IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 695/2020

In the matter between:

BIRGIT CHRISTINE LÜTZEN Applicant/Plaintiff

and

KNYSNA MUNICIPALITY Respondent/Defendant

and

Case No.: 695/2020

In the matter between:

KNYSNA MUNICIPALITY Applicant/Defendant

and

BIRGIT CHRISTINE LÜTZEN Respondent/Plaintiff

JUDGMENT DELIVERED ELECTRONICALLY ON 08 MAY 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This judgment concerns two interlocutory applications between the parties. The main action between the parties involves a delictual claim instituted by the plaintiff for damages she allegedly suffered when she fell and injured herself whilst walking on a wooden walkway which collapsed. The two interlocutory applications are the following:

a. The plaintiff's application in terms of Uniform Rule 35(7) to enforce compliance with Rule 35(3); and

b. The defendant's application to enforce compliance with Uniform Rules 35(3) and 21.

B. PLAINTIFF'S APPLICATION

[2] This application arises from a notice delivered by the plaintiff on 31 August 2022 in terms of rule 35(3) which, in relevant part stated as follows:

> "…the Plaintiff believes that there are in addition to the documents already discovered by the defendant in its discovery affidavit further documents that may be relevant to matters in question in this action.
>
> …the plaintiff requires the Defendant to make the documents listed below available for inspection in accordance with Rule 35(6) or to state under oath within 10 (ten) days from the date of service hereof that such documents are not in its possession in which event they shall state they are whereabouts if known…."

[3] The Notice proceeded to itemize 8 categories of documents requested, one of which was described as follows at paragraph 7: *"All documents logged on the Municipal "App" system relating to the reporting and/or occurrence of any incidents and/or complaints and/or concerns made by any persons including members of the public relating to the use of the said walkway."*

[4] There was some delay on the part of the defendant, which is evident from the exchange of correspondence between the attorneys, and in respect of which the

defendant's attorney requested and was granted indulgence. In one of the emails dated 13 October 2022, the defendant's attorney stated as follows:

> "We have held several consultations in relation to the extensive further documentation that your client has required of our client in terms of Rules 35(3) and Rule 21. Unfortunately, much of this documentation and information is either not available or difficult to trace, given that your client is seeking records which go back many years. We have been compelled to speak to various different departments at the municipality to ensure that all the information - and the correct information - is supplied to you as per your request, to the extent that that is possible. However, this has resulted in a situation where we require further time…"

[5] On 20 October 2022 the plaintiff issued an application in terms of Rule 35(7) in the Western Cape Division of the High Court which was set down for 28 October 2022 (*"the application to compel"*). Although the notice in terms of Rule 35(7) is not part of the papers, it is common cause that its objective was to compel compliance with the Rule 35(3) Notice that is the subject of these proceedings. It is also common cause that the application was opposed by the defendant, who countered by bringing an application in terms of Rule 30 to declare the plaintiff's application as an irregular step. What is presently relevant is that the application to compel was later withdrawn by the plaintiff on 15 February 2023, with a tender for costs.

[6] On 24 October 2022, after the launching of the application to compel, the defendant's attorney sent an e-mail to the plaintiff's attorney headed *"Re:Lutzen/Knysna Municipality"* which stated as follows:

> "We refer to the above matter and previous correspondence. Please find enclosed herewith the last bunch of documents received for our insured. We confirm that a confirmatory affidavit that the insured has supplied all documents in its possession follows shortly."

[7] The e-mail of 24 October 2022 did indeed annex some documents. Then, on 25 October 2022 a further e-mail followed, enclosing a confirmatory affidavit of one Ivan Van Wyk. This affidavit has become central to these proceedings, and it provided as follows:

> "1. I am the Acting Manager: Parks and Recreation in Knysna Municipality.
> …

> 3. I am duly authorized to dispose (sic) to this affidavit contents thereof being within my personal knowledge.
> 4. I confirm that Knysna Municipality App System does not contain any information relating to the incident involving Birgit Christine Lutzen.
> 5. I further confirm that we have provided all the documents in our possession."

[8] There was further correspondence between the parties. On 9 November 2022 the plaintiff's attorney addressed an e-mail to the defendant's attorney stating as follows: *"We look forward to hearing from you regarding ... your stance regarding a formal reply to the Plaintiff's Rule 35(3) so as to attempt to deal with the current interlocutory issues between the parties"*.

