IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBERS: 2013/44462

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: ✓

In the matter between:

EAST ASIAN CONSORTIUM B.V.	Plaintiff
and	
MTN GROUP LIMITED	First Defendant
MTN INTERNATIONAL (MAURITIUS) LIMITED	Second Defendant
MTN HOLDINGS (PTY) LIMITED	Third Defendant
MTN INTERNATIONAL (PTY) LIMITED	Fourth Defendant
NHLEKO, PHUTUMA FREEDOM	Fifth Defendant
CHARNLEY, IRENE	Sixth Defendant

Heard: 26 and 27 January 2021

Delivered: 9 February 2021

JUDGMENT

Wepener, J:

[1] The plaintiff is East Asian Consortium, B.V. a private company with limited liability incorporated under the laws of the Netherlands and with its principal place of business at Rokin 55, 1012 KK Amsterdam, The Netherlands.

[2] During the course of this matter progressing a further plaintiff referred to as Turkcell Iletşim Hizmetleri A.S has fallen away resulting in the current plaintiff being the only plaintiff in the matter.

[3] The first defendant is MTN Group Limited, a company incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at 216 14th Avenue, Fairlands, Johannesburg.

[4] The second defendant is MTN International (Mauritius) a company 100% owned by the first defendant and incorporated in terms of the laws of the Republic of Mauritius with its principal place of business at 5th Floor, Barkley Wharf, Suite 525, Le Caudan Waterfront, Port Louis, Mauritius.

[5] The third defendant is Mobile Telephone Networks Holdings (Pty) Ltd, a company 100% owned by the first defendant and incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at 216 14th Avenue, Fairlands, Johannesburg.

[6] The fourth defendant is MTN International (Pty) Ltd, a company incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at 216 14th Avenue, Fairlands, Johannesburg.

[7] The second to fourth defendants are referred to as the 'MTN defendants' and the MTN Group interchangeably, although strictly speaking, no interlocutory order can be made against the second defendant as it has disputed the jurisdiction of this court.

[8] The fifth defendant is Freedom Phuthuma Nhleko, an adult male, the chairman of the first, third and fourth defendants and at all material times a director of the first, third and fourth defendants and the Chief Executive Officer of the first defendant, with business address c/o Pembani Group, Inanda Greens Office Park, 2nd Floor, Building 3, Wierda Road West, Sandton.

[9] The sixth defendant is Irene Charnley, an adult female and at all material times a director of the first, second, third and fourth defendants with business address at Smile Communications, 12 Culross Road, Bryanston.

[10] I refer to the parties as plaintiff and defendants as they are referred to in the pleadings, although the plaintiff is the respondent and the MTN defendants and the fifth defendant are the applicants in these proceedings. The sixth defendant took no part in these proceedings.

[11] This is an application in which the defendants seek to compel the plaintiff to furnish further particulars for purposes of preparing for trial. The basis of the plaintiff's claim is the wrongful and deliberate interference of the defendants with contractual rights which the plaintiff obtained. In the alternative, the plaintiff relies on corrupt conduct of the defendants which was designed to prevent the conclusion of contractual obligations between the Iranian government and the plaintiff, which caused it damages. The particulars sought by the defendants, and persisted with during argument, can be summarised into different main categories:

1. Particulars requested but which have become obsolete due to the plaintiff having affected an amendment on 20 November 2020 and also by furnishing additional particulars on 14 December 2020. This issue only impacts on the question of costs;
2. The issue of jurisdiction over the second defendant;
3. The requirement by the defendants for the plaintiff to make a choice regarding the legal system relied upon;
4. Identification of wrongdoers;
5 The prescription issue and other defences pleaded by the defendants; and

6. The malfeasance issue.

[12] The approach to the furnishing of further particulars for trial has been set out in a number of cases. In terms of Rule 21 the following is provided:

> '(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.'
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> '(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet.'

[13] The rights pursuant to the Rule and the duty to furnish further particulars was stated thus in *Thompson v Barclays Bank DCO*[1]

> '[T]he purpose of further particulars for trial [is]
>
> (a) to prevent surprise;
> (b) that the 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 . . . [and]
> (c) having regard to the above nevertheless not to tie the other party down and limit his case unfairly at the trail.'

