IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***6th May 2020*** Signature: ***(Signed) Adams J***

CASE NO: 07182/2016

DATE: 6th MAY 2020

In the matter between:

INCUBETA HOLDINGS (PTY) LIMITED Plaintiff

and

MINDSHARE SOUTH AFRICA (GAUTENG) (PTY) LIMITED Defendant

Coram: Adams J

Heard: 5 May 2020

Delivered: 6 May 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to the CaseLines system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14h30 on 6 May 2020.

Summary: Practice and Procedure – applications to compel better discover and application to compel better further particulars for trial – rule 35(3) and rule 21(2) discussed – applications to compel better discovery granted – application to compel better further particulars for trial refused

ORDER

(1) The defendant shall within ten days from the date of this order comply with the plaintiff's notice in terms of rule 35(3) dated the 21st of December 2019 by making available for inspection in accordance with rule 35(6) the documents referred to in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11 and 12 of the plaintiff's aforementioned rule 35(3) notice, as well as any and/or all invoices received by the defendant from Xaxis for the period 1 April 2016 to 30 June 2016

(2) In the event of the defendant's non-compliance with the order in paragraph (1) above, the plaintiff is hereby granted leave to apply on the papers in this application, duly supplemented, to have struck out the defendant's defence and for judgment against the defendant.

(3) The defendant shall pay the plaintiff's costs of plaintiff's application in terms of rule 35(7) to compel better discovery, including the costs consequent upon the employment of two Counsel.

(4) The defendant's application in terms of rule 21(4) to compel better further particulars is dismissed with costs, which costs shall include the plaintiff's costs consequent upon the employment of two Counsel.

(5) The defendant's application in terms of rule 35(7) to compel plaintiff to better comply with defendant's rule 35(3) notice succeeds with costs.

(6) The plaintiff shall within ten days from the date of this order comply with the defendant's notice in terms of rule 35(3) dated the 20th of January 2020 by filing an affidavit in reply to paragraphs 8, 10 and 13 of the said rule 35(3) notice in which affidavit the plaintiff shall declare under oath which of the documents requested in the said notice are not in its possession and also state the whereabouts of such documents, if known to it.

(7) In the event of the plaintiff's non-compliance with the order in paragraph (6) above, the defendant is hereby granted leave to apply on the papers in this application, duly supplemented, for a dismissal of the plaintiff's claim.

(8) The plaintiff shall pay the defendant's costs of defendant's application in terms of rule 35(7) to compel better discovery.

JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action.

[2]. Before me are three interlocutory applications, one by the plaintiff and two by the defendant. In the first application the plaintiff applies in terms of uniform rule of court 35(7) for an order compelling the defendant to comply with its rule 35(3) notice. In the second application the defendant applies in terms of rule 21(4) for an order compelling the plaintiff to deliver further and better particulars of claim to enable it to prepare for trial. Lastly the defendant applies in terms of rule 35(7) for an order compelling the plaintiff to comply with its (the defendant's) rule 35(3) notice.

Plaintiff's application to compel better discovery

[3]. On 8 January 2020, the plaintiff delivered its Rule 35(3) Notice, calling upon the defendant to make available for inspection further documents in its possession which documents the plaintiff believes to be relevant to matters in question in the action. On 25 February 2020, the defendant replied by serving its affidavit in terms of Rule 35(3). With reference to each and every one of the documents requested to be inspected by the plaintiff, the defendant gave the following generic response.

[4]. The defendant refuses to make available to the plaintiff for inspection the documents listed in plaintiff's rule 35(3) notice, because, so the defendant alleges, the documents are not relevant to any of the matters in the action and because the documents were so widely framed. The defendant alleges in any

event that, where the documents do in fact exist, they should not be discovered on the basis that the documents are privileged and/or confidential and/or that it would not be in the interest of justice to be disclosed.

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

[6]. My reading of the defendant's reply to the plaintiff's rule 35(3) notice is that the defendant in essence objects to the production of the documents on the basis that they are irrelevant. In addition, the defendant avers that the documents are framed too widely.