[9] On 22 November 2022 the plaintiff's legal representatives addressed a letter to the defendant's attorneys, stating *inter alia* as follows:

> "At our aforementioned meeting on 28 October 2022, you undertook to specifically consider the Plaintiff's application to compel in that the only responses received from your offices in respect of the Plaintiff's notice in terms of Rule 35(3) dated 31 August 2022 was an e-mail from your offices dated 24 October 2022 stating… On 25 October 2022, per e-mail, we received a filing sheet with a confirmatory affidavit of one Ivan Van Wyk… However, the affidavit does not reference the Plaintiff's Rule 35(3), nor does it comply with the Rules of Court. We once again, therefore, invite your client to comply with the Plaintiff's notice in terms of Rule 35(3), so as to avoid the unnecessary delay of the main action involved…"

[10] On 28 November 2022 a court order was taken by agreement between the parties in terms of which the trial was postponed to 21 and 22 August 2023. In addition, the court order stated as follows:

> "The parties shall approach the Registrar of this Court for later dates for the trial in the event that interlocutory issues under the above case number or under the associated case number 17654/2022 in the Western Cape Division of the High Court in Cape Town have not been finally disposed of by agreement judgment or otherwise within 15 court days of 21 August 2023."

C. THE PARTIES' CASES

[11] Similar to its correspondence of 22 November 2022, the basis of the plaintiff's case as contained in the founding affidavit is that defendant's replies of 24 and 25 October 2022 do not reference the plaintiff's Rule 35(3) Notice, fail to comply with the requirements of the Notice itself, and with the Uniform Rules of Court. The

defendant complains in the answering affidavit that the plaintiff's founding affidavit fails to specify the specific Uniform Rules relied upon and manner in which it is alleged that it (the defendant) has failed to comply with the Uniform Rules. In the replying affidavit the plaintiff has expanded its grounds for this application, whilst at the same time stating that the defects are so patently obvious that it was unnecessary to detail them. As a result of the expanded case in reply the defendant has brought an application to strike out material in the replying affidavit which is said to be new. Because of my approach to the matter, I do not find it necessary to determine the striking out application.

[12] As the correspondence dated 7 and 22 November 2022 indicates, the plaintiff has never been satisfied with the defendant's responses contained in the two emails of 24 and 25 October which include the confirmatory affidavit of Ivan Van Wyk; and regarded compliance with the Notice as an outstanding issue and in respect of which the defendant was required to file a formal reply. That correspondence also foreshadowed what has become the plaintiff's main contentions in the founding papers, namely that the defendant's responses do not reference the Rule 35(3) notice, do not comply with the content of the notice itself and fail to comply with the Uniform Rules.

[13] In essence, the defendant's case is that it has complied with the Notice by forwarding the e-mail of 24 October 2022 which enclosed documents, and by forwarding the confirmatory affidavit of Ivan Van Wyk on 25 October 2022. On this basis the defendant argues that the plaintiff is being unduly technical because it is clear from those documents that they refer to the plaintiff's Rule 35(3) notice, including by reference to the Municipality's 'app' system, which was the subject of the requested item 7 in the notice.

[14] It is common cause that the defendant did not reply to the complaints contained in the plaintiff's letters of 7 and 22 November 22. The defendant argues that the statements made therein related to the application to compel which was subsequently

withdrawn. That, however, does not mean that the defendant complied with the notice at any stage. In fact, on the defendant's own version, its response in those proceedings in relation to compliance with the Rule 35(3) Notice was the same as in these proceedings, namely that the documents provided by it on 24 and 25 October 2022 constituted sufficient response to the rule 35(3) Notice. The bulk of its opposition to the application to compel objected to the launching of those proceedings as an irregular proceeding.

[15] The primary question arising is therefore whether the defendant's response, as contained in the emails of 24 and 25 October 2023 constituted sufficient and proper response to the plaintiff's Rule 35(3) Notice.

D. THE LAW

[16] Uniform Rules 35(3) provides as follows:

> "(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 such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.

[17] In terms of Rule 35(3), the defendant was required to make documents available for inspection in accordance with subrule (6), which provides as follows:

> (6) Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver within five days, to the party requesting discovery, a notice in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of such party's attorney or, if such party is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise. (my emphasis)

[18] The defendant admits that it did not comply with the underlined requirement. This is also admission that it failed to comply with what is stated in the Notice in this regard, namely to invite the plaintiff to inspect the documents at a relevant time. That being so, the defendant was required, in terms of sub-rule (3), to state on oath within 10 days that such documents or tape recordings were not in the defendant's possession, in which event it was required to state their whereabouts, if known. The defendant says it substantially complied with this requirement by delivering the affidavit of Van Wyk.

