

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/44089

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
30 MARCH 2012	
DATE	SIGNATURE

In the matter between:

HEMINGWAYS SHOPPING CENTRE (PTY) LTD

Applicant

and

PD NAIDOO & ASSOCIATES CONSULTING

Respondent

ENGINEERING (PTY) LTD

J U D G M E N T

KATHREE-SETILOANE, J:

[1] Hemingways Shopping Centre (Pty) Ltd ("the applicant") seeks an order compelling PD Naidoo & Associates Consulting Engineering (Pty) Ltd ("the respondent") to deliver:

- (a) the further particulars sought in its request for further particulars, dated 5 August 2011, within 10 court days after service of a copy of the court order; and
- (b) its notice in terms of rule 35(6) within five court days after the date on which the court order is served, which notice must state a time, within 5 days of the delivery of the respondent's notice, when the documents listed in paragraphs 1 to 8 of the applicant's Rule 35(3) notice, dated 5 August 2011, maybe inspected at the offices of the respondent's attorneys of record.

[2] For purposes of this hearing, I am required to only make a determination on the breath of the orders sought by the applicant. In other words, does the relief which the applicant seeks in its notice of motion constitute blanket orders?

[3] It is the respondent's contention that the relief sought in the notice of motion is not competent, as the manner in which the prayers are formulated constitute blanket orders. It submits, in this regard, that the applicant is only entitled at this stage to seek an order compelling the respondent to deliver its reply to the applicant's request for further particularity and to comply with the rule 35(3) notice. It therefore urges the court to grant an order in the terms set out in its letter to the applicant, dated 18 January 2012, in which it tendered that the applicant takes an order on an unopposed basis as follows:

- (a) that the plaintiff is compelled to deliver its reply to the defendant's request for further particulars for purposes of the trial within 10 court days; and
- (b) that the plaintiff is compelled to comply within 10 court days with Rule 35(3) of the Uniform Rules of Court in respect of the defendant's notice in terms of Rule 35(3).

The applicant, however, rejected the tender and denied that the orders sought constitute blanket orders.

[4] The respondent's complaint is that the so called "blanket order" sought by the applicant in respect of the further particulars is aimed at depriving it of the opportunity to refuse to deliver the further particulars when it files its answer, the effect being that the respondent will be in contempt of court should it refuse, even on proper grounds, to deliver the further particularity sought. It, likewise, contends that the order sought in terms of rule 35(6) is aimed at depriving the respondent of the opportunity of stating under oath that the documents sought are not in its possession, and that if it had to state that the documents are not in its possession, then it would be in breach of the court order.

[5] The so called "blanket order" approach originated in the Cape where, in applications to compel, the Court often made an order for compliance with a request for further particulars, on the assumption that the respondent retains some residual right to challenge the applicant's entitlement to the information sought when dealing with the individual questions posed in the request. The

practise in the Cape was to order the respondent to furnish a reply to a request for further particulars within a specified period of time. (*Houtlands Investment (Pty) Ltd v Traverso Construction (Pty) Ltd* 1976 (2) SA 261 (C) at 265 - 266).

[6] The criticism against granting such an order was that a respondent who was ordered to furnish a reply could find itself to be in contempt of court for failing to answer a particular question. This criticism was, however, rejected by the Cape Provincial Division in *Houtlands* (at 265-267), when it stated as follows:

"Whether or not a party is in contempt of the order must depend, in the first instance, upon the true meaning of the order as conveyed by its terms. An order to furnish a reply to a request for further particulars will clearly not be interpreted to contemplate that information which is unknown and which is unavailable to the party against whom the order is directed and which it is impossible for him to furnish, must be furnished on pain of being found to be in contempt of the order. Wilson v. Die Afrikaanse Pers Publikasies (Edms.) Bpk. 1971 (3) SA 455 (T) at pp 462-3. Impossibility of complying with an order of Court is an answer to a charge of contempt of the order. A party who has been ordered to reply to a request for further particulars may answer that the information sought is unavailable and unknown to him."

[7] In *Wilson v Spitze* 1987 (4) SA 118 (C) which also involved an application to compel, the Cape Provincial Division rejected the approach followed in *Houtlands* and expressed its preference for the practise followed in the Transvaal (as it was then known). It stated as follows (at 132-3):

*"It is true that in the Cape, in unopposed applications to compel, the Court often makes a blanket order (usually 'with costs') for compliance with a request, on the assumption that the respondent retains some sort of residual right to challenge the applicant's entitlement to the information sought when dealing with the individual questions posed in the request. Perhaps it is this approach and the fact that Rule 21(7) is seldom if ever invoked that is responsible for the proliferation I perceive in this Division of requests for particulars in which the basic rules are honoured far more in the breach than the observance. I never cease to be amazed at the number of questions practitioners are capable of thinking up to even the most prosaic and straightforward of allegations. In my respectful view this approach is wrong. Not only does an initial blanket order, especially one granted with costs against the respondent in default, make it difficult to comply with the injunction contained in Rule 21(7) (cf *Moaki v Reckitt and Colman (Africa) Ltd* and *Another* 1968 (3) SA 98 (A) at 102C-D)', but it is illogical that the Court should be asked to make an order twice in regard to the same matter; moreover, on the second occasion notionally contradicting the first order made, as is contemplated in *Houtlands Investments (Pty) Ltd v Traverso Construction (Pty) Ltd* 1976 (2) SA 261 (C) at 266A-C. It is preferable that the Court should, as in *Transvaal* (according to Nathan, Barnett and Brink *Uniform Rules of Court* 3rd ed at 142), order compliance with only so much of a request for particulars as has been properly made."*

[8] Whilst a single stage approach would have been the practice in Transvaal (now the Province of Gauteng) in the past (*JCI Co Ltd v Mitchmor Investments (Pty) Ltd* 1971 (2) SA 397 (W)), this is not the practice currently. The practise in the North and South Gauteng Divisions of the High Court is for compliance to be ordered in two stages:

"(a) If there has been no response at all to the request for particulars, an order is granted compelling a reply to the request within a specific time.

