REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***23rd July 2020*** Signature: _____

CASE NO: 36661/2015

DATE: 23rd JULY 2021

In the matter between:

THINK HOLDINGS LIMITED Plaintiff

and

WESBANK, a Division of FIRSTRAND BANK LIMITED First Defendant

EXECUJET AVIATION (PTY) LIMITED Third Party

Coram: Adams J

Heard: 20 July 2021 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 23 July 2021 – 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 14:00 on 23 July 2020.

Summary: Practice and Procedure – application to compel better discover – rule 35(3) discussed – application to compel better discovery granted –

ORDER

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(1) 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 2nd of March 2020 by discovering and making available for inspection in accordance with rule 35(6) the documents referred to in paragraphs 1, 2, 3, 4 and 7 of the defendant's aforementioned rule 35(3) notice.

(2) In the event of the plaintiff's non-compliance with the order in paragraph (1) above, the defendant is hereby granted leave to apply on the papers in this application, duly supplemented, to have the plaintiff's claim dismissed.

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

JUDGMENT

Adams J:

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

[2]. Before me is an application by the defendant in terms of Uniform Rule of Court 35(7) for an order compelling the plaintiff to make further and better discovery. The defendant in particular requires the plaintiff to discover and to make available for inspection the following documentation: (1) The offer to purchase the *Saab 340B* aircraft registered as ZS-DPD ('the Aircraft'), which offer was made by the entity or person who bought the Aircraft from the plaintiff ('the Buyer'); (2) The Sale Agreement or Terms of Sale in respect of the Aircraft entered into between the plaintiff and the Buyer; (3) The proof of payment of the purchase price for the Aircraft paid to the plaintiff by the Buyer; (4) All

documentation in respect of the negotiations for the sale of the Aircraft as exchanged between the plaintiff and the Buyer; and (5) All offers to purchase the Aircraft received by the plaintiff.

[3]. The defendant accordingly seeks an order compelling the plaintiff to properly reply to the defendant's notice in terms of Uniform Rule 35(3) which required the plaintiff to discover these documents. The plaintiff opposes this application to compel further and better discovery and has instituted a counter-application for an order that the plaintiff is to make limited disclosure of these documents.

[4]. The basis on which the plaintiff opposes the application is that the documents and the information contained therein are confidential as evidenced by the fact that, at the relevant time, there was in existence between the parties a re-marketing agreement, which contain certain confidentiality clauses, which prohibited the defendant from using information acquired by it from the plaintiff during the implementation of the agreement. In a way, the defendant, so the plaintiff avers, is its competitor and discovering the documents would enable the defendant to compete unlawfully with it.

[5]. The defendant seems to accept that the documentation required to be discovered are relevant to the issues in the main action, but believes that because of the confidential nature of the documentation, discovery and disclosure thereof should be limited and the manner thereof specifically defined. The further point is made by the plaintiff that the defendant has already breached the agreement, hence the main action. And this breach in fact forms the basis of the main action and the plaintiff's claim for damages.

[6]. These claims are denied by the defendant, who contends that there is nothing confidential about the documents. It is the case of the defendant that in this interlocutory application, the plaintiff should demonstrate that the documents are confidential. It cannot be accepted as fact on the basis of the *ipse dixit* of the plaintiff in its answering affidavit.

[7]. 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.’

[8]. In *Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others*[1], Schutz AJ stated, in relation to confidentiality issues in the context of discovery of documents, at 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’.

[9]. 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*[2].

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[1] *Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others* [1980] 4 All SA 412 (W); 1980 (3) SA 1093 (W);

[2] *Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others* [1980] 4 All SA 412 (W); 1980 (3) SA 1093 (W);

[10]. Also, in *Cape Town City v South African National Roads Authority and Others*[3] 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'.

[11]. In *Governing Body of Hoërskool Fochville and Another v Centre for Child Law; In re: Governing Body of Hoërskool Fochville and others*[4], 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.

[12]. In sum, the point about these authorities is firstly that discovery in litigation trumps confidentiality and that there is an evidentiary burden on a litigant claiming confidentiality to prove same.

[13]. On appeal to the Supreme Court of Appeal, Sutherland J's judgment in this case was overturned, and importantly the SCA in *Centre for Child Law v Hoërskool Fochville and Another*[5] had this to say regarding onus:

'For my part, I entertain serious reservations as to whether an application such as this should be approached on the basis of an onus. Approaching the matter on the basis of an onus may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term onus is not to be confused with the burden to adduce evidence

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[3] *Crown Cork & Seal Co Inc & Another v Rheem South Africa (Pty) Ltd & Others* [1980] 4 All SA 412 (W); 1980 (3) SA 1093 (W);

[4] *Governing Body of Hoërskool Fochville and Another v Centre for Child Law; In re: Governing Body of Hoërskool Fochville and others* [2014] 4 All SA 204 (GJ) at paras [22] to [25];

[5] *Centre for Child Law V Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA) at para [18];

(for example, that a document is privileged or irrelevant or does not exist). In my view the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.'

[14]. As I indicated above, the plaintiff in this matter refuses discovery of the documents in question on the basis that the said documents are confidential. These documents are the subject of the confidentiality clauses in a Remarketing Agreement between the plaintiff and the defendant, which, so the plaintiff contends, makes these documents confidential for purposes of discovery.

[15]. I disagree. The plaintiff, has in my view, failed to show why its interests to protect the confidentiality of its documentation should outweigh those of the defendant. Tellingly, the plaintiff does not inform the court why it claims that the required documents are confidential other than to say that it is the subject of confidentiality clauses in the re-marketing agreement. I therefore do not believe that the plaintiff has demonstrated that the documents are confidential – far from it.

[16]. In the circumstances, I am satisfied that the defendant has made out a case for the relief sought in its notice of motion.

Costs

[17]. The general rule in matters of costs is that the successful party should be given her or 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*[6].

[6] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[18]. In this matter, I can think of no reason why I should deviate from the general rule and I therefore intend ordering the plaintiff to pay the defendant's costs of this application.

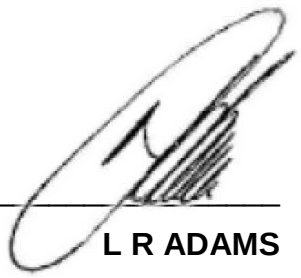
Order

[19]. In the result, I make the following order:

(1) 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 2nd of March 2020 by discovering and making available for inspection in accordance with rule 35(6) the documents referred to in paragraphs 1, 2, 3, 4 and 7 of the defendant's aforementioned rule 35(3) notice.

(2) In the event of the plaintiff's non-compliance with the order in paragraph (1) above, the defendant is hereby granted leave to apply on the papers in this application, duly supplemented, to have the plaintiff's claim dismissed.

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



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	20th July 2021 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams* digital platform
JUDGMENT DATE:	23rd July 2021 – judgment handed down electronically
FOR THE PLAINTIFF / RESPONDENT:	Advocate L C M Morland
INSTRUCTED BY:	Coetzee & Jansen Van Rensburg Attorneys, Randburg
FOR THE DEFENDANT / APPLICANT:	Advocate Unathi Gcilishe
INSTRUCTED BY:	Cliffe Dekker Hofmeyr Incorporated, Sandton