[7]. In my view, the latter ground of objection is without merit. One needs look no further than the description of the documents required as per the plaintiff's rule 35(1) notice. So for example the plaintiff requires inspection of:

'1. All invoices submitted by the defendant to any and/or all of its clients relating to the management by the defendant of all *Google* search and *Google* display campaigns for the period 1 January 2014 to 30 June 2016'.

[8]. This is as wide as the documents requested are framed. This example also represents a good example of all of the documents requested to be inspected by the plaintiff. Most, if not all, of the documents requested relate to the period from the 1st of January 2014 to the 30th June 2016. Although the documents listed may be voluminous, I do not believe that the description is widely framed. On the contrary, if regard is had to all of the documents listed in the rule 35(3) notice, the description is very specific and crystal clear. To give another example, the plaintiff requires inspection of:

'10. All agreements concluded by the defendant with any service providers in respect of the management of *Google* search and *Google* display campaigns for the period 1 January 2014 to 30 June 2015.'

[9]. Therefore, the contention by the defendant that the documents requested have been framed too widely as a ground of objection is not sustainable and is devoid of any merit.

[10]. That brings me back to the main ground of the objection, namely the contention that the documents requested to be inspected by the plaintiff are not relevant to the matters in the action.

[11]. The plaintiff contends that it is clear that the documents are relevant to matters in question in the action and that the defendant's reasons for its failure to make the documents available for inspection are without merit.

[12]. The case of the plaintiff in the main action is based on damages for the breach of a contract, which contract was to endure from the 1st of January 2014 to the 30th of June 2016 – therefore for a period of two years and six months. In its particulars of claim the plaintiff avers that the defendant breached the terms of the contract between the parties in that it (the defendant) *inter alia* failed to make use exclusively of the services of the plaintiff as provided for in the agreement. This, so the plaintiff alleges, was a breach of the exclusivity clause 2.4 of the Agreement. Therefore, in a nutshell it is the case of the plaintiff that the defendant utilised the services of other service providers or performed the duties itself when it was obliged in terms of the agreement to utilise the plaintiff's services in the provision of services agreed upon in the contract.

[13]. The documents which the plaintiff requires the defendant to discover, such as the invoices mentioned above, so the plaintiff contends, will demonstrate exactly the breach and the extent thereof. The defendant charged its clients, so the argument on behalf of the plaintiff continues, for the services which were supposed to be rendered by the plaintiff to the defendant but instead was rendered by the defendant itself or outsourced to other service providers. The documents required, so contends the plaintiff, will prove the breach by the defendant of the exclusivity clause in the agreement.

[14]. The relevance of the documents requested by the plaintiff, including emails between employees of the defendant and defendant's clients relating to managing *Google* search and *Google* display campaigns – showing the breach

of the exclusivity clause of the agreement, is, according to the plaintiff, self-evident.

[15]. The defendant contends in the main action that the plaintiff failed to comply with the Service Level Agreement in that the plaintiff's reporting was inaccurate and/or late, which in turn affected the defendant's ability to report back to its clients timeously. In this interlocutory application the defendant contends that the conduct by the defendant, which, according to the plaintiff amounts to breaches of the agreement, is admitted by the defendant, and those issues are no longer in dispute. The defendant admits that they engaged the services of other service providers or performed some of the services themselves, so it is not necessary for the plaintiff to have access to the documents listed because there is agreement on these issues, which, in turn means that the documents are not relevant.

[16]. There are two difficulties with defendant's contention in that regard. Firstly, the documents requested may still be relevant to the quantum of the plaintiff's claim in that the extent of the breaches may give an indication of the damages suffered by the plaintiff as a result of the breaches. Secondly and more importantly, the defendant denies that its admitted conduct amounted to breaches of the agreement, and avers that its conduct was necessitated by the plaintiff's breach of the agreement. The point is that, even on defendant's version, the relevance of the documents is clear. Depending for example on the timing of certain of the conduct on the part of the defendant, its version will be demonstrated by these documents to be either true or false. Either way, I am of the view that the documents are relevant to the matters in the main action.

