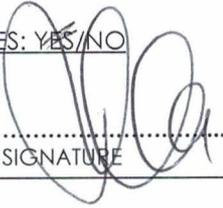


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 225 /2020

(1)	REPORTABLE: YES / NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
(4)	<u>11/6/2020</u> DATE	

In the matter between:

THE SOUTH AFRICAN BREWERIES (PTY) LTD

Applicant

and

OCEAN LINGHT SHIPPING CC

Respondent

In re:

OCEAN LINGHT SHIPPING CC

Plaintiff

and

THE SOUTH AFRICAN BREWERIES (PTY) LTD

Defendant

JUDGMENT

MAKUME, J:

INTRODUCTION

[1] In this matter the Applicant who is the Defendant in the action proceedings seeks an order compelling the Respondent to comply with the notices served

on it in terms of Rules 35(12) and (14) of the Uniform Rules. Secondly interdicting the Respondent from delivering a notice of Bar.

- [2] The application is opposed on various grounds as will appear hereunder. I shall refer to the parties as the Plaintiff and the Defendant as in the particular of claim.

BACKGROUNDS FACTS

- [3] During or about July 2019 the Plaintiff and the Defendant concluded an agreement in terms of which the Plaintiff undertook to provide clearing, forwarding, transportation and warehousing services for the Defendant.
- [4] On the 8th January 2020 the Plaintiff instituted action against the Defendant following the Defendant's failure to make payment to the Plaintiff of the outstanding amount of R44 050 813.23. This amount represents numerous invoices issued by the Plaintiff pursuant to the rendering of the agreed services by the Plaintiff during the period 21st August 2019 to the 5th December 2019.
- [5] The Defendant refuses and or failed to make payment and instead delivered notice to defend on the 29th January 2020.
- [6] On the 25th February 2020 the Defendant filed and served notices in terms of Rule 35 (12) (14) of the Uniform Rules of Court. The Plaintiff had five (5) days from the 25th February 2020 to comply with the notices.
- [7] The Plaintiff failed to respond to the notices as a result on the 5th March 2020 the Defendant served on the Plaintiff notices in terms of Rule 30 A of the Uniform Rules of Court. In terms of that notice the Plaintiff was afforded a further 10 days within which to comply with the Rule 35 (12) and (14) notices failing which an application to compel would be proceeded with.
- [8] On the 23rd March 2020 the Plaintiff filed its response to the Rule 35 (12) and Rule 35(14).

- [9] On the 2nd April 2020 the Defendant's Attorneys Messrs Bowman addressed a letter to the Plaintiff's Attorneys and said the following:

"We received your client's responses to our client's notices in terms of Rule 35(12) and Rule 35(14).

We notice that in the responses to the extent that your client undertakes to provide requested documents it has undertaken to provide the requested documents via email.

In the notices our client specifically requested, as it is entitled to do in terms of Rule 35(12) and Rules 35(14) that your client makes the requested documents available for inspection and copying and to the extent that such documents emanate from a computer or computer programme that our client inspects originals on the computer from which the documents originated.

Our client will not be satisfied merely by the emailing of the requested documents.

Kindly clarify whether your client will make available the original documents as requested once the period of lock down currently in place ends, and the place at which such inspection will take place."

- [10] On the 7th April 2020 the Defendant served its second notice in terms of Rule 30A in which it complained that the Plaintiff has not adequately complied with the notices in terms of Rule 35(12) and 35(14).

- [11] On the 23rd April 2020 the Plaintiff's Attorneys in reply to the Defendant's letter of the 2nd April 2020 said the following:

"SARS attended at our client's premises on 20 January 2020 in order to obtain shipment files pertaining to this audit period and to remove same from our client's premises. These shipment files were removed under seal by SARS officials, our client was only permitted to make copies of these files under the supervision of and with the permission of SARS officials and it is only these copies that remain in our client's possession. SARS has retained all of the original shipment files and it will therefore not be possible for your client to

inspect and copy the original documents until such time as the original shipment files have been released back to our client.

That said it is not possible for our client to permit the physical inspection of documents so requested.

As regards your client's insistence that it must inspect the balance of the documents set out to enable it to file a plea, exception or counter-claim our client stands by its position as set out in its replies to your client's Rule 35(12) and 35(14) notices."

- [12] Simultaneously with the above letter the Plaintiff replied to the Defendant's latest Rule 30A notice in brief repeating contents of its letter of the 23rd April 2020. In paragraph 2 of its response the Plaintiff says the following:

"The Plaintiff has advised the Defendant that it is not possible to permit the inspection of the originals of the documents as such documents are in the possession of the South African Revenue Services."

