

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2018/45674

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

[22 SEPTEMBER 2021]

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SIGNATURE

In the matter between:

TARSUS DISTRIBUTION (PTY) LTD

Applicant/Defendant

and

GRANDBRIDGE TRADING 74 (PTY) LTD
T/A RED APPLE FURNITURE

Respondent/ Plaintiff

J U D G M E N T

MUDAU, J:

- [1] This is an application in terms of Rule 35(7) of the Uniform Rules of Court to compel further and better discovery and to order the production for inspection of certain documents. The applicant is the defendant in an action pending in this Court in which the respondent is the plaintiff. It will be convenient to refer to the parties as the plaintiff and the defendant respectively. The pleadings in the action have closed, but the matter is yet to come to trial. The notice of motion is couched in relevant parts thus:

“1 That the Respondent comply with paragraph 2, 3, 4 and 5 of the Applicant's Notice in terms of Rule 35(3) and (6) dated 30 March 2021 ("the Notice").

2 That the Respondent make available for inspection and copying the documents specified in paragraph 2, 3, 4 and 5 of the Notice in terms of Rule 35(3) read with Rule 35(6) within 5 (five) days of this order alternatively to state on oath within 5 (five) days that such documents or tape recordings are not in the Respondent's possession, in which event the Respondent shall state their whereabouts, if known.”

- [2] Paragraph 2 of the Notice required the plaintiff to produce for inspection *"All documentation (including but not limited to instructions, memoranda, meeting notes, file notes and other communications) between the plaintiff and Sizwe IT Group instructing, and appointing Sizwe IT Group to prepare annexures Qf to Q3 of the Plaintiff's Particulars of Claim"*. Paragraph 3 of the Notice required the Plaintiff *"to produce for inspection but not limited to instructions, memoranda and notes) between the Plaintiff and Sizwe IT Group relating to any work carried out by Sizwe IT Group for the Plaintiff."*

- [2] Paragraph 4 of the Notice required that the plaintiff produce for inspection documents relating to the quantification of the plaintiff's claims, such as its annual financial statements (or any similar documents of a financial nature setting out its profit, loss, assets, expenses, liabilities, and the like). Paragraph 5 of the Notice requires that the plaintiff produce for inspection documents relating to paragraphs 20.13.1, 20.13.2 and 20.13.3 of the Particulars of Claim. (i.e. the documents supporting its figures alleged in its calculation of the loss of profits equalling R 38 000 000.00).

- [3] The plaintiff opposes the application on the basis that the documents sought by the defendant in paragraphs 2 and 3 of the Notice have since been provided by way of a supplementary discovery affidavit that were lost due to technical difficulties. On plaintiff's version, there are no further documents in its possession in response to paragraph 2 and 3 of the Notice. The plaintiff contends that, the documents sought in paragraphs 4 and 5 of defendant's notice are irrelevant to the dispute between the parties. Flowing from the closing arguments between the parties it remains to deal only with paragraphs 4 and 5 of the notice as well as the question of costs.

The nature of the plaintiff's claim

- [4] The plaintiff's action was instituted in December 2018. The plaintiff's cause of action is founded on a partly written and partly oral contract. The plaintiff claims that the contract was entered upon on or about 16 January 2015. The terms and scope of the agreement however, are in dispute. The agreement was terminated by notice at the instance of the plaintiff on 20 February 2017. According to the plaintiff, the defendant was to deliver and install a complete e-commerce system for the plaintiff that would be fully functional for its purpose.
- [5] The plaintiff pleads that prior to the conclusion of the agreement with the defendant, it had determined to deploy "a new business model, based on a proof of concept blueprint, for an all -in -one fully integrated e-commerce digital technology platform". In order to implement the e-commerce platform, the plaintiff required the components of the e-commerce platform to be designed, implemented and commissioned by the defendant.
- [6] The plaintiff emphasises and alleges that the defendant's obligations in terms of the agreement was to provide the necessary hardware and software, and commissioned the integrated e-commerce platform so that the proposed business operations could commence. The plaintiff alleges that it incurred a loss in sum of R 1 070 650.00 in the acquisition of additional resources, contractors and equipment or items that were redundant or wasted because of

the defendant's breach of the Agreement. The plaintiff claims this amount from the defendant in prayer 1.1 of its Particulars of Claim.

[7] The plaintiff alleges that, it suffered damages *inter alia* for loss of profits in the amount of R 38 000 000.00 over a three-year period brought about by "the delay to the Plaintiff in the launch of its E-Commerce Platform" and calculated on several revenue amounts that are pleaded in paragraph 20.13 of the plaintiffs Particulars of Claim. The plaintiff claims R 38 000 000.00 from the defendant in prayer 1.3 of its Particulars of Claim.

[8] The defendant denies that it was contracted to install a full solution but that is was only required to deliver certain goods.