[17]. The defendant then, almost as an afterthought, contends that the documents should not be inspected by the plaintiff because they may be privileged and/or confidential. However, in its reply to the plaintiff's rule 35(3) notice no particulars are furnished of the alleged privilege or confidentiality claimed. During the hearing of the applications, Mr Silver, Counsel for the defendant, submitted that the plaintiff is not entitled to have access to the details of other entities with whom the defendant does business or to

information relating to the terms of such contracts with such clients and/or service providers, especially the prices/charges/costs and payment terms in terms of the contracts. These entities with whom the defendant contracted, so Mr Silver argues, are competitors of the plaintiff and, if the contracts are ordered to be produced, the plaintiff would be enabled to unlawfully compete with such entities and the defendant.

[18]. There is no merit in these contentions by the defendant for the simple reason that no such case is made out by the defendant in its affidavit in reply to the plaintiff's rule 35(3) notice. In any event, confidentiality of a document of and by itself is not a ground for the refusal to disclose such document.

[19]. In *Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others* [1980] 4 All SA 412 (W); 1980 (3) SA 1093 (W), Schutz AJ states, in relation to confidentiality issues in the context of discovery of documents, as follows:

'In my view it is open to a South African Court to adopt the English practice. Nothing has been pointed out that persuades me that the English practice is based upon any provision in the English Rules that is not contained in ours. Then, our Courts have a discretion in enforcing Rule 35 (7). The crux of the matter is the reasons which underlie the practice. No less in South Africa than in England does the conflict arise between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part'.

[20]. The above passage was cited with approval by the Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re*

Masetlha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC) at paragraph 27.

[21]. Also, in *Cape Town City v South African National Roads Authority and Others* [2015] 2 All SA 517 (SCA), at par 37 the SCA stated as follows:

'Discovery impinges upon the right to privacy of the party required to make discovery. According to Lord Denning MR (in *Riddick v Thames Board Mills Ltd* 1977, 3 All ER 677 (CA) at 678) "compulsion is an invasion of a private right to keep one's documents private". But while there is an interest in protecting privacy there is also the public interest in discovering the truth. .... Litigants must accordingly be encouraged to make full discovery on the assurance that their information will only be used for the purpose of the litigation and not for any other purpose. In that sense ... the interests of the proper administration of justice require that there should be no disincentive to full and frank discovery'.

[22]. This principle was applied in *Governing Body of Hoërskool Fochville and Another v Centre for Child Law; In re: Governing Body of Hoërskool Fochville and other* [2014] 4 All SA 204 (GJ) at paras 22 to 25. In that case this court held that in the context of Rule 35(12) a party is excused from disclosing a document if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but that party cannot refuse to discover a document on the grounds of confidentiality.

[23]. As I indicated above, the defendant in this matter refuses inspection of the documents in question on the basis that the said documents are confidential and/or privileged. If these documents are seen by the plaintiff, so the defendant contends, it would be harmful to the defendant because the plaintiff would be placed in a position to compete unlawfully with the defendant and its other service providers.

[24]. During the hearing of the application, Mr Hollander indicated that the plaintiff, in order to address the concerns of the defendant relating to issues of confidentiality, would be willing to give an undertaking that the documents will be inspected only by its legal representatives and not by the plaintiff itself. That, in my view, would have been sufficient safeguard against the confidentiality

concerns raised by the defendant. In that regard, I was referred to *Unilever PLC and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C).

[25]. However, the defendant did not avail itself of this offer by the plaintiff. As was the case in the *Unilever* matter, the defendant showed no interest in addressing plaintiff's proposal that limits be imposed on the production of the documents. I infer therefore that the defendant's attitude is an all-or-nothing one – the application should be refused in its entirety, with no attempt to carve out a compromise solution. In the circumstances I, like Thring J in *Unilever*, have decided to exercise my discretion against imposing such qualification on the plaintiff's right to inspect the documents concerned.