- [13] In paragraph 2(c) the Plaintiff continues as follows:

"To the extent that the Defendant requests an inspection of the documents that emanate or were generated from a computer system such physical inspection is not presently permitted in light of a National Lockdown implemented by the President of the Republic of South Africa pursuant to the global covid-19 pandemic."

- [14] On the 30th April 2020 the Defendant's attorneys sent a letter to the Plaintiff attorneys and said the following:

"Further to your letter and notices sent last week we note and accept your offer to physically inspect the original documents when these are returned from SARS and to physically inspect the computer system once lockdown has been lifted and the regulations and directives allow from such movement. We will be

in touch in due course to make arrangements in this regard, once we have greater clarity on when such movement shall be allowed.”

- [15] On the 12th May 2020 the Plaintiff served on the Defendant a notice of Bar in terms of Rule 26 calling on the Defendant to file its plea within five days or be barred *ipso facto* resulting in an application for default judgment.
- [16] On receipt the notice of bar the Defendant addressed a letter to the Plaintiff’s attorneys informing them that their notice of Bar is premature on the basis that the Plaintiff has not yet complied fully with the notices in terms of Rule 35 (12) and (14) Defendant requested the Plaintiff to withdraw the notice of Bar by not later than the 13 May 2020 failing which an application will be launched to set aside the notice of bar.
- [17] On the 14th May 2020 the Plaintiff informed the Defendant by letter that they will not withdraw the notice of Bar. As a result the Defendant filed a notice in terms of Rule 30 (2) (b) to declare the notice of Bar an irregular step.
- [18] On the 15th May 2020 the Plaintiff withdrew the notice of Bar. On the 25th May 2020 the Defendant served this application to compel as well as for an order interdicting and restraining the Plaintiff from delivering a notice of Bar on the Defendant pending the outcome of the inspection and copying of documents set out in the Defendant’s Rule 35(12) and 35(14) notices.

THE PLEADINGS

- [19] In paragraph 9 of its particulars of Claim the Plaintiff’s pleads as follow:

“ The Plaintiff issued numerous invoices in respect of each designated shipment of the Defendant for which the services were rendered. The invoices are set out in the table below and are described hereafter as the outstanding invoices.

- [20] In paragraph 12 the Plaintiff pleads as follows:

“On 12 December 2019 and 23 December 2019 the Plaintiff issued the Defendant with two demands for payment of outstanding invoices. To date payment has not been received from the Defendant.”

THE DOCUMENT SOUGHT IN TERMS OF RULE 35(12)

[21] In the Rule 35(12) notice dated the 25th February 2020 the Defendant requires seven items marked 1-7. The Defendant has however abandoned items 5,6 and 7 only requests production and inspect of items 1-4.

ITEM 1

[22] As far as it concern item 1 being the invoices listed in the table set out in paragraph 9 Plaintiff has made copies of the invoices available but refused to permit the Defendant to inspect the originals.

ITEM 2

[23] In respect of item 2 being purchase orders referred to in paragraph 6.2 of the Particulars of Claim the Plaintiff denies being in possession of such documents and says that because such purchase orders where generated by the Defendant it is the Defendant who is in possession of same.

[24] This is denied by the Defendant who in paragraphs 40 -41 of its replying affidavit tells the court that the *modus operandi* on the generation of such purchase order is such that the Plaintiff is placed in possession of the purchase order.

ITEM 3

[25] The required documents here relate to invoices referred to in paragraph 6.5 read with paragraph 10 of the Plaintiff's Particulars of Claim. The Plaintiff has refused to produce such invoices on the basis that same are irrelevant.

ITEM 4

[26] Item 4 refers to copies of the demands set out in paragraph 12 of the Particulars of Claim. The Plaintiff has made the copies available but refused to allow the Defendant to inspect the originals.

