heads of argument that it is not disputed by the defendant that the documents requested are relevant to the issues on the pleadings. Save for the documents that are averred not to be in its possession, the defendant contends that they are not relevant *for present purposes* i.e in relation to those paragraphs referred to in the order granted in terms of Rule 33(4).

30. Moreover, the applicant argues that despite the agreement to separate issues, all of the documents requested in the Rule 35 notice are relevant

[15] *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA), par 41.

to the action, including the oral agreement issue, in that (i) the documents serve as proof of subsequent conduct and to corroborate the applicant's version as to the oral agreement; and (ii) the documents also serve as proof of conduct consistent with the parties' implementation of the oral agreement and thus prove the oral agreement. In so far as the documents may serve such purpose, they appear to me to be relevant, having regard to the authorities referred to earlier in the judgment on this topic. The defendant did not seek to counter these submissions either its written or oral argument presented at the hearing of the matter.

31. The defendant complains that all the documents that the applicant seeks production of under the Rule 35 Notice relate to *Miganu Property Consortium (Pty) Ltd* for the period 1 August 2005 to date. Accordingly, all these documents relate to a third party which is not a party to this action. However, as the applicant points out, MPC (which consortium was subsequently incorporated as 'Miganu Property Consortium (Pty) Ltd') is inextricably linked to the facts of the matter and the issues in dispute on the pleadings, including the issues delineated on the pleadings in relation to the oral agreement. This submission appears to me to be correct, *ex facie* the pleadings. The notice does not seek to elicit documents extraneous to the applicant's claim or the defendant's defences as pleaded.

32. Even though certain documents are requested with reference to certain paragraphs that are not listed in the separation order (*vide* paragraphs 5; 6; 8; 10; 12; 13; and 14 of the Rule 35 notice), the documents would in my view be relevant to prove or disprove the parties' versions regarding the oral agreement. The shareholding held in in MPC or the defendant, the

earnings that flowed from the Growthpoint BBBEE transaction, the financial statements of MPC, all records evidencing the Growth point BBBEE transaction and the acquisition of shares in Growthpoint Properties, payments made by the defendant on behalf of MPC or loans raised by the defendant and the flow of dividends emanating from the BBEE transaction or paid by the defendant including the basis for such payment, are relevant *ex facie* what is pleaded in paragraphs 4.5.6.6,9 and 7 of the particulars of claim. The documents sought will inevitably evidence the subsequent conduct of the parties and how the oral agreement was implemented.

33. The documents in paragraphs 16-20 of the rule 35 notice are referred to in the paragraphs of the plea as provided for in the separation order. The defendant has stated on oath that such documents are not in its possession, despite a diligent search conducted by it to locate same. In addition, the defendant avers that the documents referred to in paragraphs 9 and 15 of the Rule 35 notice are not in its possession. The plaintiff does not persist with its request in paragraph 9 of the Rule 35 notice.

34. As held in *Swissborough,*[16] the court held that the *onus* is on the party seeking to go behind the discovery affidavit. In determining whether to go behind the discovery affidavit, the court 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

[16] Cited in fn 13 above, at p 320 F-G.

(iv) any admissions made by the party making the discovery affidavit; or

(v) the nature of the case or the documents in issue.

35. As regards the requests in paragraphs 15 to 20 of the Rule 35 notice, which the defendant avers are not in the possession or control of the defendant, the plaintiff submits as follows:

35.1. Re par 15:[17] Diliza, who deposed to the rule 35 response on behalf of the defendant does not state that he is not in possession or control of the requested communications of which he was a party or that he conducted a search therefore. He also does not say that such communications do not exist. As such, the response is perforce deficient.

35.2. Re paragraphs 16 to 19:[18] In respect of these documents, the defendant avers in general terms that it is not in possession or control of 'any further documentation' apart from documents already discovered by it, despite a diligent search conducted therefore. The defendant does not state that the documents requested do not exist. The plaintiff argues that it is entirely improbable that the documents could not be located, given that the documents are referenced by the defendant in its plea. The

[17] The request is for written communications between Powerhouse Financial Solutions and Mzolizi Diliza and/or any board member or shareholder of MPC.

[18] In paras 53 and 55 of the plea, it is averred that the defendant (including other named entities) was invited by Growthpoint Properties to form a BBBEE Consortium for purposes of acquiring shares in Growthpoint Properties. The acquisition of shares was funded through loan raised by consortium partners from various financial institutions with the assistance of Growthpoint properties. In September 2005 the plaintiff was issued with 11% in Miganu Property Consortium (Pty) Ltd and is paid dividends in respect thereof when they are declared.