[26]. The point is this: in balancing the competing interest of the plaintiff to a fair trial on the one hand and, on the other hand, the defendant's right to have its confidential information protected, the plaintiff's entitlement to have its matter adjudicated effectively should, in my view, enjoy preference. As was said by Sutherland J in the *Hoërskool Fochville* matter (supra), there is clear authority that confidentiality does not trump the rule relating to discovery.

[27]. One last issue which requires my attention relates to item 5 of the plaintiff's rule 35(3) notice which requires the defendant to make available for inspection the following documents:

'5. All invoices received by the defendant from Xaxis for the period 1 January 2014 to 30 June 2016'.

[28]. After delivery of its notice in terms of rule 35(3) it came to the attention of the plaintiff that this company, Xaxis, was in fact only incorporated in April 2015. It is therefore not possible for the defendant to be in possession of invoices from this company issued prior to the date of its incorporation. The plaintiff therefore asks for an order at variance with the rule 35(3) notice to the effect that the documents under 5 to be made available should only be for the period from April 2015. In my view, this is an order which can competently be granted by this court.

[29]. In the circumstances, I am satisfied that the plaintiff has made out a case for the relief sought albeit in a modified form. Accordingly, the plaintiff's

application to compel inspection of the documents listed in its rule 35(3) should succeed.

Defendant's application to compel better further particulars for Trial

[30]. On 29 November 2019, the defendant served its request for further particulars in terms of Uniform Rule of Court 21(2) to enable it to prepare for trial. On 9 January 2020, the plaintiff delivered its 'reply to the defendant's request for further particulars', consisting of some twenty four pages of further particulars and numerous annexures. The defendant's request for further particulars itself consisted of no less than seventeen pages and interrogated each and every aspect of any and/or all possible issues in the matter.

[31]. The defendant was not satisfied with all of the plaintiff's replies and launched this application to compel further and sufficient replies to certain paragraphs. The aforesaid application was served on the plaintiff on 25 March 2020.

[32]. Rule 21(2) provides as follows:

'(2) After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within ten days after receipt thereof.'

[33]. It is trite that the purpose of further particulars for trial is firstly to prevent surprise. Secondly, parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations. This does not however mean that the other party should be tied down and unfairly limited in presenting his case during the trial.

[34]. The defendant bears the onus to satisfy the court that the particularity sought is strictly necessary for the purposes of preparing for trial.

[35]. The plaintiff contends that its replies to defendant's request for further particulars are sufficient to enable the defendant to prepare for trial. In any event, so the plaintiff submits, the better further particulars sought in this application are not strictly necessary for the defendant to prepare for trial.

[36]. I will now proceed to deal with further particulars requested by the defendant which is the subject of this application.

[37]. In paragraph 1.5 of its request the defendant required the plaintiff to 'plead the charge/fee for each service rendered'. In its reply the plaintiff states that the fees charged for the services rendered were in accordance with the provisions of the agreement and refers the defendant to the relevant clauses in the contract.

[38]. I agree with the plaintiff's submission that the reply to this request is sufficient. I cannot see what more the plaintiff can say.

[39]. In paragraph 8 and paragraph 12 the defendant enquires whether the plaintiff persists with its allegation that it complied with its obligations in terms of the agreement and the service level agreement. The plaintiff replies in the affirmative, and then goes on to aver that insofar as the plaintiff did not at any stage comply with any of its obligations same was remedied. I understand this reply to mean that, according to the plaintiff, it has complied with its obligations as provided for the agreement. There is nothing more that the plaintiff needs to say.

[40]. In paragraph 9.4 the defendant requires the plaintiff to furnish the dates on which each feedback session with the defendant occurred. The plaintiff replies that it had monthly campaign feedback sessions with the defendant. Further that, the plaintiff stated that it was not in a position to provide further particularity and that the dates of feedback sessions are within the knowledge of the defendant. Again, I agree with the submission on behalf of the plaintiff that this reply was more than sufficient to enable the defendant to prepare for trial.

[41]. In paragraph 18 the defendant asks for precise details and exact particulars relating to credit notes issued by the plaintiff. In its reply, the plaintiff refers the defendant to all of the credit notes which had been discovered. Similarly, the defendant in paragraphs 19 and 20 requires full details and exact particulars relating to any and/or all invoices issued to the defendant by the plaintiff and Net Media Planet respectively. Again, in its reply the plaintiff refers

the defendant its (plaintiff's) discovery affidavit in which all of the invoices are discovered.