[14] In addition, a court will not compel the disclosing of evidence if it is solely used as a tool for the early provision of evidence.[2] This does not mean that further particulars may not be ordered if it will disclose evidence – the test is if either party would be prejudiced in its preparation for trial.[3] In *Szedlacsek v Szedlacsek*; *Van der Walt v Van der Walt*; *Warner v Warner*,[4] Leach J held:

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[1] 1965 (1) SA 365 (W) at 369.
[2] *Carte v Carte* 1982 (2) SA 381D at 319C-E.
[3] *Annandale v Bates* 1956 (3) 549 (W) at 550.
[4] 2000 (4) SA 147 (E).

> 'It is clear from the final words of [Rule 21(4)] that this Court retains a discretion to grant or refuse an order for the delivery of further particulars. An applicant is accordingly not entitled to an order compelling a reply as of right should the opposing party fail to deliver further particulars timeously of sufficiently, but must set out sufficient information to enable the Court to consider whether or not to exercise its discretion in his favour.'

Jurisdiction

[15] The second defendant denied that this court has jurisdiction over it.

[16] The question of further particulars became moot after particulars were furnished on 14 December 2020 and, this issue, also only impacts on the question of costs.

Choice of legal system

[17] The defendants complained that the plaintiff has failed to identify whether the Iranian law or other legal system governs the unlawfulness of the fifth defendant's conduct. In its pleading the plaintiff relies on the defendants' unlawful conduct in the alternative and in so doing, reliance is placed on the South African law and in the alternative on certain provisions of Iranian law. The plaintiff sets out several paragraphs specifically quoting the Iranian law relied upon.[5] A complaint was made that the plaintiff claims that the conduct was wrongful and unlawful in terms of South African law and entitles the plaintiff to claim damages under South African law calculated in the manner set out below, and then in para 65 at the same page in the alternative to the previous paragraph, the conduct of the defendants pleaded above is wrongful and unlawful in terms of Iranian law and entitles the plaintiff to claim damages under Iranian law calculated in the manner set out below. The plaintiff set out that the unlawfulness is governed by the South African law, alternatively the Iranian law. The complaint is that there was no reference to which law governs the quantification of damages. During argument, counsel for the plaintiff assured me that it was an oversight and further, prepared a notice in which it was clarified that the alternative allegations also apply to the

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[5] In this regard see the previous judgment in this matter in the interlocutory application between the parties in *Turkcell Iletisim Hizetleri AS and Another v MTN Group Limited and Others* (2013/44462) [2020] ZAGPJHC 244 (6 October 2020) paras 37-44.

manner of the calculation of the damages. That removed any uncertainty.

[18] In my view, the plaintiff furnished sufficient particularity regarding its reliance on Iranian law. It is entitled to rely on alternative allegations of fact provided they do not cause prejudice to the opposing party.[6] The complaint, as I see it, is that the defendants wish to force the plaintiff to elect now on which legal system it wishes to rely. But, that is a fallacy as the evidence to be led may satisfy either the South African law or the Iranian law or both. I can find no embarrassment nor prejudice for the defendants by virtue of the allegations, which are made in the alternative and the request based on the plaintiff's reliance on these allegations should not be granted.

Wrongdoers or malfeasance

[19] The fifth defendant submitted that amongst the allegations made by the plaintiff is that certain persons performed certain acts and these persons were the first and or second defendants and or third and fourth defendants including the fifth defendant and sixth defendants acted in a certain way in relation to approaches made to individuals in Iran.

[20] The defendants then enquired who the authorised representatives were who visited these individuals.