The requests made in these paragraphs of the Rule 35 notice relate documents relating to the invitation the defendant received from Growthpoint Properties, as referred to in paragraphs 53.2.1 and 55.2 of the plea (par 16); documents evidencing the BBBEE transaction referred to in par 53.2.1 of the plea (par 17); share certificates , directors' resolutions resulting in the acquisition of shares in Growthpoint Properties as referred to in par 53.2.2 of the defendant's plea (par 18); and loan agreements, records and resolutions of directors relating to the loans raised by the defendant as referred to in par 53.2.2 of the plea (par 19).

plaintiff issued summons in respect of its claim in March 2019 and the defendant delivered its plea thereafter, some 4 years after the conclusion of the Growthoint transaction or any invitation by Growthpoint to consortium members (being those named in in par 53.2.1 of the plea). The amended plea (incorporating paragraph 53) was delivered in May 2020, being some 5 years after the transaction. Yet they were referenced in the plea, despite the long passage of time. The Growthpoint BBBEE transaction is at the core of the dispute in the action. It is material to the plaintiff's claim. How it eventuated and how it was implemented impacts directly on the oral agreement issue. It is in my view improbable, given the passage of time, that the requested documents were not in the defendant's possession or under its control when the plea and amended plea were delivered. Interestingly, the defendant does not state in its response to the Rule 35 notice that the documents were previously in its possession or under its control but subsequently became lost or misplaced. Nor does it state in its affidavits filed in these proceedings that no regard was had by it to any such documents, despite being referenced in the plea. The defendant also does it state where they may be located, given that they exist. I am therefore inclined to agree with the plaintiff that a proper response was not provided to the rule 35 notice and that it cannot be correct that the specific documents requested cannot be located.

36. For all the reasons given, it follows that the compelling application must succeed.

Striking out application

37. As indicated at the outset of the judgment, the defendant seeks the striking out of the plaintiff's amended notice of motion in the compelling application, as referenced in par 5 of the replying affidavit, together with paragraphs 7.1; paragraphs 10 to 10.7 (inclusive) and paragraph 11 of the replying affidavit on the basis that it introduces new matter and/or makes out a new case and if not struck out, the defendant will be prejudiced.[19]

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[19] These paragraphs read as follows:

"5...Accordingly, the Applicant will persist with the relief sought in that the Applicant contends...that the Response is wanting, and falls short of compliance with the Rules of the above Honourable Court. In this regard, I annex hereto an amended Notice of Motion seeking to compel the production of particular documents cited in the Notice, and which the Respondent has failed, refused and/or neglected to produce, marked "RA1".

7.1. the Response does not comply with the Uniform Rules of Court in that the Respondent has not furnished documents which are relevant and germane to issues in dispute, in the action ("the inadequate response").

The Applicant contends that that despite the agreement to separate, all of the documents requested in the Notice are relevant to the action and to the oral agreement issue in that:-

10.1. the documents serve as proof of subsequent conduct and to corroborate the Applicant's version as to the oral agreement;

10.2. the documents also serve of proof of conduct consistent with the parties' implementation of the oral agreement, and thus prove the oral agreement;

10.3. The applicant was, in terms of the agreement, entitled to be a consortium member/shareholder of MPC;

10.4. the applicant in terms of the oral agreement is entitled to hold a 11% interest in MPC;

10.5. MPC (the so-called third party) is inextricably linked to the facts of the matter and issues in dispute, as delineated in the pleadings;

10.6. MPC is named in the Relationship Agreement; and

10.7. The documents sought to be produced are named in the Respondent's plea.

11. The issues of relevancy of the documents requested in the Notice are clear, ex facie the pleadings filed of record. The Notice does not seek to solicit documents extraneous to the Applicant's causa and the Respondent's defence. The Respondent cannot rely on the separated issue as a basis not to disclose the documents as the Respondent has an obligation to disclose documents which are related to "any matter in question", and this refers and/or relates to the entire action and the issues in dispute as delineated in the pleadings."

38. The striking out application was seeming precipitated by what was stated in paragraph 21 of the answering affidavit filed in the compelling application, namely, that *"The applicant in any event has made out no case in its founding affidavit, as to the relevance of the documents vis a vis the separated issue as to the oral agreement. Any attempt to make out such a case in reply will be objected to."* The defendant now argues that the applicant introduced new matters and a new cause of action in its replying affidavit.