[19] At the very least, sub-rule (3) requires the party called upon to produce documents to sufficiently identify the documents in its details to enable (i) the other party to call for it, and (ii) the court to know whether or not the document in question has been produced.[1] The defendant has woefully failed to meet these requirements. It remains unclear in what respects the defendant claims to have complied with the requests made in the plaintiff's Rule 35(3) Notice - in other words, which items are said to have been discovered. The issue remains no clearer after my repeated enquiry from the defendant's counsel.

[20] Instead, the defendant emphasizes that courts are, as a general rule, reluctant to go behind a discovery affidavit which is regarded as conclusive. This is correct. However, context is everything. That general rule operates unless it can be shown from, amongst other things, the discovery affidavit, that 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 made.[2] The Notice in question here is in terms of Rule 35(3). It expressly states that the plaintiff believes that there are reasonable grounds for supposing that the defendant has additional documents in its possession not yet discovered. In that context, the general rule relied upon by the defendant cannot

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[1] *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194C–E. See Erasmus RS 20, 2022, D1472A.
[2] *Federal Wine & Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749H. See also *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 597E–G.

operate in its favour. In any event, the further context is that the purpose of Rule 35(3) is not delivery of a discovery affidavit - which the defendant now argues should be seen to be the end of its compliance - where the general rule implored by the defendant could be implored. That is another reason the general rule cannot assist the defendant here.

[21] As a result of the defendant's failure to meet the requirements of Rule 35(3), (6) and of the Notice that was served upon it by the plaintiff, the plaintiff was entitled to bring this application in terms of Rule 35(7), which provides:

> "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 as 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 the claim or strike out the defence."

[22] Under the circumstances discussed above, the plaintiff is entitled to obtain an order enforcing compliance with the Rule. It does not assist for the defendant to claim that any order will breed confusion or will be unenforceable. It is the defendant that has failed to meet the requirements of the Rules. In fact, as I have already indicated, at no stage has the defendant ever indicated in what specific respects it has complied with the Rule. And at no stage has it ever sought clarity regarding the plaintiff's complaints -which are recorded from as far back as November 2022 - that it was required to formally comply with the Rules.

[23] In all the circumstances, the defendant ought to comply with the plaintiff's Rule 35(3) Notice dated 31 August 2022.

E. THE DEFENDANT'S APPLICATION

[24] On 30 March 2023 the defendant delivered an application seeking orders directing the plaintiff to comply with its (defendant's) notices, both dated 5 September 2022, in terms of Rule 35(3) and Rule 21, respectively.

[25] The application concerning the Rule 35(3) notice sought to enforce compliance with paragraphs 7 and 8 of the defendant's Rule 35(3) notice, in terms of which the plaintiff was requested to make available for inspection certain itemized, including the following:

> "7. All disability claims, insurance claim forms, correspondence, emails and any other documentation whatsoever pertaining to any claims or applications of whatsoever nature submitted by the Plaintiff in Germany or elsewhere, whether for medical, insurance or other purposes, arising from the incident.
>
> 8. All correspondence and any other documentation whatsoever submitted to the Plaintiff's employer, Academische Arbeitsgemeinschaft, or any other employer or organisation in relation to sick leave, disability leave or otherwise in relation to the Plaintiff's absence from her employment or other activities."

[26] Although the remainder of the documents requested in the notice were made available by the plaintiff, she refused to make the documents requested in paragraphs 7 and 8 available on the basis that they *"pertain to the issue of quantum and are not therefore relevant to the matters currently in question in respect of the trial on the preliminary issue of liability"*. It is common cause that the parties had previously agreed to a separation of issues, between of merits and quantum, in terms of Uniform Rule 33(4).

[27] In correspondence leading up to this application, the defendant maintained that the documents in question remained producible because firstly, even though the merits and quantum are separated, it is entitled to consider them for purposes of making a Rule 34 tender in settlement of the main matter. Furthermore and in any event, the defendant stated that the documents requested may well have a bearing on the merits of the claim because such documents often contain important information including dates and versions of witnesses.

[28] In response, the plaintiff stated that the specific documentation requested was voluminous, and it was alleged that, in requesting the documents, the defendant was embarking on a fishing expedition. Nevertheless, on 19 October 2022, the plaintiff

offered to provide copies of the documents relating to *"disability applications, et cetera"*, *"in the interests of moving the matter forward"*. In response to this offer the defendant insisted on a formal response which was compliant with Rule 35(3). Instead of a formal response, the plaintiff forwarded some documents on 31 October 2022, for purposes of complying with the request at paragraphs 7 and 8 of the defendant's notice.

