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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 18562/2015

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
18/303/2016

In the matter between:

MAWENZI MANAGEMENT SERVICES (PTY) LTD

MZILIKAZI GODFREY KHUMALO N.O on

behalf of **MAWELA FAMILY TRUST**

MAKHOSAZANA KHUMALO N.O on

behalf of **MAWELA FAMILY TRUST**

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

And

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES**

RESPONDENT

JUDGMENT

WINDELL J:

Introduction.

[1] This is an application for an order to compel the respondent (SARS) to produce certain documents requested in terms of Rule 35 (12).

[2] SARS opposes the application on the basis that it did comply with the rule 35(12) notice as it made available for inspection all the documents referred to in the answering affidavit. SARS also contends that the remainder of the documents referred to in the rule 35(12) notice are not documents referred to in the answering affidavit and that the applicants are therefore not entitled to it.

[3] SARS also contended that despite making documentation available to the applicants for inspection more than six months ago the applicants have not made use of the opportunity to inspect these documents. It is submitted that this application constitutes an abuse of Rule 30 A and was brought merely to delay and frustrate the winding –up of Mawela Properties (Pty) Ltd (in liquidation) (*hereinafter referred to as “Mawela Properties”*).

Background.

[4] The applicants launched an application (“the main application”) for the removal of the liquidator (“Mr van den Heever”) in the winding up of Mawela Properties on 22 May 2015. The applicants also move for an order to interdict Mr van den Heever and his co-liquidators from selling, alienating or disposing of any assets of Mawela Properties pending the finalisation of the main application.

[5] SARS was joined as a respondent in the main application as it is a creditor in the winding up of Mawela Properties.

[6] The main application is opposed by the liquidators and SARS and SARS has filed its answering affidavit in the main application.

The legal position

[7] Rule 35(12) of the Uniform Rules of Court governs the production of documents referred to in a party's affidavit. The rule provides that *“any party to an action or proceeding may at any time before the hearing give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce that document for inspection and to permit him to take a copy of it.”*

[8] It is trite that the rule is intended to cover the situation where an averment flows from or is related to something contained in a document, and not to an averment based on an inference drawn from the absence of any reference in any document¹. The inspection cannot be demanded of documents not referred to but the existence of which can be inferred from an affidavit or pleading. A document which has not been referred to in an affidavit, but is referred to in a document annexed to it, may fall within the ambit of the rule.²

The documents

[9] In the Rule 35 (12) notice the applicants requested more than 18 separate documents. SARS has accepted that the applicants are entitled in terms of Rule 35 (12) to the following documents:

- i. The final draft version of the liquidators answering affidavit referred to in paragraph 7 of SARS answering affidavit (**Request 3.2**);
- ii. The letter to Mr. Van den Heever dated 18 February 2015 referred to in paragraph 107 of SARS answering affidavit (**Request 17.2**);

[10] The applicants conceded during the hearing of the application that they are not entitled to the documents (if any), or email correspondence that accompanied the final draft version of SARS answering affidavit. (**Request 3.3**) They also conceded that no reference was made to a document in paragraph 108 of the answering affidavit and that they are therefore not entitled to *“a copy of the instruction to Mr van den Heever”* (**Request 18.2**)

¹ *Penta Communication Services Pty Ltd v King and Another* 2007 (3) SA 471 (C)

² *Universal City Studio v Movietime* 1983 (4) SA 736 (D)

[11] The remainder of the requests which are refused relate to the following averments in SARS answering affidavit:

- i. Documents relating to the SARS deponent's authority.(paragraphs 2-4 of the answering affidavit)
- ii. The information and documentation which SARS holds regarding Mawela and other entities. (paragraphs 5 of the answering affidavit)
- iii. Documents relating to SARS claims.(paragraphs 37.1,37.2, 37.3, 37.4, 37.5 37.6 of the answering affidavit)
- iv. SARS further claim against Mawela properties.(Paragraph 38 of the answering affidavit)

Request 1: SARS deponent's authority

[12] In paragraphs 2,3 and 4 of SARS answering affidavit the deponent stated that she is a SARS official as envisaged in section 6 of the Tax Administration Act 28 of 2011 ("the Act"). She further states that she is duly authorized in terms of sections 11(1) and (2) of the Act to depose to the affidavit. She also states that she is exercising her duties under the control, direction and supervision of SARS as contemplated in sections 3 to 6 of the Act.

[13] The applicants requested SARS to produce a copy of the delegation by the Commissioner.

[14] In the answering affidavit no reference was made to a written delegation by the Commissioner. The applicant relies on the deduction that there must be a written delegation because the Act makes provision for it.

[15] In *Penta Communication Services Pty Ltd v King and Another*³ the question arose whether the production of documents can be compelled when they are alleged not to be functional to the compelling party's case and whether indirect allusions to documents may trigger the provisions of the Rule 35 (12).

³ 2007 (3) SA 471 (C)

[16] The respondent in *Penta* stated the following in its founding affidavit in the main application: “ *The aforesaid funds were then systematically transferred to another Absa account (No [....]).....*” The applicant then requested any and all documents relating to the specified bank account. It was argued on behalf of the applicant that where upon analysis of a statement it can reasonably be inferred that a document/s must exist relating to that fact or allegation, then the opposing party is entitled to it. ⁴

[17] After considering the arguments the court held the following:

“[17] This was in effect the argument adopted by the second respondent in the compelling application. In my view this extends the provisions of Rule 35(12) too far in that it gives the concept of a 'reference' to a document so broad a meaning as to make it almost superfluous. In my view this does not fit within the purpose or scope of Rule 35(12). The Rule provides a mechanism for a party to obtain production and inspection of documents prior to making out his case where these documents have been referred to by another litigant but not annexed. To give the Rule the wide meaning contended for by Mr *Vetten* would be to sanction immediate and full discovery as provided for by Rule 35(1). This is not the purpose of Rule 35(12)”.