39. At the time the compelling application was launched, a Rule 35 response had not been delivered by the defendant at all. Having considered that the defendant subsequently delivered an inadequate and non-compliant response, (i.e., one that does not comply with the requirements of the Rule) the plaintiff elected to persist with the relief sought by it in the compelling application. It is axiomatic therefore that until receipt of the response (received subsequent to service of the compelling application) it was unknown whether and on what basis the defendant would resist the production of documents. It was also impossible for the plaintiff to have set out grounds for why the court should go behind the oath regarding the defendant's response to the documents sought in paragraphs 9 and 15-20 of the Rule 35 notice, given that the defendant had not yet responded to the Rule 35 notice.

40. The defendant's complaint is that the plaintiff ought to have filed a supplementary founding affidavit to deal with the issue of relevancy of the documents sought or in which it provided reasons for why the court should not accept the response in which the defendant stated that the documents sought (which are undoubtedly relevant ex facie the pleadings to the separated issue) were not in its possession or why the Court should

order compliance, despite the explanation provided on oath by the defendant.

41. A proper reading of the relevant paragraphs which the defendant seeks be struck out, reveals that it consists of submissions (argument) by the plaintiff as to the relevancy, *ex facie* the pleadings, of the documents sought in relation to the issues in dispute, including the separated issue. In my view, the defendant's arguments are contrived. Firstly, the defendant brought its application in terms of Rule 6(15),[20] which permits the striking out of scandalous, vexatious or irrelevant matter. The defendant has not demonstrated that the submissions contained in the relevant paragraphs constitute such matter. Secondly, as indicated earlier, a court determines relevancy from the pleadings, not extraneously. The plaintiff did not provide new factual evidence in the replying affidavit, rather, it contained submissions in regard to relevancy, having regard to the issues raised in the pleadings at the close of pleadings, being something this court would be entitled to consider since these submissions are included in the Plaintiff's heads of argument. In those circumstances, the question of prejudice does not arise, despite the defendant's contention otherwise. The defendant had an equal opportunity to pursue its lack of relevancy argument at the hearing of the matter. It pegged its sail to the mast when relying primarily on a right to deferred discovery. Thirdly, in responding to what was averred in the answering affidavit, the applicant addressed its dissatisfaction with what it considered was a non-compliant response. As the response was only

[20] Rule 6(15 reads as follows:
"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

delivered after the compelling application was brought, it is understandable that it could not be dealt with in the founding affidavit. In those circumstances, the case did not 'morphe' into a different application, with a new cause of action having been relied on in the replying affidavit, as was suggested by the defendant. Fourthly, the amended notice of motion pertains to documents referred to in the Rule 35 notice, however, which excludes those documents which have indeed been provided by the defendant or which the applicant no longer persisted in seeking. Ultimately, the documents listed in the amended notice of motion are less than those initially sought in the Rule 35 notice, which certainly cannot be said to be prejudicial to the defendant.

42. Ultimately, the true question which requires an answer is whether the approach which is advocated by the defendant, namely to disregard the identified paragraphs in the replying affidavit on the basis that they ought to have appeared in a supplementary founding affidavit, in circumstances where no new factual evidence was actually provided, advance the interests of justice?[21] I think not. It would only serve to increase costs unnecessarily. In so far as the defendant relies on what was stated in paragraphs *Mofokeng, supra,*[22] where the court, in reiterating the trite principle that an applicant must make out its case for the relief it seeks in its founding affidavit and cannot make out its case for the relief it seeks in

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[21] In *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC), par 41, the Constitutional court held that 'What the role of interests of justice is in this kind of application again entails the need to ensure that form never trumps any approach that would advance the interests of justice.' The court went on to state that 'The Constitution and our law are all about real justice, not mere formalities...'