[29] The defendant admits receiving *"a substantial bundle of documents"* which was supplied by the plaintiff on 31 October 2022, *"comprising documentation in German fitting the description of paragraphs 7 and 8 of the [defendant's] notice in terms of Rule 35(3)"*. In the replying affidavit it is stated that amongst those documents the defendant has identified several which are relevant to the merits of the matter.

[30] The defendant persists in its quest for the documents and repeats its contentions contained in the correspondence set out above. Its complaint in these proceedings is that the plaintiff has failed to comply with the letter of Uniform Rule 35(3) by either making the documents in her possession available for inspection in accordance with Rule 35(6), or stating under oath the whereabouts of those documents not in her possession if known. In particular, it is stated that the defendant is entitled to know that it has all the documentation requested and the whereabouts of documentation that is not in the possession of the plaintiff.

[31] The plaintiff continues to rely on her replies set out above, contending that the defendant is not entitled to inspection of the documents called for at paragraphs 7 and 8 of the Rule 35(3) notice. In addition, she states in these proceedings that the request for documents in paragraphs 7 and 8 of the notice is vague and unduly broad. Furthermore, the plaintiff adds that nothing precludes the defendant from making a tender in terms of Rule 34, regardless of whether the documents in question are made available.

[32] I first turn to consider the plaintiff's refusal on the basis that the documents requested relate to quantum and not merits. In appropriate cases the court may, in the exercise of its discretion, order deferment of discovery of documents relative to a contingent issue. This will be done only in exceptional circumstances where the court will not oblige the defendant to contest the issue on which discovery is claimed until the defendant has succeeded on the primary issue.[3] The issue, however, is case-specific and involves considerations such as the prejudicial nature of the information if it is revealed to the applicant.[4]

[33] Here, the plaintiff has not placed any such exceptional circumstance. She relies on an assumption that the documents referred to relate only to quantum and not to merits, which assumption is apparently based on nothing more than the experience of the plaintiff's legal representatives. The assumption is not only disputed by the defendant, but it is dispelled by the defendant's discovery that some of the documents already made available as a matter of courtesy are indeed relevant to the merits of the case of the defendant. This negates the plaintiff's basis for refusing to make the documents available.

[34] It bears highlighting that the obligation to discover is very wide, and applies even if a party may lawfully object to production of such a document.[5] In *Transnet v MV Alina II*[6], this Division applied the following authority: *"...the scope of discovery… 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. But a court may, of course, refuse to order discovery to the extent that the discovery is not necessary for fairly disposing of the matter, and to the extent that it would be oppressive to order it"*.[7]

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[3] *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 595D–E.
[4] See Erasmus RS 18, 2022, D1476; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 199E–200E.
[5] *Durbach v Fairway Hotel Ltd* 1949(3) SA 1081 SR at 1083.
[6] At para 22.
[7] See *Transnet v MV Alina II* ZAWCHC 124; 2013 (6) SA 556 (WCC) (5 September 2013) para 22.

[35] Further, relevance of documents is to be determined with reference to the pleadings and the issues raised by them.[8] In this regard, what was stated in *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd*[9] bears reference:

> "The test of discoverability or liability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still *prima facie* conclusive, unless it is shown on one or other of the bases referred to above that the Court ought to go behind that oath; and the *onus* of proving relevance, where such is denied, still rests on the party seeking discovery or inspection". (my emphasis)

[36] Here is a further difficulty regarding the plaintiff's stance. She did not deliver an affidavit on oath regarding the alleged vagueness, over-breath, irrelevance, or even prejudice, which was alluded to during the hearing. As a result, there is no 'oath' to speak of as being conclusive in her favour.

[37] I have included the ground of alleged prejudice in the previous paragraph because it was argued at the hearing that, since the documents requested are in German, the task of collating them is burdensome. I would have expected this to be a foremost reason for refusing the defendant's request, and not for it to have arisen in the manner it did. I do not find it appropriate to decide the issue in plaintiff's favour. Rather, the plaintiff should place the difficulties encountered in collating the documents under oath, to enable to defendant to deal therewith. The same goes for the remaining bases for plaintiff's refusal, namely that the request for the documents is vague, overbroad and amounts to a fishing expedition. I point out, as regards the alleged vagueness, that the plaintiff's reply, dated 27 September 2022, did not seem to have difficulty in understanding what was sought by the defendant. No complaint regarding vagueness was raised at that stage.

