



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

Case No: 26465/2020

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

SIGNATURE

26 SEPTEMBER 2022

DATE

In the matter between:

IMPERATECH SOLUTIONS (PTY) LTD

Plaintiff

And

COLUMBUS CONSULTING (PTY) LTD

Defendant

In re:

IMPERATECH SOLUTIONS (PTY) LTD

Applicant

And

COLUMBUS CONSULTING (PTY) LTD

Respondent

JUDGMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] This matter came before me as an opposed application in the opposed motion roll and was set down for hearing on 27 July 2022.

[2.] The plaintiff seeks to compel the defendant to furnish documents to it in terms of rules 35(3), (6), (8), and (10). It alleges the documents are relevant to the action proceedings instituted by the plaintiff, seeking contractual damages against the defendant for its alleged repudiation of an alleged oral agreement which agreement is denied by the defendant. These documents include: All correspondence exchanged between the defendant and the South African National Biodiversity Institute ("SANBI") prior to 29 February 2020, including but not limited to letters, emails, and notices in terms of rules 35(3), (6), (8), and (10) (my emphasis).

[3.] The defendant's main contentions are set out in the defendant's plea and answering affidavit to compel filed subsequently, that there is no contractual agreement between the plaintiff and the defendant that would rationalize the furnishment of the sought-after documents. Further, it contends that the plaintiff is not entitled to any correspondence exchanged between the defendant and the Sanbi because not only are these documents irrelevant to the plaintiff but if divulged, the confidentiality of the SANBI's procurement relationship with the defendant would be compromised. In contrast, the plaintiff contends that seeking discovery of documentations as aforesaid is relevant to its version of the disputes on the pleadings.

I will refer to the parties as described in the main action and shall now turn to deal with each ground of objection as pleaded. These grounds are succinctly summarised in the plaintiff's heads of arguments as follows:

[4.] *"The plaintiff alleges that on or about 14 December 2019, the plaintiff and the defendant concluded an oral agreement in terms whereof it was agreed that the plaintiff would provide certain services to the defendant to enable it to comply with its tender contract with SANBI. The defendant denies the existence of such an oral*

agreement and pleads that the negotiations that occurred between the parties did not result in any agreement being concluded. Further, that it did not require any services from the plaintiff in order to meet the tender contract with SANBI. The plaintiff alleges that during the execution of the agreement, it employed certain employees in order to render the services agreed upon in the agreement. However, the defendant repudiated the agreement and interfered in the employment relationship, persuading the plaintiff's employees to terminate their employment with the plaintiff. The Defendant denies these allegations, yet pleads that the plaintiff failed to pay its "resources" (presumably employees) and that as a result, the plaintiff was faced with "unhappy resources threatening to walk out and refusing to render services to SANBI"; the defendant was "accordingly left with no other option but to employ the Plaintiff's unhappy resources in order to continue rendering services to the SANBI. The plaintiff submits that these' latter allegations by the defendant of course starkly contradict its denial that any agreement was in place or that the plaintiff's employees were meant to render services for the SANBI tender contract.

[5.] The Plaintiff/Applicant has accordingly, in its Rule 35 (3) Notice, requested (i) correspondence between the Defendant/Respondent and SANBI; (ii) correspondence with the Applicant's employees (the "unhappy resources"); (iii) employment agreements concluded between the Respondent and certain specified individuals and (iv) a statement of the SANBI account showing invoices and payments received. This documentation according to the Applicant all relates directly to the version of events as pleaded by the Applicant (and to a large extent as accepted by the Respondent in its contention that the Applicant's unhappy employees were rendering services to SANBI and did in fact take up employment with the Respondent). The Respondent's objects to the furnishing of this documentation inter alia on the ground that "as per the defendant's plea, the parties held numerous talks and negotiations but did not reach any final agreement ..." The Respondent proceeds to respond that because the Applicant was not a party to any agreement, it is not entitled to the documentation requested⁷. The novel position is therefore adopted by the Respondent that because it denies the existence of an agreement, the Applicant is not entitled to any discovery of documentation which may go to show the existence of such an agreement.

[6.] The Respondent contends that the correspondence between the Respondent and the Applicant's erstwhile employees is confidential, as are the employment contracts concluded. The Applicant contends that it is trite, with respect, that confidentiality is not, of itself, a valid ground to object to the discovery of relevant documentation.

[7.] The third objection relates to the over broad nature of the request. The Applicant denies same and submits that the Applicant's request is limited to four specific categories of documents, all of which are circumscribed by the parties thereto, the dates thereof and/or the individuals reflected therein. The request is specific and well within the generally accepted form of a request for discovery".