The discovery process

[9] Following exchanges of notices in terms of Rule 35(1) calling upon both parties to discover, the plaintiff served and filed its discovery affidavit on 4 March 2020. As indicated, the defendant served and filed the notice in terms of Rule 35(3) and (6) on 30 March 2021. In the Notice the defendant stated that it believed that, in addition to the documents already disclosed by the plaintiff in its discovery affidavit, there were other documents (including copies) which might be relevant to the matters in question and that such documents were in the possession of the plaintiff. According to the defendant, the documentation sought in paragraph 4 and 5 of the Notice is relevant to the issues as pleaded in the action as *"Defendant is entitled to interrogate the quantification of the loss of profits, calculations of the Plaintiffs' sums and other damages that it contends it is owed, how they are made up and whether such documentation supports the said amounts claimed"*.

[10] In response, the plaintiff served a document entitled "Plaintiff's response to Defendant's notice in terms of Rule 35(3) and (6)". The document purports to be an affidavit, however, on page 4 of the said document the indicated space for a commissioner of oaths' signature has not been completed. Accordingly, the document does not comply with Regulation 4(2)(a) of the Regulations Governing the Administering of an Oath or Affirmation, GN R 1258 of 1982

appearing in Government Gazette 3619 of 21 July 1972 as amended. In addition, an undertaking was given that it would supplement its documentation provided in response to questions 2 and 3 "within the next ten days".

- [11] Consequently, on 2 June 2021 the defendant's attorneys of record wrote to the plaintiffs' attorneys recording that the "Plaintiff's response to Defendant's notice in terms of Rule 35(3) and (6)" is defective in that it does not constitute an affidavit for the reason set out above and noting that the Plaintiff has failed, to date, to supplement its affidavit as it said it would". It was pointed out that the plaintiff is not entitled to withhold relevant documentation. On 3 June 2021, the plaintiffs' attorneys responded, recording that they attached the corrected affidavit signed by their client on 7 May 2021, which they erroneously "omitted to furnish after it was received."
- [12] The plaintiffs' attorneys, in a subsequent email, confirmed that one of the plaintiff's computer hard drive storage devices which contained emails relevant to its relationship with Sizwe IT group ("Sizwe") had failed and was unrecoverable and that the plaintiff was endeavouring to trace all correspondence with Sizwe from other computers. The defendant took the position when it launched the current application on 7 June 2021 that the plaintiff has, however, failed to set out a proper response to the documents required under paragraph 2, 3, of the notice under oath as required in terms of Rule 35(3) and unduly withheld relevant documentation required in paragraphs 4 and 5 of the notice after pointing out that it will deal with the damages claim by way of an expert report.
- [13] On 11 June 2021, the plaintiff's attorney directed correspondence to the defendant's attorney notifying them that the plaintiff had received correspondence between it and Sizwe and would furnish the said correspondence by way of a supplementary affidavit which they did on 30 June 2021 in response to paragraphs 2 and 3 of the notice. On 2 July 2021, despite receiving the plaintiff's supplementary affidavit, the defendant's attorney served a notice of set down of the current application on plaintiff's attorney coupled with a request for the hardcopies for the documentation that

the plaintiff discovered and tendered reasonable photocopy charges. On 5 July 2021, the plaintiff's attorney advised in writing that they will calculate the costs involved and revert to the defendant. In addition, that, if the application was pursued they will file their intention to oppose on 6 July 2021 by close of business.

[14] In a replying affidavit, the defendant pointed out that the plaintiff only complied with its obligations in that regard when it filed its answering affidavit at 14h32 on 20 July 2021¹. As pointed out earlier, paragraphs 2 and 3 has since become moot but for the question of costs. In resisting this application, the plaintiff contends that his claim is not for past loss of profits but for prospective loss of profits that would have been made in relation to a business that has not been launched during the time period for which the defendant's seeks financial statements precisely because of the defendant's breach of contract which formed the subject matter of the claim. According to the plaintiff, the damages claim for loss of profits are based on what profits would have been made by the plaintiff had the defendant not breached its contract.

[15] The plaintiff argues that its claim is for profits that has not been made before, has not been quantified based on its financial statement and for that reason its financial statements has no relevance to the claim. The plaintiff undertakes to provide the relevant expert reports to the defendant to explain how the vacuum would have been filled upon completion. The defendant contends that the plaintiff is withholding the information sought in paragraph 4 and 5 without any lawful grounds. Rule 35 (3) entitles a party who believes that there are documents which may be relevant to give notice that these be made available for inspection.

[16] Rule (35) (3) of the Uniform Rules provides:

"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

¹ Reference to 20 October 2021 in the replying affidavit is a patent error. The matter was heard on 23 July 2021.

requiring him to make the same available for inspection in accordance with subrule (6), or to state an oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him or her”.