- [27] The correspondence exchanged between the parties clearly demonstrates that the Plaintiff promised and undertook to avail the required documents to the Defendant for copying and inspection. The Defendant accepted such undertaking in its letter to the Plaintiff dated the 30th April 2020.
- [28] It is common cause that the Defendant has been waiting to inspect the original documents once same shall have been returned to the Plaintiff by SARS. Secondly in respect of documents generated by Plaintiff's computer, Defendant would be allowed to have physical inspections of those computer as soon as circumstances permit in view of the Disaster Management regulations.
- [29] The Plaintiff's attorneys in partial compliance with the Rule 35(12) and (14) notices provided a link to down load copies of the documents which they promised to provide. The Plaintiff has however persisted in resisting to allow the Defendant to inspect the original documents and says that by furnishing copies it has fully complied with the notices.
- [30] The Defendant maintains and correctly so that the original documents sought and emanating from the Plaintiff's computer system are material to the Defendant's defence. The Defendant disputed that the Plaintiff has acted in compliance with the terms under which it engaged the Defendant to perform on its behalf as Defendant's Agent.
- [31] Rule 35(12) is clear an unambiguous it entitles a party to inspect and make copies of documents which have been referred to in that party's affidavit or pleadings. The entitlement to see or inspect such documents arises as soon as reference is made thereto in the pleadings or affidavit. In **Protea Assurance Company Ltd v Waverly Agencies CC 1994 (3) SA 247 (C) at 249** the court concluded that the entitlement to inspect a document arises as such as reference is made thereto in a pleading or affidavit.
- [32] Rule 35 (12) uses the word "produce such documents for inspections it does not say make copies available. In the matter of **Finlay and Another vs Kutoane 1993 (4) SA 675 (W) Flemming DJP at page 685** said

“Production need not take the shape only of producing during the giving of evidence. The word means what it normally means. Show to the other party like the Afrikaans word “toon”. It is not only toon tydens getuienisaflegging which is good but “production anyhow.” The said natural meaning without straining and as a matter of the original meaning of produce avoids a non-legislated limitation of its meaning.”

[33] The Plaintiff’s defence that it will not be able to comply with the order of inspection because of the documents being in the possession of SARS is not a good defence it is an excuse which has no base. All that the Plaintiff has to say is to grant the Defendant to make arrangement with SARS to inspect the documents. In any case the Plaintiff has in its letter agreed that as soon as the documents are returned to it by SARS it will make such available for inspection. Such inspection can only take place on production.

[34] The second excuse that the Plaintiff’s computer software was subjected to “ransomware” on the 27th January 2020 is an afterthought it was never mentioned in the correspondence exchanged between the parties preceding this application. The Plaintiff must accordingly allow the Defendant to inspect the documents (originals) wherever they may be.

[35] As far as the documents required in item 2 the Plaintiff pleads that not only are the documents irrelevant but says also that the Defendant is in possession of such invoices. This defence is equally untenable. In *Vermont J in the matter of Magnum Aviator Operation v Chairman National Transport Communication* 1984 (2) SA 398 W said that Rule 35(12) is not qualified by the requirements of relevance and that once a document has been referred to, it must be produced irrespective of whether the party requesting has it in his or her possession. It must be produced for inspection and to enable the Applicant to confirm that it is such a document upon which the Respondent relies.

[36] In as far as it concerns computer generated documents which the Defendant seeks to be inspected and copied these are data messages as described by

Spilg J in **Makate v Vodacom (Pty) Ltd 2014 (1) SA 191 (GSJ)**. The Plaintiff's only objection as raised in its answering affidavit and in the letter of the 23 April 2020 is that it is not possible to permit physical inspection of their computer because of the current lockdown regulation in terms of the Disaster Management Act.

[37] Whilst it is correct that as at April 2020 the country was in total lockdown level 5 it is so that the restrictions have been drastically relaxed as a result industries are back to normal with limited restrictions thus to allow access and inspection by agreement should not pose any difficulties.

[38] The Plaintiff's version about the ransomware attack is in my view spurious. The Plaintiff has furnished no details about that notwithstanding that it had earlier undertaken to furnish the documents.

[39] The refusal by Plaintiff as Agent to provide the Defendant as principal documents which it is ordinarily obliged to do is indicative of the Plaintiff attempting to hide material documents which the Defendant requires to inspect to enable it to plead.

[40] All the documents referred to in the Plaintiff's Particulars of Claim are relevant and must be produced for inspection by the Defendants.

DOCUMENTS WHICH THE DEFENDANT SEEKS TO INSPECT AND COPY IN
TERMS OF RULE 35(14)

[41] Rule 35(14) reads as follows:

“ After appearance to defend has been entered, any party to any action may for purposes of pleadings require from the other party to make available for inspection within 5 days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipates issued in the action and to allow a copy or transcription to be made thereof.”

[42] The only defences or objection which a party may raise against making available documents requested in terms of this sub-rule is:

- a) *if such document is not clearly specified;*
- b) *such a document is not relevant to a reasonably anticipated issue in the action.*

[43] It is trite law that if such document is not in the possession of the party being requested then such a party must indicate where such a document is. This is to enable the requester then to subpoena such document from the possessor.

