




**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No. 12178/15

(1) REPORTABLE: / NO	
(2) OF INTEREST TO OTHER JUDGES: /NO	
(3) REVISED	
2021/09/29	 SIGNATURE
DATE	

In the matter between:

WACO AFRICA (PTY) LTD

Plaintiff

And

FORM FORCE (PTY) LTD

First Defendant

ISMAIL SADEL

Second Defendant

HASSAN SULEMAN

Third Defendant

J U D G M E N T

PHAHLAMOHLAKA, AJ:

INTRODUCTION

[1] These are two interlocutory applications that I am called upon to adjudicate on. The first is an application in terms of Rule 35(7) by the first defendant seeking an order compelling the plaintiff to discover certain documents, and the second is an application in terms of Rule 21 by plaintiff seeking an order against the defendants for delivery of further particulars.

BACKGROUND

[2] In this matter the plaintiff's claim, according to the summons, is for payment of monies that are payable as a result of hiring certain scaffolding equipment to the defendants. The defendants' defence is inter alia that " in respect of the Addington Hospital works, at least 50% of the equipment supplied by the WACO 2005 to the first defendant was defective in that it was badly corroded, unsafe for construction ad not fit for the purpose for which it was hired"

[3] As alluded to in paragraph 1 the first defendant seeks an order in terms of Rule 35(7) compelling the plaintiff to discover certain documents that the first defendant contends are highly relevant to their defence. The application is opposed by the plaintiff who brought its own application against the defendants for the delivery of further particulars. It will be prudent for me to start with this application by the defendants in terms of Rule 35(7).

DEFENDANT'S APPLICATION

[4] The defendant seeks the following relief in terms of Rule 35(7) of the Uniform Rules;

"1.Compelling the plaintiff to comply with the defendant's notice to discover in terms of Rule 35(3) dated 6 September 2017 and in specific paragraph 4, 5,6,7,8,9 and 10 thereof.

"2 Ordering the plaintiff to discover and make available for inspection the documents referred to in paragraph 1 above within 5(five) days from date of the order.

"3 In the event of the plaintiff failing to comply with paragraph 1 and 2 above, that the defendants are given leave, on the same papers, duly supplemented, to seek a dismissal

of the plaintiff's claim, with costs and for judgment in terms of the first defendant's counterclaim."

THE APPLICABLE LAW

[5] Rule 35(3) provides that *"if a party believes that there are, in addition to documents or tape recordings that have been discovered, others 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 same available for inspection."*

Rule 35(7) provides that *"if a party fails to discover or, having been served with a Rule 35(6) notice, omits to give notice of a time for inspection or does not allow inspection, the party desiring discovery or inspection may apply to court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."*

[6] The emphasis here is that the document to be discovered must be "relevant to any matter in question." This procedure should therefore not be used just to delay the proceeding. The documents sought to be discovered must be such that failure to discover or produce the documents will make it difficult for the party seeking discovery to present its case properly. The documents must be relevant either to strengthen the case of the person seeking the discovery of the documents or to weaken the case of the opponent.

[7] The documents that the defendant seeks the plaintiff to discover in terms of Rule 35(3) are the following:

- (i) *A copy of the application submitted to the competition Commission for the approval of the merge in terms of which it is contended that the plaintiff acquired ownership of the business from its predecessor, Waco Africa 2005 (Pty) Ltd with registration number 2005/038286/07, together with all annexures, including all agreements of sale and acquisition.*
- (ii) *All certificates demonstrating compliance with section 44 of the Occupational Health and Safety Act read with Regulation GNR1010 of 23 July 2003, section 14*

thereof reference with SANS10085 in respect of scaffolding safety supplied to the first defendant.

- (iii) The report dated 7 October 2014 by the Peritum Network Investigators referred to in paragraph 5.1 of the founding affidavit deposed by Elizabeth Strydom in the application against Gormley's complete answering affidavit.*
- (iv) Any written correspondence relating to the scaffolding collapse incident which the plaintiff or any of its legal representatives or agents addressed to any party involved.*
- (v) All written responses and/or documents submitted by the plaintiff to the Department of Labour (DOL) pursuant to a section 32 enquiry held by DOL under the Occupational and Safety Act("the enquiry").*
- (vi) Record and transcripts of any enquiries in which evidence was led in terms of the enquiry.*
- (vii) Transcripts of all expert evidence that was and is being led at the enquiry at the enquiry in respect of the scaffolding collapse incident.*
- (viii) Any claims and/or summonses instituted by any of the persons injured and/or killed in relation to the scaffolding collapse incident, including pleadings and all discovered documents.*
- (ix) Copies of all investigation reports that have been launched by the DOL, South Africa Police, the City of Johannesburg, the Engineering Council of South Africa as well as Murray & Roberts.*

[8] The Plaintiff raises the following defences to the Defendant's notice in terms of Rule 35(3);

8.1 That the Rule 35(3) Notice is fatally defective and a nullity;

8.2 That the documents sought are irrelevant;

8.3 That providing the documents will cause prejudice to the plaintiff and third parties;

8.4 That the first defendant's request for the documents constitutes an abuse of the court process; and

8.5 That the endeavour to seek the documents amounts to a fishing expedition.

[9] It is indeed a well-established principle that documents sought to be discovered must be relevant and this requirement of relevance embodied in Rule 35(3) has been considered on numerous occasions by our courts.