[21] The plaintiff's response was by naming certain individuals and stating that 'at least' these individuals were so involved. The defendants' complaint is that others are not identified and it is argued that the plaintiff can later call additional surprise witnesses. The defendants submitted that the answer implies that there are indeed other witnesses whom the plaintiff elected not to name. The submission is made with reference to case law regarding the identification of particulars when serious allegations of misconduct are made.[7] In my view, it is clear that the plaintiff does not have any other witnesses at this stage but that it is hopeful to find additional witnesses in the future, if they are indeed available. The defendants' position is that the words 'at least' should be removed and the

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[6] *Kragga Kamma Estates CC and Another v Flanagan* 1995 (2) SA 367 (A) at 374H-I.

[7] *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* 2017 (1) SA 391 (SCA) paras 29-31.

plaintiff can always seek an amendment in the future should it be able to find further witnesses. I am of the view that the defendants are neither embarrassed nor unable to properly prepare for trial. The names of the known representatives have been made available and the argument that the plaintiff implies that there are other witnesses who are specifically left out from the list or that it has to reformulate its answer has no merit and no place in an application to compel further particulars. The plaintiff has adequately complied with what is requires of it: In *Snyman v Monument Assurance Corporation Ltd*[8], Coleman J said[9]:

> 'It has frequently been said that a Court dealing with an application of this kind should not order the respondent to do what is impossible.'

There is no allegation that the plaintiff is not bona fide in its assertion that it does not have further witnesses. Then what must a court compel them to do? There is nothing to compel them to do as it is not clear that there are indeed further persons involved.

[22] Counsel for the MTN defendants submitted that the plaintiff's refusal to answer a few 'modest' questions should result in an order compelling it to answer. One such example is the following:

> 'Do the plaintiffs contend that the defendants caused the South African government to take the actions described in paragraphs 56.6 and 56.7, (that is to abstain from voting), abstain on the vote.
>
> When and how did the defendants do so? Why was it unlawful for them to do so and on what grounds is the conduct described in paragraph 56.1 to 56.7 alleged to have been corrupt?'

[23] I am of the view that the answers to these questions are matters for evidence; they do not assist in the preparation of trial, nor have I been shown how they can so assist. There are a large number of particulars sought which are in this category and I am of the view that the plaintiff is justified in its conduct by not furnishing it.

[24] A further example is the argument that many of the allegations made by the plaintiff

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[8] *Snyman v Monument Assurance Corporation Ltd* 1966 (4) SA 376 (W).
[9] At 377H.

are innocuous and do not lead to the serious conclusions of fraud and corruption. But the answer to this is that the particulars of claim should be read holistically and if so read, the seemingly innocent conduct is alleged to have the wrongful result alleged by the plaintiff. A question such as

> 'on what grounds is it alleged that the conduct is alleged to have been corrupt?'

does not, in my view, assist to prepare for trial. The court will one day decide whether the conduct is such that it justifies the result which is pleaded to be the legal result of the conduct.

[25] I am of the view that the plaintiff has set up a clear framework as to the basis of its case with sufficient precision for the parties to prepare for trial.

Prescription

[26] The plaintiff alleges that it first became aware of the facts underlying its claim no earlier than October 2011. Although it is an allegation that impacts on the question of prescription, the defendants, who pleaded prescription, embarked on a series of questions regarding when and where and how and who obtained knowledge of the facts in relation to the precise dates thereto.

[27] The onus to prove prescription is on the party alleging prescription to prove the facts that would lead to the plea being successfully upheld[10]. This is even if a plaintiff foreshadows a plea of prescription the full onus remains with the party relying on prescription[11].The defendants have the duty to collect and advance the evidence in this regard. I am of the view that the interrogatories directed at the plaintiff regarding an aspect which the defendants bare the onus does not require answers from the plaintiff.

[28] Related to this heading are the vast number of questions directed at the plaintiff which could only be asked if regard is had to the defence that has been pleaded. I am of the view that in those matters where the defendants bear the onus of the matters raised by them, the questions directed at the plaintiff to obtain 'more clarity' are not matters which

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[10] *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) para 142.
[11] *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) para 10.

the plaintiff is obliged to answer – the defendants know their case and must prepare for trial and cannot complain that the plaintiff does not assist them with their pleaded cases in an application to compel the furnishing of further particulars.