[44] The Plaintiff in opposing compliance with this sub-rule refers to the decision of **Cullinan Holdings (Pty) Ltd v Mamelodi Stadsraad 1992 (1) SA 615 (T)** where the court held that to obtain an order to compel production and inspection in terms of Rule 35(14) an Applicant must establish that the document is essential (not merely useful) for purposes of pleadings. This decision was not supported as there is no authority for the additional requirements that such document or tape recording should be essential for purpose of pleadings.

[45] The decision in *Cullinan Holdings* (supra) was criticised in **UNITAS Hospital v Van Wyk 2006 (4) SA 436 (SCA) at 444** where it was held that the word require in the context of the phrase require for the protection of any right does not mean that “useful” or relevant is enough, but on the other end of the scale the requester does not have to establish that the information is essential or necessary.

[46] A further objection raised by the Plaintiff in resisting production under this sub-rule is that the documents are not clearly defined in that they constitutes broad categories of documents generated over a substantial period of time.

[47] It is common cause that the services for which the Plaintiff alleges that the Defendant is indebted to it relate to clearing and forwarding services over a long period of time. It is during that period that the Plaintiff collected funds from the

Defendant to make payment of any duties and taxes which are due to SARS in respect of the importation of beverages. The Defendant disputes that the Plaintiff has acted in compliance with the terms under which it was engaged by the Defendant to perform on its behalf. In this regard the Defendant disputes that the Plaintiff has properly declared the imported alcoholic beverages and paid SARS the full custom duty as well as VAT claimed by the Plaintiff from the Defendant.

- [48] In **Titus v RNE Holdings [2000] 2 ALL SA 331 (TK) at 335** the court held that: If a defence is based on a continuous conduct which occurred over a period of time it would be inappropriate to expect the Applicant to give a specific description of each and every document required for the purposes of pleading mismanagement which occurred over a period of time.
- [49] In respect of item 1.1 the Defendant requested each bill of lading which the Plaintiff relies on for which it charged the Defendant in terms of the agreement. In this regard the Plaintiff agrees to make available copies of such bills of lading and refuses inspection. The refusal to inspect is unreasonable the copies originated from the computer system of the Plaintiff therefore the Defendant is entitled to inspect such computer system.
- [50] The request for documents in item 1.3 has not been complied with despite an undertaking to do so. The Plaintiff will be ordered to make the originals available for inspections and copying.
- [51] Similarly the documents referred to in item 3 being packaging lists from the original supplier of goods which relate to each transaction listed in the table in paragraph 9 of the Particulars of Claim. Initially the Plaintiff denied the Defendant inspection and copying thereof on the basis that those are the Defendant's documents. This stance changed when the Plaintiff in its opposing affidavit now agrees to make copies available but refuses inspection and copying.

- [52] The basis for denying inspection is unreasonable and can only point out to a suspicion that the Plaintiff is hiding something that may be detrimental to its case.
- [53] The Plaintiff's in response to item 4 of the request says that the purchase orders in respect of the invoices claimed were generated by the Defendant or its service provider accordingly Defendant is or should be in possession of such documents. Once again the refusal to make those purchase order is unfounded the sub-rule does not say that if a requester is already in possession of such documents he or she is not entitled to same from the other party.
- [54] The Defendant is entitled to inspect those purchases orders in the possession of the Plaintiff to ascertain whether the Defendant can admit or deny that the Plaintiff has performed in terms of the agreement.
- [55] Item 6 Here the Defendant requested the Plaintiff to produce each document that the Plaintiff furnished to SARS and or customs in respect of each shipment. The Defendant is entitled to those documents because Plaintiff collected money from the Defendant on the basis of those documents which it the Plaintiff made payment to SARS. The Defendant is entitled to inspect those documents to verify if its money were expended correctly.
- [56] In item 9 the Defendant requires the Plaintiff to produce its bank statements which indicate each and every payment the Plaintiff made to SARS and or to Customs in connection with custom duty paid as well as VAT. It is clear that those bank statements all have relation to the allegations in paragraph 9 of the Particulars of Claim.
- [57] The Plaintiff resists production of those bank statements on the basis that the documents are not necessary to enable the Defendant to plead.
- [58] As indicated these bank statements have close relationship with what is stated in paragraph 9 of the Plaintiff's Particulars of Claim. The Documents are highly relevant to determine whether Plaintiff indeed performed in terms of the

agreement. Plaintiff itself will rely on such bank statements to show that the amounts claimed for clearing and forwarding services as well as VAT were in fact paid by the Plaintiff.

[59] The documents requested under item 10 being those documents that SARS and or Customs sent to the Plaintiff acknowledging and confirming payments of customs duty and VAT are related to the documents requested under item 9. I say nothing more and repeat my finding as stated in respect of item 9.