APPLICABLE LEGAL PRINCIPLES

[8.] Rule 35(1) and (2) requires from a party to an action that has been requested thereto, to make discovery on oath of all documents and tape recordings relating to any matter in question in such action which are, or have at any time been in the possession or control of such party.

[9.] If a party is not satisfied with the other party's discovery, it may make use of the procedure provided for in Rule 35(3) to obtain inspection of documents which that party believes are in the possession of the other party and which are relevant to any matter in question. Rule 35(3) provides that:

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

[10.] The object of discovery was stated in ***Durbach v Fairway Hotel Ltd***¹ to be, to ensure that before the trial, both parties are made aware of all the documentary evidence that is available. Discovery of such documents are intended to assist the parties and the court to discover the truth and, in doing so, to contribute to a just determination of the case.

[11.] In ***Herbstein & Van Winsen***, it was stated that:

“Our law recognises that proper mutual discovery in litigation of contemporary documentary material which is often more valuable than the oral testimony.”

And furthermore that:

“The scope of discovery... is wide. It extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence but which may fairly lead to an enquiry relevant to the issues.”

[12.] In applications under uniform 37(7), the court has a discretion whether or not to compel discovery or inspection. This discretion is clear from the wording of the subrule, which provides that:

“If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection and aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss a claim or strike out the defence.”

CONTENTS OF THE RELEVANT PLEADINGS

[13.] The Applicant's Notice in terms of Rule 35(3) is filed on caselines paginated bundle 008-1-008-2. The Respondent is requested to provide documentation for inspection by the Applicant and the following were stated:

“the Plaintiff requires the Defendant, in compliance with Uniform Rule 35(3), to make the following documents available for inspection in accordance with sub-

¹ 1949 (3) SA 1081 (SR) AT 1083.

rule (6), or to state under oath within 10 (TEN) days that the documents are not in the Defendant's possession, in which event the Defendant must identify the requested documents' whereabouts, if known to it:

- 1. All correspondence exchanged between the Defendant and SANBI prior to 29 February 2020, including but not limited to letters, emails and whatsapp communications.*
- 2. All correspondence exchanged between the Defendant and the Plaintiffs erstwhile employees who subsequently took up employment with the Defendant;*
- 3. All employment agreements concluded between the Defendant and Tebelo Mpedi; 3.2. Samuel Suteka; 3.3. Renaldo Williams; 3.4. Ntsane Kuenane; 3.5. Alfred Shabangu; 3.6. Damian Lambert; 3.7. Anthony Hilary Johnson; 3.8. Francois Fourie.*
- 4. The Defendant 's comprehensive statement of the SANBI account showing all invoice and payment remittances relating to the contract”.*

[14.] The Respondent's responses to the Notice of Applicant is captured on caseline bundle 009-3. In its affidavit in reply to the 35(3) notice dated 18 March 2021, the Respondent states as follows:

“7.1.1 As per the defendant's plea, the parties held numerous talks and negotiations, but did not reach any final agreement.

7.1.2. Thus, in the absence of the plaintiff being a party to the agreement concluded between SANBI and the defendant, it is not entitled to what it seeks hereunder.

7.1.3. Further/alternatively, in any event, it is trite that in terms of rule 35(3), the information requested must be properly identified since the sub-rule envisages a demand to produce information/documentation.

7.1.4. The plaintiff, by requesting "All documentation... including but not limited to..." has failed to comply with the sub-rule and such request is tantamount to a 'fishing expedition'.

7.2. All correspondence exchanged between the defendant and the plaintiff's erstwhile employees who subsequently took up employment with the defendant) (my emphasis)

7.2.1. The defendant objects to the production of this documentation, which is strictly confidential.

7.2.2. The defendant has no mandate from these employees to share their personal information with third parties, such as the plaintiff, and thus has a strict responsibility to protect same.

7.2.3. Further, alternatively, in any event, it is trite that in terms of rule 35(3), the information requested must be properly identified since the sub-rule envisages a demand to produce ~specific information/documentation.

The plaintiff, by requesting "All correspondence... with the defendant..." has failed to comply with the sub-rule and such request is tantamount to a 'fishing expedition'. (All employment agreements between the defendant and the 8 individuals listed in 3.1— 3.8) The defendant objects to the production of this documentation, which is strictly confidential.

7.3.2. The defendant has no mandate from these employees to share their personal information with third parties, such as the plaintiff, and thus has a strict responsibility to protect same.

7.3.3(The defendant's comprehensive statements of the SANBI account showing all invoice and payment remittances relating to the contract) In the absence of the plaintiff being a party to the agreement concluded between SANBI and the defendant, it is not entitled to what it seeks hereunder.

...

7.4.2. The information/documentation requested is strictly confidential, and not for dissemination to third parties, such as the plaintiff."