[18] In par 18 Bazalek J concludes that:

“[18] Reverting to the particular documents sought, no doubt where a bank account is utilised there must exist somewhere documents evidencing its existence and its use. It does not follow, however, that a reference to that bank account, without more, constitutes a reference, for the purposes of Rule 35(12), to documentation relating to such bank account.”

As stated in *Penta*⁵ a litigant cannot use Rule 35(12) as a mechanism whereby a litigant can go behind the words of an affidavit and “argue that although no direct or even indirect reference is made to a document that such document would in the ordinary

⁴ *Penta* at [17]

⁵ *Penta* [21]

course of events exist” and must, if in the possession of the opposing party be produced.

[19] I am not convinced that the written delegation is covered by Rule 35(12).

Request 2: The information and documentation which SARS holds regarding Mawela and other entities

[20] In paragraph 5 of the answering affidavit the deponent states the following:

“I have been involved in this matter since the latter part of 2013 and the information and documentation which SARS holds regarding Mawela Properties and the related entities referred to herein fall under my direction and control”

[21] The applicant requested SARS to produce the documentation that SARS holds regarding Mawela Properties and the documentation relating to *“the related entities”*.

[22] Paragraph 5 of the answering affidavit must be seen in context. The reason for paragraph 5 is to convince the reader that the deponent has the necessary personal knowledge in regards to Mawela Properties and the other related entities to enable her to depose of the affidavit. The reference to “information and documentation” clearly does not refer to a specific document as envisaged in Rule 35 (12).

[23] The documents requested do not fall within the ambit of Rule 35 (12).

Requests 4 to 15: Documents relating to SARS claims

[24] In paragraphs 37.1,37.2, 37.3, 37.4, 37.5 37.6 of the answering affidavit SARS referred to the claims it has against certain other entities where Mr van den Heever has been appointed a liquidator and /or co-liquidator. SARS attached several documents in support of the claims against these entities. (**SARS 2 to SARS 19**)

[25] In *Universal City Studio v Movietime* 1983 (4) SA 736 (D) it was held that where a document is not referred to in an affidavit but in a document annexed to it, the document referred to will fall within the ambit of the subrule.

[26] In par 37.1 SARS makes reference to “a claim for unpaid taxes” against Lwami Investments (Pty) Ltd (in liquidation) in an amount of R 89 025 076.69. The applicants requested SARS to provide proof of the debt and how the assessment was arrived at. They also requested “*the related documentation evidencing how the amount of R 89 025 076.69 was arrived at*”. Request was also made for “*copies of the claims submitted to the liquidator together with all the supporting documentation that has been sent , including the necessary affidavits*”

[27] SARS attached “SARS 2”, a Master’s certificate of appointment that relates to Lwami Investments (Pty) Ltd (in liquidation). It shows the registration number and the winding up of Lwami Investments (Pty) Ltd. “SARS 3” attached to the affidavit is a copy of the claim which SARS approved in the winding up, setting out the details. A similar situation applies to the other entities referred to in paragraph 37.2 to 37.6.

[28] To the extent that reference was made to claims relating to other entities, SARS annexed the necessary documents setting out the details of the claims. In my view the applicants is not entitled to additional documentation evidencing how the amounts were arrived at.

SARS further claim against Mawela properties

[29] In paragraph 38 of the answering affidavit it is stated that SARS has further claims of more than R 750 000 against Mawela Properties. The claims are based on returns submitted for the 2014 to 2015 VAT periods. It is also stated that there are further claims of more than R 250 000 for SDL and UIF.

[30] The applicants requested “ *the documents in relation to the further claims of more than R 750 000 to be produced*”.

[31] In *Holdsworth and Others v Reunert Ltd* 2013 (6) SA 244 (GNP) reference was made in the affidavit to a “proved claim”. No documents were attached to the affidavit. The court held that reference to a claim refers to submission of an affidavit, which is a document within the meaning of rule 35(12).

[32] No documents were attached to the answering affidavit in support of the additional claims against Mawela Properties. The applicants are entitled to the documents in relation to the further claims.

Costs

[33] The documents referred to in paragraph 38 of the answering affidavit appear prima facie, to be relevant. It will only be possible to ascertain during the hearing of the main application if it was indeed relevant and necessary. For this reason costs in this application is reserved.

Conclusion

[34] In the result the following order is made:

1. The respondents are ordered to produce for inspection and allow the applicants to make copies of the documents requested in paragraph 16 of the Rule 35 (12) notice.
2. The documents referred to above must be produced and made available to the applicants within seven days from the date of this order.
3. Costs reserved.

L. Windell

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Attorney for applicants: Shepstone & Wylie Attorneys

Counsel for appellants: Advocate Bava SC

Attorney for respondent: Gildehuys Malatji Attorneys

Counsel for respondent: Advocate Snyman SC

Date matter heard : 1 March 2016

Judgment date: 18 March 2016