[17] It is trite that the purpose of discovery before trial, is to ensure that the parties are made aware of all the documentary material available. The function of discovery is to provide the parties with the relevant documentary material so as to assist them in apprising the strength or otherwise of their respective cases and thus provide a basis for a fair disposal of the matter. The test as to whether a document should be discovered is relevance with due regard to the issues as defined in the pleadings. Rule of Court 35(3) entitles a party who believes that there are documents which may (and not must) be relevant to give notice that they be made available for inspection². The onus of establishing relevance lies with the party seeking discovery or inspection on a balance of probabilities. An application of this nature has to be considered on its own facts and circumstances and whether on the totality thereof an applicant has shown on a balance of probabilities that there are documents which require production.

[18] The courts from numerous decisions are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action, (iv) from any admission made by the party making the discovery affidavit, or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents or tape recordings in his possession or power, or has misconceived the principles upon which the affidavit should be made³. This court has a discretion whether or not to enforce discovery or inspection⁴. It follows, accordingly, that the discretion by the court has to be exercised judiciously.

² *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

³ *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 598 D-E; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 320F-H).

⁴ *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 594H-595E; *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 93C-H.

- [19] If a party requires more time to respond to a request 'for further and better discovery', it is seeking an indulgence, and in the absence of an extension being agreed upon to by the other party, would be required to make application for an extension of time under rule 27(1)⁵. The documents that the defendant seek are *prima facie*, relevant and of evidential value. They are relevant to its defence and, what is more, they are relevant to a central issue of the quantification of damages in the litigation.
- [20] The expert report that the plaintiff will rely on, inevitably, will require facts upon which the expert will rely to base his or her opinion for admissibility purposes. An expert witness, it is trite, is someone who gives an opinion either because he or she has special skill and knowledge on a topic where the court is incapable of forming an opinion without assistance⁶.
- [21] As counsel for the defendant pointed out, the defendant is entitled to relevant documents in preparation for the trial; investigating, interrogating, assessing the correctness of the alleged basis for, rebutting and plaintiff's calculation of its claim for lost profit. Hence the requirement of giving an of opposing party notice of the party intention to call and expert witness and the deliverance to the opponent the summary of the expert's opinions and reasons ⁷. Proper compliance with this procedure enable experts to exchange views before giving evidence and to reach agreement on some of the issues which in turn, save costs and court time. As correctly pointed out, these documents are necessary for the defendant to prepare its own expert witness report, preparation for trial and ultimately cross examination of the plaintiff's expert witness. It was not contended that the documents were not in the plaintiff's possession. It is trite, where the material facts are in dispute, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order⁸.

⁵ *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) 34C-E.

⁶ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MbH* 1976 (3) SA 352 (A).

⁷ Rule 36 (9) of the Uniform Rules.

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G - I.

[22] As indicated, the defendant is instead asking for documents which were, will, or would be used by the plaintiff and its expert witness in arriving at the allegations in paragraphs 20.13.1 to 20.13.3 of the plaintiff's particulars of claim in arriving at the figures as alleged. I find, accordingly, that there is no substance in this objection by the plaintiff. If the documents are in the plaintiff's possession and are relevant they ought to be made available for inspection. In the just and fair resolution of the current dispute between the plaintiff and the defendant, given the nature of the claim under consideration, this court must be slow in the exercise of a discretion against the defendant who persists in disputing the claim. In all probability, the documents that the defendant seeks, will in due course resolve the matter one way or the other.

[23] Having considered each party's position separately and cumulatively, I have accordingly come to the conclusion that, at this stage, the defendant has justified its contention that the plaintiff ought to be ordered to make discovery or allow inspection of such documents that are the subject of paragraphs 4 and 5 of the notice. There is no reason why costs should not follow the result.

ORDER

[24] Accordingly, I make the following order:

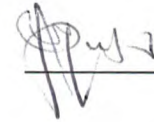
24.1 The Plaintiff /respondent is directed to comply with paragraph 4 and 5 of the notice dated 30 March 2021 given by the Defendant /applicant in terms of Rule 35 (3) and (6) ("the notice");

24.2 That the respondent makes available for inspection and copying the documents specified in paragraph 4 and 5 of the notice within sixty (60) days of this order alternatively to state on oath within sixty (60) days that such documents or tape recordings are not in the plaintiff's possession, in which event the plaintiff shall state their whereabouts, if known;

24.3 That the applicant is given leave, in the event of the respondent failing to comply with the orders in paragraph 1 above, to approach the above

Honourable Court on the same papers, supplemented if necessary, for an order striking out the respondent's relevant claim in the above matter, and;

24.4 That the respondent is ordered to pay the costs of this application.



T P MUDAU
[Judge of the High Court]

Date of Hearing : 23 July 2021

Date of Judgment : 22 September 2021

APPEARANCES

For the Applicant : Adv G W Amm

Instructed by : A B Scarrott Attorneys

For the Respondent: Adv C Whitcutt SC

Adv C van Castricum

Instructed by : RCA Attorneys