ANALYSIS

[15.] The ambit of the dispute between the Plaintiff/Applicant and the Defendant/Respondent in the main action is:

15.1 The Applicant avers that the parties concluded an oral agreement to collectively tender for tender IT335/2019 in the name of the Respondent, to apply if the Respondent was awarded the tender. The Respondent in contrast avers that the parties engaged in discussions, but the parties have not concluded any agreement subsequent to the written agreement noted in item 1 above.

15.2 The Applicant avers that it performed in terms of the alleged oral agreement referred to above. The Respondent avers that there was no agreement as alleged. Applicant made aware that tender IT335/2019 awarded to Respondent. The Applicant avers that the parties concluded a further oral agreement to regulate services to be provided by the Applicant to SANBI and its remuneration in respect of IT335/2019.

15.3 The Respondent avers that there was no oral agreement concluded. The Applicant avers that it rendered services to SANBI in terms of the alleged additional oral agreement with the Respondent. The Respondent denies that there was any oral agreement concluded between the parties. The Applicant avers that it cancelled the agreement with the Respondent and the Respondent denies that there was an agreement.

15.4 If indeed services were rendered to the Respondent, whether the Respondent had received payment for the specified invoices;

15.5 The issues in the matter and all documents sought to be discovered can therefore only be related to the specified invoices and payment claims contained therein.

15.6 The documents requested in terms of the Applicant's 35(3) notice, in as much as it do not only relate to the said invoices and payments thereof, are not relevant to the issues in question.

15.7 The rule 35(3) notice does not clearly specify which documents the application requires.

15.8 The Applicant cannot, by means of an application to compel, seek discovery, being also something which the Respondent stated in its affidavit is not in the Respondent's possession.

15.9 The Applicant's case on the pleadings in the present matter is based on an IT service agreement which it contends was breached by the Respondent, by not paying and interfering with its employees. This is vehemently denied by the Respondent, in that, the talks between the parties never resulted to any agreement whether oral or

written. In its heads of argument, the Respondent refers me to plathora of case law supporting its contention. One of which is the Con-Court decision of **Independent Newspapers** with full citation at paragraph 25 of its heads of arguments, which *inter alia* impresses the principle of how the right to discovery is intertwined to the right to a trial and the litigant's right to discover documents that are confidential. Chief amongst those is that the Respondents contention that the documents sought are not in their possession and this latter contention is highly rejected by the Applicant.

15.10 The Respondents further referred me to the test set by rule 35(3), which entails the relevance of the documents sought. In this case Adv. C Louis on behalf of the Respondent submits that the rule of discovery does not open to the party in the position of the Applicant to aver an oral agreement between two parties relating to the second party's dealings with third parties if that agreement is disputed discovery is invoked as a remedy for the Applicant. According to Adv Louis, if this can be allowed, the same would create scope for abuse. The correct mechanism is for an Applicant in that position who relies on the existence of an oral agreement, he must aver the terms of that contract and not seek discovery of the contracts of third parties who had dealings with the Respondent. This is a fishing expedition that still have to be proved so the submissions go.

[16.] The party who is not satisfied with the discovery has the onus of proving on the balance of probabilities that the documents exist and are relevant. (See **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa 199 (2) SA 279 (T) at 323 F-J.**

[17.] An ordinary meaning of the words used in Rule 35(3) lays the two grounds on which such a notice may be served for it to be valid. First, a party must **believe**. Secondly, the document sought must be **relevant**. The Applicant must lay sound grounds for its believe.

[18.] To my mind, the Applicant has not objectively laid the basis for requesting these documents. The relevance of the documents will inevitably not enable the Applicant to advance its own case and to prove its damages against the Respondent.

[19.] The Respondent has raised valid objections to not producing such documents. In ***MLAMLA v MARINE & TRADE INSURANCE COMPANY 1978 (1) SA 401 (E)*** at 402 it was found that the right of a party to an action to resist discovery is a limited right existing only in certain well-defined circumstances for instance, where the document “is covered by legal professional privilege” or “it would be injurious to the public interest if it were to be disclosed.”

CONCLUSION

[20.] I am satisfied that the Applicant has not described the document under request with sufficient accuracy to be able to be identified. In the premise I take the view that the Applicant is not entitled to a better discovery affidavit from the Respondent. In the absence of any allegations of possible prejudice, I am inclined to exercise my discretion in favour of the Respondent and not to order the Respondent to provide a better discovery to the Applicant.

[21.] In the premises I make the following order:

21.1 The Applicant’s application to compel discovery be dismissed with costs



N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 26 September 2022.

APPEARANCES

FOR THE APPLICANT: ADV. C LOUIS

FOR THE RESPONDENT: ADV. D LINDE

DATE OF HEARING: 27 JULY 2022

DATE OF JUDGMENT: 26 SEPTEMBER 2022