



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)



Case No: 59047/2012

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
T.J. RAULINGA	DATE

In the matter between:

**TMT SERVICES AND SUPPLIES (PTY) LIMITED**

and

**MPUMALANGA PROVINCIAL GOVERNMENT:**

**DEPARTMENT OF ROADS AND TRANSPORT**

AND

**PLAINTIFF**

**DEFENDANT**

**CASE NO: 17827/2014**

In the matter between:

**TMT SERVICES AND SUPPLIES (PTY) LIMITED**

And

**MPUMALANGA PROVINCIAL GOVERNMENT:**

**DEPARTMENT OF SAFETY, SECURITY AND LIAISON**

**PLAINTIFF**

**DEFENDANT**

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**JUDGMENT**

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RAULINGA J,

1. The applicant TMT and Supplies (Pty) Ltd, seeks an order compelling the discovery of certain specified documents which it alleges are relevant for the conducting of the litigation. The applicant has further narrowed the relief sought by it in reply by limiting the documentation sought to that referred to in paragraph 1.2 and 1.3 of the notice of application. The application accordingly only concerns the defendant in case number 5904/2012, being the Department of Roads and Transport (hereinafter referred to as the "respondent").
2. On 7 March 2018, having heard counsel for the parties, I issued an order which included both the defendants in the consolidated action. On 18 May 2018, the applicant or plaintiff filed a notice in terms of Rule 41(2) abandoning part 1 of the judgment or order handed down on 7 March 2018. This leaves the Department of Roads and Transport as the only respondent in this matter.
3. On 19 March 2018, the respondent filed a notice in terms of Rule 49(1) (c) requesting for reasons of the judgment or order granted on 7 March 2018. This notice never reached me, until the 11 September 2020, when I received a note from the acting DJP alerting me of the said notice. I immediately reverted indicating that same never reached my chambers.
4. The following are reasons for the judgment or order so granted.
5. The applicant, as plaintiff claims payment of the sum of R33 Million from the respondent for services rendered to the Provincial Government pursuant to a tender and contract for traffic surveillance and enforcement system.

6. It seems to me that the respondent does not contend that the services were not provided, but raises instead a variety of other defences. In January 2016, the respondent amended its plea to add a further defence. The defence is based on the allegation that it was a material condition of the tender that all tender applicants be registered as debt collectors in terms of the Debt Collector's Act No 114 of 1998. The respondent pleads that the applicant was not in fact registered as a debt collector, it misrepresented to the respondent that it was registered and accordingly the tender was awarded to the applicant at the time when the applicant was in fact disqualified from tendering. The respondent accordingly pleads that the award of the tender, and the subsequent contract, are null and void.
7. The applicant contends that the respondent was aware that the applicant and other tenders were not registered as debt collectors, the respondent was aware that the applicant utilised the services of a third party as its authorised debt collector and that this was acceptable to the respondent. Further, that the respondent was aware that a number of tenderers were not registered as debt collectors, and decided not to disqualify any of them and adjudicated all of them, together with the applicant, as competing tenderers.
8. The respondent avers that the request for discovery in terms of Rule 35(3) cannot be countenanced, because the documents to be discovered are irrelevant or immaterial as provided for in section 2 of the Civil Proceedings Evidence Act 25 of 1965. Therefore, the said documents cannot conduce to prove or disprove any point or fact in issue.
9. It is also the argument of the respondent that it served and filed its amendment to its plea as long ago as 21 January 2016. That to date



hereof, the applicant has failed to replicate to such plea and is, in terms of Rule 26 of the Uniform Rules of Court, *ipso facto* barred from doing so.

10. To this averments, the applicant submits that in its opposing affidavit and the heads filed on its behalf, the respondent overstates the test for relevance of documentation as was laid down in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co*, 11 Q.B.D 55 and also referred inter alia in *Continental Ore Construction v Highveld Steel & Vanadium Corp Ltd* at 597 with approval as follows:

*"under the earlier Rule it was held that discoveries had to be made of every document-*

*'which not only would be evidence upon any issue but also which, it is reasonable to suppose, contains information which may- not which must- either directly or indirectly enable the party requiring the affidavit either to advance his own case or damage the case of his adversary....'*

*In the Compagnie financiere case, supra, which is the fons et origo of the test of relevance quoted above, Brett L J, at page 63, explained as follows why he had inserted the words "either directly or indirectly" in laying down the principle-*

*"I have put in ...(these)... words because ...a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is document which may fairly lead him to a train of enquiry which may have either of these two consequences".*

11. I am in agreement with the applicant that the test for relevance is accordingly whether the documentation may enable the party, directly or

indirectly, to advance his case. The documentation will indirectly allow this, if it may fairly lead the litigant to a trail of enquiry which may be of assistance.