[42]. The defendant is not satisfied with these answers. Mr Silver submitted that the replies are wholly insufficient. The plaintiff cannot expect, so Mr Silver contended, the defendant to 'wade through hundreds of pages of discovered documents instead of simply providing sufficient answers to the request for trial particulars'.

[43]. I cannot agree with these submissions. The information required by the defendant are contained in the documents to which the plaintiff had referred the defendant. This is not disputed by the defendant, whose only gripe is that the particulars are provided in a format not acceptable to it. There is no merit in this objection by the defendant.

[44]. In paragraph 23 the defendant requests details relating to the dates upon which the plaintiff alleges the defendant committed the breaches of the terms of the agreement. The plaintiff's reply is that the agreement was breached during the period between August 2014 and 2 June 2015. I agree with the plaintiff that this answer is more than sufficient for purposes of rule 21 further particulars.

[45]. Then in paragraph 35 the defendant enquires about the plaintiff's knowledge as to the alleged consequences to the defendant if the plaintiff breached its material obligations in terms of the agreement. This inquiry, as rightly stated by the plaintiff, in its reply does not fall within the ambit of rule 21. If anything, it calls for irrelevant speculation on the part the plaintiff.

[46]. In paragraph 39 to 41, 44 to 46, 49 to 51 the defendant enquires as to the legal basis upon which the plaintiff's claim for damages is premised. The plaintiff responds that the legal basis is on a balance of probabilities with reference to remuneration earned by the Plaintiff during prior periods. I am not convinced that the answer given by the plaintiff is appropriate. However, there can be no doubt that the particulars requested by the defendant relative to the quantum of the plaintiff's claim are strictly necessary to enable the defendant to prepare for trial. The point is that the quantum of the plaintiff's claim will be assessed on the basis of the facts in the matter and by the application of the

applicable legal principles. The plaintiff is *dominus litis* and will be required to prove the quantum of its claim. I am therefore of the view that the defendant is not entitled to further particulars requested in these paragraphs.

[47]. In paragraph 54 the Defendant enquires as to the total amount of the plaintiff's expenses for the period 2 June 2015 to 30 June 2016 in the hypothetical scenario in which the plaintiff had complied with its obligations in terms of the agreement (and the SLA) and rendered the services for the period 2 June 2015 to 30 June 2016. The plaintiff's reply was a simple R312 000 and then proceeds to provide details and particulars of how this amount is arrived at. The plaintiff submits that no more is required of it in order to answer the enquiry. I find myself in agreement with this submission.

[48]. In sum, I am not persuaded that the better further particulars requested by the plaintiff are strictly necessary for purposes of enabling the defendant to prepare for trial. The replies given by the plaintiff originally are sufficient and in compliance with the provisions of rule 21.

[49]. In the premises, the defendant's application in terms of rule 21(4) stands to be dismissed.

Defendant's application to compel better discovery

[50]. On 21 January 2020, the defendant served its rule 35(3) notice calling upon the plaintiff to make available further documents which the defendant believes to be in the plaintiff's possession and which documents are relevant to matters in question in the action.

[51]. On 13 March 2020, the plaintiff delivered its affidavit in reply to the defendant's rule 35(3) notice. In the said affidavit the plaintiff made available to the defendant those documents requested which exist and which 'can be located'. This answer the defendant is not happy with. It alleges that the plaintiff has not complied with the provisions of rule 35(3).

[52]. The defendant did not avail itself of the plaintiff's offer to make available the requested documents for inspection. Instead, the defendant insisted that the plaintiff provide a list of those documents which are not in its possession. This is

so despite the fact that in its description of the documents in its rule 35(3) notice the defendant grouped documents together. So for example in paragraph 10 of the notice the plaintiff is required to make available for inspection the payslips of thirty two of plaintiff's erstwhile and present employees for the period from the 1st of January 2014 to the 30th of June 2016.