[22] Cited in fn _ above. As recorded in paragraphs 41 & 42 of the judgment, the facts found by the court were that '*As appears from the Replying Affidavit, and the Applicant's Practice Note and Heads of Argument, at the hearing of the Rule 30A Application the Applicant sought entirely different relief to what was set out in the Applicant's Notice of Motion. The Applicant did not file an Amended Notice of Motion and did not file a Supplementary Founding Affidavit.*" The court held that

a replying affidavit, held, based on the peculiar facts of that matter (*inter alia,* that the new relief that had been sought by the applicant in the replying affidavit fell under paragraph 4 of the Notice of Motion, being *Further and/or alternative relief*) that ' Whilst it is certainly desirable that litigants should not be overly technical, and that legal proceedings should be dealt with in as practical a manner as is possible, the rules of procedure cannot be abandoned entirely, as the rules clearly serve a valuable and practical purpose. It is certainly not practical for an applicant to seek different relief to what was sought in a notice of motion at the hearing of an application based on what was alleged in a replying affidavit.'[23]

43. In my view, the facts of *Mofokeng* are distinguishable from the facts of the present matter where, as was pointed out above, no new case was sought to be made out in the replying affidavit, nor was 'new' relief sought therein.

44. Lastly, the defendant relies on the case of *Tragor Logistices,*[24] for its contention the Rule 35 notice is impermissibly being used by the plaintiff to infer the existence of documents under the Growthpoint transaction in circumstances where not all the specific documents requested are

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[23] *Mofokeng,* paras 44 & 45.

[24] *Tragor Logistics CC v Concargo Supply Chain (Pty) Ltd* (461/2021) [2023] ZAWCHC 213 (24 July 2023) at paras 15 & 16, where the following was said:

"In terms of Rule 35(12) a party may request the production of any documents which are referred to in another party's pleadings or affidavits. The Court retains a general discretion in this regard, and will not order a party to produce a document that cannot be produced, or that is privileged or irrelevant.

"Reference" in terms of this Rule has a specific meaning, and reference by mere deduction or inference does not constitute a reference as contemplated. Where the existence of a document can be deduced only through a process of inferential reasoning, then such document does not fall to be produced in terms of Rule 35(12). Reference must thus have been made the document in question. Supposition is not enough. The description of a process is insufficient to trigger Rule 35(12): "...*where a document identifies a process by which documents can (or even probably or certainly will be or were) created, that by itself does not trigger the obligation under the rule*". " (footnotes excluded)

referred to in the relevant paragraphs of the plea as referred to in the notice. The argument is in my view misplaced in the context of the present matter, regard being had to the pleadings and specifically the defendant's amended plea. Firstly, it has not been contended by the defendant, in relation to the documents requested in terms of rule 35(12), that such documents do not exist and/or were never generated. There is also no suggestion in the defendant's affidavits that the plaintiff relies on mere supposition for their existence.

45. Secondly, the request for documents in *Tragor Logistics was extremely wide* and described in vague and generalized terms based on the inference that there had to be written documents where an oral agreement was relied on. As such, the facts are distinguishable from the present matter.

46. Thirdly, it was recognized in *Tragor Logistics*[25] that, *"...with reference to requests for further discovery in terms of rule 35(3), that the subrule is not intended to 'afford a litigant a licence to fish in the hope of catching something useful'. That said, 'relevance' is given a generous meaning for the purposes of discovery, and in this regard mention is often made, with approval, of the dicta of Brett LJ in Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 *that 'It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it*

[25] Id, par 6.

is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."[26] (emphasis added).

47. For all the reasons given, I am persuaded that the striking out application must fail.

48. As regards costs, both parties sought costs on a punitive scale in their papers.

49. In *Nel v Davis SC NO* [2016] JDR 1339 (GP) at para 25, Davis J stated:

> "A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation."

50. In *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39 at para 46, the court put it thus:

> "[T]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

51. These aforementioned cases were endorsed by the Constitutional Court in the minority judgment by Mogoeng CJ in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paras 8 and 40.

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[26] Quoted from *Investec Bank Ltd v O'Shea NO* [2020] ZAWCHC 158 (16 November 2020) at para [16].

52. The facts of the present matter do not in my view warrant a finding of 'indubitably vexatious' litigation or reprehensible conduct on the part of the litigants or their legal representatives.

53. Accordingly, the following order is granted:

1. The compelling application succeeds with costs. In this regard, the respondent/defendant is ordered to:

    1.1 Comply with the disclosures sought in paragraphs 5 to 20 (inclusive) of the Plaintiff's Notice in terms of Rule 35(3) & (12) dated 28 November 2022;

    1.2 Pay the Applicant/plaintiff's costs on the scale as between party and party.

    1.3

2. The striking out application is dismissed with costs.

AVRILLE MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	12 March 2023
Judgment delivered	30 May 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 30 May 2024.

APPEARANCES:

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