12. The relevancy of the documents is determined from the pleadings and not extraneously therefrom. A party may only obtain inspection of documents relevant to the issues of the pleadings – *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999(2) 279 (T) at 311A.
13. The meaning of relevance is circumscribed by the requirement that the documents and or recordings relate to or may be relevant to “any matter in question: “Any matter in question is determined from the pleadings- *Swissborough* (supra) at 316 J to 317 A.
14. Interestingly, the respondent also raises the issue whether the written agreement relied upon by the first respondent in the consolidated actions under case number 59047/2012 and 17827/2014 is invalid and unenforceable.
15. In the first place, this application pertains only to the respondent under case number 59047/2012. Secondly, I am satisfied that the applicant has described the documents in a manner that they are identifiable. As such the applicant may require production of any number of documents, it is not limited to number of documents. Moreover, the applicant has dealt in its affidavit with all relevant issues- *Swissbrough* supra- at 322I –J and 323 B-C.
16. As the applicant submits, the facts at issue are
  - (i) Whether the competing tenderers were not registered as debt collectors;



- (ii) Whether the competing tenderers disclosed the fact, that they were not registered to the respondent either in their tender applications or in their tender presentations to the respondent;
- (iii) Whether the respondent was aware, at the time of adjudication, that the competing tenderers were not in fact registered as debt collectors; and
- (iv) Whether the respondent nevertheless proceeded to adjudicate the competing tenders on the basis that all qualified for consideration.

17. I am with the applicant that the relevance of the tender application and tender presentations of the competing tenderers is manifestly relevant to its case. It fulfils both the criteria of "directly and indirectly" relevant referred to by Brett LJ in *Compagnie supra*. Further, the documents are directly relevant to the factual allegations in this case, and indirectly in the sense that they can fairly be said to open a line of enquiry that will be relevant to the dispute. Moreover, if the documents are not discovered, the applicant will be unable to succeed in presenting its proposed answer to the defence.
18. The respondent alleges that it served and filed its amendment to its plea as long ago as 21 February 2016. That to date hereof, the applicant has failed to replicate to such plea and is, in terms of Rule 26 of the Uniform Rules of Court, *ipso facto* barred from doing so. The respondent raises the issue of waiver and estoppel.
19. In my view, and as submitted by the applicant, the respondent's amendment raised an entirely new defence, and one that on its own would non-suit the applicant if upheld, as is clear from the order of 8 July 2016, in terms of Rule 33(4).

20. Notwithstanding, the applicant has already filed a replication and needs only deal with the new defence. Therefore, the applicant is not *ipso facto* barred from amending its already existing pleading. Secondly, to the extent that the rule may seek to bar an amendment to existing replication, the applicant is entitled to seek condonation in terms of rule 27.
21. Indeed, if the applicant was the only tenderer who was not registered as a debt collector at the time of tendering, then proving a waiver or estoppel will be difficult since the waiving of the condition for the applicant alone would constitute the granting of an unfair advantage to one tenderer over others.
22. While it is trite that the applicant (plaintiff) should make its factual allegation on its pleadings, it is also important that the documents be provided to the court to know whether the factual assertion is true or not. For that reason, the applicant must be allowed to compel discovery. I reiterate that a litigant is entitled to the discovery of documentation which may lead it on a "trail of enquiries" which would ultimately advance its case.
23. It seems to me that the issue of confidentiality raised by the respondent in paragraph 22 of its heads of argument is not persisted with. Further, since confidentiality is not the same as legal privilege and does not constitute a valid ground to refuse discovery, save in exceptional circumstances. Exceptional circumstances do not exist in this case.
24. The contract that the respondent referred to, was concluded after the tendering process. As the applicant correctly submits, this does not impact on whether the respondent was entitled to waive a tender requirement across the board for all tenderers at the time of tendering.

25. Consequently, the application must be granted with costs.

26. The order made on 7 March 2018, is accordingly amended and granted as follows:

- a. "The respondent is ordered to discover the documents in terms of paragraph 1.2 and 1.3 of the notice of application.
- b. The order concerns the defendant in case number: 59047/2012, being the Department of Roads and Transport".



**JUDGE T. J RAULINGA**  
**JUDGE OF THE HIGH**  
**COURT**

**APPEARANCES**

For the Applicant : Adv J Newdigate SC

Adv A.D Brown

Instructed by : Natalie Visagie INC

For the Defenadant : Adv M.M Oosthuizen SC

Adv S.G Webster

Instructed by : Soutie Janse Van Rensburg Attorneys

Matter heard on : 07 March 2018

Date of Judgment : 22 January 2021