[53]. Understandably, this would be a huge task for the plaintiff and its legal representatives to collate and list these documents, hence their approach to make available to the defendant these documents in bulk for inspection. However, the question remains whether the plaintiff had complied with the provisions of the rule 35(3) and considerations of volumes and cost saving measures do not, in my judgment, should play any role in answering that question.

[54]. To demonstrate the point it may be apposite to make reference to one further example of the documents in dispute. In its rule 35(3) notice at par 8, the defendant requires the plaintiff to make available to it (the defendant) the following documents:

'8. The contracts of employment of the persons mentioned in paragraphs 9, 10, 12, 17, 21.2, 21.3 and 24 of the plaintiff's reply to the defendant's request for further particulars dated 9 January 2020 ("the persons").'

[55]. The reference to the persons mentioned in paragraphs 9, 10, 12, 17, 21.2, 21.3 and 24, is a reference to a list of thirty two individuals who were in the employ of the plaintiff at some time or the other.

[56]. The plaintiff's reply to this request by the defendant is a rather general and generic response as follows:

'12. Ad paragraph 8

12.1. Such of the contracts of employment of the persons referred to herein that the plaintiff has been able to locate will be made available to the defendant's attorneys for inspection at the offices of the plaintiff's attorneys at a mutually convenient date and time.

12.2. Save as stated in paragraph 12.1 above, the plaintiff has been unable to locate, and is not aware of the whereabouts of, any other contracts of employment in respect of the persons mentioned herein.'

[57]. The defendant complains that the plaintiff's affidavit in terms of rule 35(3) does not comply with said rule 35(3) in respect of paragraphs 8, 10 and 13 of the defendant's rule 35(3) notice. The replies given to paragraphs 10 and 13 were along similar lines as those given in respect of paragraph 8 referred to above. The defendant's objection to these replies is that the plaintiff has failed to state under oath which documents are not in its possession and the whereabouts thereof if known.

[58]. It was submitted by Mr Hollander, who appeared on behalf of the plaintiff, that paragraphs 8, 10 and 13 pertain to the documents that were made available to the defendant for inspection. These documents are voluminous and fill three hard cover lever arch files. The Plaintiff specifically states that insofar as any of the documents so requested are not contained in the inspection files, the plaintiff is unable to locate, and is not aware of the whereabouts of same. In other words, the documents contained in the inspection files are all that the Plaintiff has in its possession. Insofar as the documents are not contained in the inspection files, such documents cannot be located and the plaintiff is unaware of its whereabouts.

[59]. The defendant contends that it is unable to determine which of the documents listed in the rule 35(3) notice the plaintiff has in its possession and are being made available for inspection and which of those documents are not in plaintiff's possession. This means, so the defendant submits, that the plaintiff has not complied with the letter and the spirit of rule 35(3) which *inter alia* requires the plaintiff 'to state under oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him'.

[60]. I find myself in agreement with these submissions on behalf of the defendant. In the case of paragraph 8 of the defendant's rule 35(3) notice cited above, the plaintiff was required to make available for inspection the contracts of employment of thirty two of its erstwhile or present employees. Their reply to the rule 35(3) notice could and should be along the lines, by way of illustration, that the employment contracts of say persons 1 to 16, naming these individuals,

are available for inspection and that the contracts relating to individuals 17 to 32, again listing these persons, are not available and then, if possible, give an indication of the whereabouts of such contracts. Alternatively, the reply could be to the effect that the employment contracts of all thirty two employees, and then to name them, are available for inspection. That, in my view, would amount to proper compliance with the provisions of rule 35(3).

[61]. The point is this: the defendant has requested the plaintiff to make available for inspection a list of documents, which had been described clearly and sufficiently. In terms of rule 35(3) the plaintiff is required to deal with each and every document so listed by the defendant in its said notice. That the plaintiff has not done. The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries the duty to put those documents in proper order for both the benefit of his adversary and the court in anticipation of the trial action. (See: *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194I)

[62]. The plaintiff cannot be heard to complain that the documents are voluminous and that this justifies its non-compliance with the rules. That just cannot be. As correctly submitted by Mr Silver, if regard is had to the wording of rule 35(3), the defendant cannot be expected to guess which documents the plaintiff does not have in its possession. Rule 35(3) obliges the plaintiff to indicate under oath the documents that are not in its possession, in which event it shall state their whereabouts if known to it.