[60] As regards the last document referred to in item 13 the Defendant requested each and every electronic Data Interchange Communication between Plaintiff and SARS. It must be understood that such communication is only in respect of the transaction affecting the Defendant as in terms of the agreement between Plaintiff and Defendant. Such electronic communication is necessary and will assist the Defendant to plead one way or the other. The communication will indicate whether the Plaintiff has performed its obligations strictly in terms of the agreement it alleged in its Particulars of Claim.

[61] The Plaintiff must accordingly make all such communication available for inspection and copying. It must make the originals available not copies. The sub-rule dictates as such the Plaintiff has no right to decide whether to make copies or originals available. The sub-rule does not say that the requested party should make copies available.

THE INTERDICT

[62] It is common cause that the Plaintiff served a notice of Bar on the Defendant in terms of Rule 26 which it later withdrew. The Defendant now seeks an interdict preventing the Plaintiff from serving another Rule 26 notice as it has threatened to do pending the outcome of this application to inspect and copy the documents required by the Defendant.

[63] I have already made a finding that the Plaintiff must produce for inspection and copying the documents as requested in the Rule 35(12) and (14) notices. That

finding clearly confirms a right to the Defendant in satisfaction of the requirement of an interim interdict.

[64] The Plaintiff relying on the decision of **Potpale Investments (Pty) Ltd v Mkhize 2016 (5) SA 96 (KZP)** has indicated that it has the right to at anytime serve a Rule 26 notice on the Defendant.

[65] Reliance on the Potpale decision is misguided on the following basis, the Rule 35 notices were served after the Plaintiff in that matter had already filed its Rule 26 application which is not the case in this matter. Secondly the court dismissed the application to interdict the Rule 26 notice on the basis that the application for default judgment in terms of Rule 31 (5) was improperly before the court when that Rule requires that it be dealt with by the Registrar.

[66] Accordingly in my view Defendant has established on a balance of probabilities that it has grounds for a reasonable apprehension that its rights will be detrimentally affected. That apprehension of harm is reasonable and apparent.

[67] Prest in *The Law and Practice of Interdicts* at page 201 says:

“A Legal System in its quest for the ascertainment of truth and ensuring that justice is done, must not permit its procedures to become so cumbersome and time consuming that the end to which the very system is directed is defeated. The lesson of history teaches us that the subject of the law is an impatient and restless creature. When a crisis situation presents itself, he seek expeditious and effective action at least on an interim basis until such time as the principal dispute can be resolved. The law, if it is effective, must always keep pace with these demands. It is a servant of circumstances and not the master. It must not give rise to problems it must provide solutions to such problems as arise out of the requirements of modern commercial and social developments.”

[68] I have accordingly come to the conclusion that the Defendants are entitled to establish the authenticity of the documents relied upon by the Plaintiff in the action by also having access to the computers on which they were generated.

[68] In the result I hereby issue an order in the following terms:

ORDER

- 1 Within 5 days from date of service of this order on the Plaintiff or its attorneys of record, the Plaintiff is to comply with the Applicant's/Defendant's notice in terms of rule 35(12) served on 25 February 2020 ("the Rule 35(12) Notice"), by permitting and allowing the Applicant/Defendant and its representatives to inspect and copy all of the documents which are set out and described in items 1, 2,3 and 4 of the notice.
- 2 Within 5 days from date of service of this order on the Plaintiff or its attorneys of record, the Plaintiff is to comply with the Applicant's/Defendant's notice in terms of rule 35(14) served on 25 February 2020, by permitting and allowing the Applicant/Defendant and its representatives to inspect and copy all the document which are set out and described in terms of 1.1,1.2,3,4,6,9.10 and 13 of the notice.
- 3 The orders in paragraphs 1 and 2 above are hereby suspended until the happening of the earlier of the following: Either the national state of disaster declared in terms of the Disaster Management Act, 2002 is lifted or the regulations issued in terms thereof permit the Applicant/Defendant and its representatives to inspect and copy the documents.

- 4 Pending the outcome of the inspection and copying of the documents set out in paragraph 1 and 2 thereof, the Respondent/Plaintiff is interdicted and restrained from delivering a notice of bar calling upon the Applicant/Defendant to plead.
- 5 The Plaintiff/ Respondent is to pay the cost of this application on party and party scale.

Dated at Johannesburg on this the 2nd day of May 2021.



M.A. MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	MAY 2021
DATE OF JUDGMENT	:	MAY 2021
FOR APPLICANT	:	ADV
INSTRUCTED BY	:	
FOR RESPONDENT	:	ADV
INSTRUCTED BY	:	