[10] In my view that the documents requested are not relevant and therefore will not prevent the defendant from properly preparing its defence. I cannot find how providing the documents will cause prejudice to the Plaintiff and third parties. In any event, I have already found that those documents required are irrelevant.

[11] Indeed the First Defendant's request for the documents constitutes an abuse of the court process because they relate to issues most of which are not pleaded and one fails to comprehend the relevance thereof.

[12] I agree that the endeavour to seek the documents amount to a fishing expedition. The Plaintiff's case is clear and concise and the documents required do not relate to the alleged contract between the plaintiff and the defendants.

[13] I therefore find that the defendant has not made out a proper case for the relief sought. The defendant's application in terms of Rule 35(7) stands to be dismissed.

I now turn to the Plaintiff's application in terms of Rule 21.

PLAINTIFF'S APPLICATION

[15] The plaintiff seeks an order for delivery of further particulars against the defendants.

[14] Rule 21(2) provides that "*after pleadings have closed any party may, not less than 20 days before trial, deliver a notice requesting only such particulars as are strictly necessary to enable it to prepare for trial.*"

Rule 21(4) provides that "*if the party requested to furnish any particulars as aforesaid fails to deliver them timeously and sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or striking out of the defence, whereupon the court may make such order as it deems meet.*"

[16] The purpose of further particulars in a trial is to prevent surprises, to ensure that a party is informed with great particularity what the other party is intending to prove in order to enable its opponent to prepare its case properly. It is to ensure that the other party is not ambushed during trial.

[17] The plaintiff requires the defendant to furnish the following further particulars in terms of Rule 21:

- (i) *In paragraph 4 of Defendants' plea Defendants deny paragraph 5 and 6 of Plaintiff's particulars of claim. Plaintiff requires the following further particulars:*
 - a) *Do the Defendants particularly the First Defendant, concede/admit that **Annexure "W5"** to Plaintiff's particulars of claim was signed/concluded on behalf of First Defendant;*
 - b) *Should the answer to the foregoing question be in the affirmative, First Defendant and Third Defendant are requested to confirm that Annexure "W" had been signed by the Third Respondent and initialled on every page thereof.*
- (ii) *In paragraph 1.3 of Defendants' plea Defendants allege that, in respect of the Addington Hospital Works, the First Defendant and Waco 2005 entered into a written contract which is attached to the Defendants' plea as **Annexure "P1"**. Plaintiff requires the following further particulars:*
 - a) *Do Defendants admit/concede that, in light of the fact that **Annexure "W5"** (to Plaintiff's particulars of claim) had been concluded prior to **Annexure "P1"**, and in light of the fact that **Annexure "W5"** (to the Plaintiff's particulars of claim) (at clause 1 of the Terms of Trade) contains a provision that the terms of Annexure "W5" (to the particulars of claim) shall form part, and apply, to all contracts entered into between the parties, unless specifically excluded or amended by the parties, such exclusion or amendment to be in writing and signed on behalf of the parties, that the terms of **Annexure "W5"** (to the Plaintiff's particulars of claim) were*

applicable to all transactions between the Plaintiff and the First Defendant, including those in respect of the Addington Hospital Works?

- b) Defendants are required to state what "Form – Scaff standard conditions of hire" applied, as provided in paragraph 1 of **Annexure "P1"**.*
 - c) Defendants are, in addition, required to provide a copy of such standard conditions of hire (as referred to in clause 1 of **Annexure "P1"**), should such standard conditions not be contained in **Annexure "W"** (to Plaintiff's particulars of claim).*
- (iii) The First Defendant admits, in paragraph 5.13 of its plea, to be indebted to the Plaintiff in respect of the remainder of the Durban Projects (excluding the Addington Hospital Works), in an amount of R2,335,620.95 and in respect of the Johannesburg Projects in an amount of R852,620.56. In light of the First Defendant's denial as contained in paragraph 4..1 of its plea, and subject thereto that the defendants are not willing to make the admissions/concessions required in terms of paragraph 1.1 and 21 [(i) a and (ii) b] above, the Defendant (specifically the First Defendant) are required:*
- a) To confirm whether the goods supplied in respect of the remainder of the Durban Projects and the Johannesburg Projects respectively were supplied in terms of a written agreement (in which case, the Defendants are required to produce a copy of such agreement/s), or in terms of an oral agreement/s, in which case the Defendants are required to state:*
 - (i) The terms of such oral agreement/s;*
 - (ii) Where and when such agreement/s were concluded; and*
 - (iii) Who represented the parties (Plaintiff and First Defendant) in the conclusion of such agreement/s.*
- (iv) Defendants plead that the Plaintiff was only entitled, in respect of the Addington Hospital Works, to charge the First Defendant an amount of R6,818,704.00.*

The Plaintiff requires full particulars as to the calculations of the aforementioned amount.