[63]. I am therefore of the view that the plaintiff in its reply to the defendant's rule 35(3) notice has not complied with the provisions of the said rule. Defendant's application to compel better discovery in terms of rule 35(7) should therefore succeed.

Costs

[64]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the

successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[65]. I am also satisfied that, having regard to the complexity of the issues involved in the main action and the quantum of the plaintiff's claim, that the employment by the plaintiff of two Counsel is justified even in these interlocutory applications relating to discovery. The importance of discovery in the litigation process cannot and should not be underestimated. As was said by the court in *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513G–H: 'Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be, and often is a devastating tool.'

[66]. I therefore intend ordering the costs in each of the applications to follow the suit.

Order

In the result, I make the following order:

(1) The defendant shall within ten days from the date of this order comply with the plaintiff's notice in terms of rule 35(3) dated the 21st of December 2019 by making available for inspection in accordance with rule 35(6) the documents referred to in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11 and 12 of the plaintiff's aforementioned rule 35(3) notice, as well as any and/or all invoices received by the defendant from Xaxis for the period 1 April 2016 to 30 June 2016

(2) In the event of the defendant's non-compliance with the order in paragraph (1) above, the plaintiff is hereby granted leave to apply on the papers in this application, duly supplemented, to have struck out the defendant's defence and for judgment against the defendant.

(3) The defendant shall pay the plaintiff's costs of plaintiff's application in terms of rule 35(7) to compel better discovery, including the costs consequent upon the employment of two Counsel.

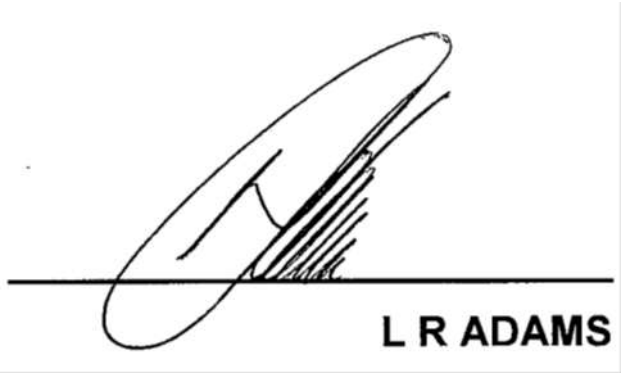
(4) The defendant's application in terms of rule 21(4) to compel better further particulars is dismissed with costs, which costs shall include the plaintiff's costs consequent upon the employment of two Counsel.

(5) The defendant's application in terms of rule 35(7) to compel plaintiff to better comply with defendant's rule 35(3) notice succeeds with costs.

(6) The plaintiff shall within ten days from the date of this order comply with the defendant's notice in terms of rule 35(3) dated the 20th of January 2020 by filing an affidavit in reply to paragraphs 8, 10 and 13 of the said rule 35(3) notice in which affidavit the plaintiff shall declare under oath which of the documents requested in the said notice are not in its possession and also state the whereabouts of such documents, if known to it.

(7) In the event of the plaintiff's non-compliance with the order in paragraph (6) above, the defendant is hereby granted leave to apply on the papers in this application, duly supplemented, for a dismissal of the plaintiff's claim.

(8) The plaintiff shall pay the defendant's costs of defendant's application in terms of rule 35(7) to compel better discovery.



Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	5th May 2020
JUDGMENT DATE:	6th May 2020
FOR THE PLAINTIFF:	Advocate L Hollander, together with Advocate C Dènichaud
INSTRUCTED BY:	Edelstein Farber Grobler Incorporated, Johannesburg
FOR THE DEFENDANT:	Adv M D Silver
INSTRUCTED BY:	David Oshry & Associates, Johannesburg