Denials

[29] The complaint that the plaintiff's denials cause some embarrassment has its origin in the plaintiff's replication. The plaintiff commenced its replication by stating that which is usually found in a replication namely that the plaintiff joins issue with the allegations set out in the plea. The plaintiff then stated that without derogating from the generality of the aforegoing, the plaintiff replicates as set out where after a number of specific allegations are made.

[30] The main complaint that took some time before me is that the joining of issue is too broad and it contradicts some of the undisputed allegations made by the defendants. But again, these are allegations made by the defendants and issues which the defendants have the onus of proving. The series of questions are not to obtain clarity or to prepare for trial but rather, as submitted by counsel for the defendants, the answers as furnished raises a 'lack of clarity' as the general denial is against the authority of *Sterling*.[12] But the questions, like the questions regarding prescription, are largely in relation to issues pleaded by the defendants themselves and I am not satisfied that the defendants require further answers to that which the plaintiff has furnished. If the plaintiff elected not to replicate, the defendants would have been in the exact same position where it is presumed that all the allegations in the plea are denied[13] and generally speaking, an opposing party is not entitled to particulars in relation to a mere denial[14]. In *Hardy v Hardy*[15] it was said:

> 'From a perusal of the numerous authorities quoted from the Bar by both counsel for the plaintiff and counsel for the defendant, it appears that in each case where particulars were sought and granted, they were particulars of allegations made in the pleadings by the party from whom such particulars were sought. No case is quoted to me in which a party, who

[12] *Sterling Consumer Products (Pty) Ltd v Cohen and Other Related Matters* [2000] 4 All SA 221 (W).
[13] Rule 25 (2) of the Uniform Rules.
[14] *Swart v De Beer* 1989 (3) SA 622 (E) at 625.
[15] 1961 (1) SA 643 (W) at 646D-F.

has pleaded a bare denial of the allegations made by his opponent, was ordered to give particulars of any matter placed in issue by such a denial. That this is so, is not surprising, as this would be tantamount to ordering a party to furnish particulars of allegations made by his opponent, and it cannot be the function of particulars to enable a party to prove allegations which he himself has made.'

[31] Some of the arguments before me may have been appropriate in exception proceedings but I do not believe that a court should saddle a party with a duty to furnish particularity in the circumstances prevailing in this matter. The defendants know the case they have to meet and know what case they are putting up and can prepare for trial. If there is any contradictions as result of any particular denial, the defendant will, no doubt, capitalise on it during cross-examination of the plaintiff's witnesses.

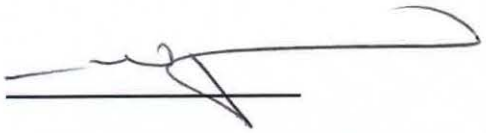
Costs

[33] The defendants were not successful in this application, but also launched it due to inadequate answers which were eventually furnished by 14 December 2020. In so far as the application to compel further particulars were proceeded with beyond these dates when the plaintiff remedied the shortcomings, the defendants should bear the costs of the application.

[34] Although all parties were represented by several counsel, I am of the view that this matter justifies the employment of two counsel but not more than two.

Order

1. The applications to compel the plaintiff to furnish further particulars are dismissed.
2. The plaintiff is to pay the costs of the defendants up to and including 14 December 2020. Such costs are to include the employment of two counsel by each defendant.
3. The defendants are to pay the plaintiff's costs incurred after 14 December 2020 jointly and severally, the one paying the other to be absolved. Such costs are to include the employment of two counsel.



W.L. Wepener

Judge of the High Court of South Africa

APPEARANCES

Counsel for the Plaintiff: A Franklin SC with J.P.V. McNally SC with J.J. Meiring and T. Moretlwe

Attorney for the Plaintiff: Vasco de Oliviera Inc. Ref: V. De Oliviera

Counsel for the First to Fourth Defendants: W. Trengrove SC with S. Symon SC

Attorney for the First to Fourth Defendants: Webber Wentzel Ref: Mr. N. Alp

Counsel for the Fifth Defendant: MD Kuper SC with J. Cane SC and L. Sisilana

Attorney for the Fifth Defendant: Werksmans Attorneys Ref: D. Williams