- (v) *The Defendants refer to an expert report in paragraph 5.7 of the plea. The Defendants are requested to identify the document referred to and to indicate whether they intend to comply with the provisions of Uniform Rule 36(9) in respect of such expert(s) and if so when.*
- (vi) *The Defendant denies, in paragraph 5.19 of its plea, that it received or that the Plaintiff delivered the quantity of scaffolding as alleged by the Plaintiff. The First Defendant is required to specify:*
 - a) *The exact amounts of goods which it admits to having received, in respect of the Addington Hospital Works and the remainder of the Durban Projects, respectively; and*
 - b) *The dates on which the goods referred to in paragraph 5.1 were received; and*
 - c) *The dates on which said goods were returned to the Plaintiff.*
- (vii) *Defendants deny paragraph 12 of Plaintiff's particulars of claim, wherein Plaintiff introduces certificates of balance (attached to the particulars of claim as **Annexure "W6"** and **"W7"** respectively). Plaintiff requires the following further particulars:*
 - a) *Defendants are required to state, in full details, the basis upon which the Defendants dispute the accuracy/correctness of the certificates of balance attached as **Annexure "W6"** and **"W7"** respectively.*
- (viii) *Defendants deny paragraph 27 of Plaintiff particulars of claim, wherein Plaintiff introduces certificates of balance (attached to the particulars of claim as **Annexure "W8"** and **"W9"** respectively). Plaintiff requires the following further particulars;*

- a) *Defendants are required to state, in full detail, the basis upon which the Defendants dispute the accuracy/correctness of the certificates of balance attached as **Annexure “W8”** and **“W9”** respectively.*

[19] The defendants responded to the plaintiff's request for further particulars but the plaintiff contends that the answers given are not adequate. In fact the defendants blatantly refuse to answer the requested further particulars. For example the defendants were asked whether the third defendant admits to concluding **Annexure “W5”** (to the particulars of claim). In addition thereto the plaintiff seeks particulars whether it is in fact the third defendant that initialled every page thereof. The defendants refused to provide further particulars relating to whether or not the third defendant initialled every page of **Annexure “W5”**. The reason furnished for refusal to furnish further particulars is that making such admission would obviate the plaintiff from calling a witness in relation to the signatures on the document. Counsel for the defendants referred me to a number of authorities to support his argument that the further particulars sought by the plaintiff are not relevant to enable the plaintiff to prepare its case. In particular in the matter of **Dotcom Trading 118 (Pty) Ltd v Hobbs Sinclair Advisory (Pty) Ltd [2016] ZAWCHC 155 Davis J** said the following “in summary the defendant has misconstrued the law in respect of the scope of Rule 21 and the particulars which may be requested. Rule 21 as I have indicated, may only be utilised in respect of particulars which are strictly necessary to enable the defendant to prepare for trial. In particular, evidence may not be sought by way of request for trial particulars.” I agree with the said passage but it does not find resonance in the current matter. I cannot find that the plaintiff is seeking evidence in its request for further particulars. I was also referred to **Hardy v Hardy 1961 (1) SA 653 (W) at 647**, among others, by counsel for the defendants. I have to reiterate that the particulars sought by the plaintiff are such that if they are not provided the plaintiff will not be able to prepare its case with peculiarity.

[20] It is clear that failure by the defendants to furnish further particulars as requested is only aimed at frustrating the other party or the opponent. The defendants cannot furnish any convincing reason why the further particulars sought by the plaintiff are not relevant to the plaintiff's case. For this reason I am of the view that the plaintiff should be furnished with the particulars it seeks. The test for refusing to furnish further particulars is not whether furnishing same would obviate the calling of further witnesses or not. The test is

rather whether such further particulars are strictly necessary to enable the party requesting them to prepare for trial.

[21] The defendant's objection to furnish the further particulars as requested by the plaintiff is therefore without merit.

[22] Consequently I am of the view that the plaintiff's application should succeed.

[23] In the result I make the following order:

23.1 The application by the defendants in terms of Rule 35(7) is dismissed.

23.2 The application by the plaintiff in terms of rule 21 succeeds and the Defendants are ordered to deliver the further particulars as requested by the plaintiff within 3 (three) days from the date of this judgment.

23.3 The defendants are ordered to pay costs.


K.F PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 29 September 2021 at 10:00.

HEARD ON:

12 August 2021

FOR THE PLAINTIFF:

Adv. Reubenheimer

INSTRUCTED BY:

**Klagsbun Edelstein Bosman Du Plessis
Inc**

FOR THE DEFENDANT:

Adv. Amier SC

INSTRUCTED BY:

Kabir Khan Attorneys

DATE OF JUDGMENT:

29 September 2021