At this stage, no consideration is given to the issue of whether the particulars sought are strictly necessary to enable the party seeking the particulars to prepare for trial.

- (b) *The party seeking further particulars may be dissatisfied with the response. In that event, that party seeks an order compelling the other party to furnish the particulars sought. The issue to be determined would generally be whether the particulars sought are strictly necessary to prepare for trial.”*

(Joffe *et al*, High Court Motion Procedure: A Practical Guide (2010))

[9] Having regard to the two stage approach which is followed in this Division, the applicant would only be entitled, at this stage, to an order compelling the respondent to deliver a reply to its request for further particulars. Such an order, in my view, does not constitute a blanket order as the respondent will, in its reply, have the opportunity to indicate whether or not it is able to comply with the order. It will, therefore, not be in contempt of the order for being unable to comply, on good grounds.

[10] In my view, the term “blanket order”, which has been used to describe orders such as the one made by the Court in the *Houtlands* matter, is both unsuitable and inappropriate. A blanket order would, in my view, be one which is made without giving proper consideration to the consequences which might flow from the inability or impossibility to comply therewith. An order of the nature sought by the applicant in prayer (1) of the notice of motion would, in my view, constitute a blanket order, as in the event of the

respondent being unable to comply therewith, it could be found to be in contempt of court. An order, such as the one which I am required to make in terms of the practise which is followed in this Division — compelling the respondent to deliver a reply to the applicant's request for further particularity within a specified period of time — should not, therefore, be described as a blanket order.

[11] I now turn to the application to compel discovery. Rule 35(3) provides that if a party believes that in addition to those documents discovered, other documents and tape recordings exist, which may be relevant to any matter in question, that party may give notice to the other party to make the documents or tape recordings available for inspection in terms of Rule 35(6), or to state on oath that such documents are not in his or her possession, within 10 days of the service of the notice.

[12] Rule 35(6) provides that a party may by notice require inspection of documents or tape recordings discovered. The party in receipt of the notice must respond, within 5 days of receipt of the notice, stating a time, within 5 days of receipt of the notice, when the requisite inspection can occur. Rule 35(6) relates only to the inspection of documents already discovered, and not to documents that have not been discovered.

[13] It is apparent from the applicant's founding affidavit that the documents which it requires the respondent to make available for inspection, in terms of Rule 35(6), are documents which the respondent had not

discovered by way of its discovery affidavit. Rule 35(3) is applicable to the discovery of such documents. Accordingly, in an application to compel discovery of documents not discovered, the appropriate order would be that which is contemplated in Rule 35(3), namely an order compelling the respondent to comply with the applicant's notice in terms of Rule 35(3) within a specified period from the date of service of the order on the respondent's attorney of record.

[14] If, as contended for by the applicant, the Court is to order the respondent to deliver its notice in terms of Rule 35(6) stating a time when the documents listed in the applicants Rule 35(3) notice may be inspected at the offices of the respondent's attorney of record, then the respondent will be denied the opportunity of stating under oath that the documents sought are not in its possession, if this is the case.

[15] The application to compel discovery is made in terms of Rule 35(3) and not Rule 36(6). However, the relief sought by the applicant in prayer (2) of its notice of motion is in accordance with that which is contemplated in Rule 35(6). Rule 35(6) is only applicable to documents or tape recordings which have already been discovered. The documents sought in this application are documents that have not been discovered by the respondent. The respondent must therefore be given an opportunity, in terms of Rule 35(3), to state on oath whether such documents are in its possession or not. The order sought by the applicant in prayer (2) of the notice of motion does not provide the respondent with such an opportunity. Consequently, should the respondent be

unable to make available for inspection the documents sought, within the specified time, it could be found to be in contempt of court. In the circumstances, the order sought by the applicant in prayer (2) of the notice of motion would constitute a blanket order.

[16] In the result, I make the following order:

- (1) The respondent (plaintiff in the action) is ordered to deliver a reply to the applicant's request for further particulars within 10 days of service of this order on the respondent's attorney of record.
- (2) The respondent (plaintiff in the action) is ordered to comply with the applicant's notice in terms of Rule 35(3) within 10 days of service of this order on the respondent's attorney of record.
- (3) The applicant (defendant in the action) is ordered to pay the costs of the application.



KATHREE-SETILOANE, J
SOUTH GAUTENG HIGH COURT
JOHANNESBURG

APPLICANT'S COUSEL: MR AN KRUGER
 APPLICANT'S ATTORNEYS: EBERSOHN ATTORNEYS
 RESPONDENT'S COUNSEL: MR JF STEYN
 RESPONDENT'S ATTORNEYS: NORTON ROSE ATTORNEYS

DATE OF HEARING: 16 February 2012

DATE OF JUDGMENT: 30 March 2012