[38] Considering that it has already been shown that some of the documents that the plaintiff assumes are not relevant for the various reasons already referred to, are in

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[8] *Swissborough Diamond Mines of RSA and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 317 A-D; *Federal Wine and Brandy Co Ltd v Kantor* at 753 D-G; *Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd* 2000 (3) SA 181 (WLD) at 194A)).
[9] At 598 D-F.

fact relevant. The parties, and this Court, cannot be held to the plaintiff's unsustained assumptions. Given that the duty to discover is wide, it is more appropriate that the documents be provided, and if some prove not to be relevant, then, according to the case law, so be it.

F. THE DEFENDANT'S RULE 21 NOTICE

[39] I now turn to the defendant's notice in terms of Rule 21. First, some applicable legal principles. It has long[10] been accepted that the purpose of further particulars for trial, is as follows: (a) to prevent surprise; (b) that the party should be told with greater precision what the other party is going to prove in order to enable his or her opponent to prepare his or her case to combat counter-allegations; (c) having regard to the above, nevertheless not to tie the other party down and limit his or her case unfairly at the trial.

[40] Furthermore, a court will not compel the disclosing of evidence if it is solely used as a tool for the early provision of evidence.[11] This, however, does not mean that further particulars may not be ordered if it will disclose evidence. Even if the particulars requested may at times involve the disclosure of evidence, that fact does not disentitle the applicant from obtaining the particulars if on the grounds of embarrassment or prejudice in the preparation of his or her case (s)he would otherwise be entitled to know what case (s)he had to meet.[12] The test is therefore whether either party would be embarrassed or prejudiced in its preparation for trial.

[41] Again, the court holds a discretion regarding whether or not to order compliance with a request for further particulars.[13]

[42] The defendant seeks to compel replies to its request for trial particulars which were itemized as 6, 7,13,14.7, 15,19 and 22.

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[10] *Thompson v Barclays Bank D.C.O.,* 1965 (1) SA 365 *(W) at p. 369.*
[11] *Carte v Carte* 1982 (2) SA 381D at 319C-E.
[12] *Annandale v Bates* 1956 (3) SA 549 (W) at 551.
[13] *Szedlacsek v Szedlacsek* 2000 (4) SA 147 (ECD) at 150 A – B.

[43] The request at paragraphs 6 and 7 was for the plaintiff to furnish particulars regarding where she was coming from and where she was going to at the time of the incident. It now transpires that what the defendant was after, was the direction in which the plaintiff was headed. This, however, is not what was requested, and I am in agreement with the plaintiff that the request, as expressed in the defendant's notice, is not strictly necessary for purposes of preparing for trial. The defendant does not need to know where the plaintiff was coming from or going to. To make matters worse, the defendant argues in the heads of argument that the answer to its request may reveal whether or not the plaintiff had imbibed alcohol at lunch, revealing yet another set of particulars that it seeks. This amounts to a fishing expedition, and is not within the category of particularity that is strictly necessary for purposes of preparation for trial.

[44] At paragraph 13 the defendant requested the plaintiff to furnish particulars of whom she was with when the incident occurred, and of any persons who attended to her thereafter and of any such witnesses. This request is justified, in the first instance, by reference to an alleged promise made by the plaintiff in a pre-trial minute. In this regard, the plaintiff admits that she undertook to provide details of any further witnesses she intends calling in due course, but that, however, she is not obliged to provide such particulars as and when the defendant decides.

[45] In the second instance, the defendant justifies this request by stating that it may wish to consult with these witnesses. But the law is clear that a party is not entitled to know whether the other party is going to call witnesses and, in the event of such party calling witnesses, who they are and what they will say.[14] In my view, in seeking these particulars, the defendant seeks to elevate the plaintiff's promise to a duty which is protected by Rule 21. That cannot be. The particulars sought are not strictly necessary for purposes of preparing for trial.

[46] At paragraph 14.7 the defendant requested to know whether it is "*alleged that, prior to stepping on the relevant part of the walkway, there was no visible damage or*

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[14] *Mlamla and Another v Marine and Trade Insurance Co* 1978 (1) ECD 401 at 402F – G.

defect in the walkway?" The plaintiff refused on the basis that the particulars sought are not strictly necessary for purposes of preparation for trial and constituted evidence.

[47] The particulars requested are undoubtedly a matter for evidence, and are not strictly necessary for the defendant to properly prepare for trial. I also do not think that the defendant would be prejudiced or embarrassed if the particulars were not supplied.

[48] At paragraph 15 the plaintiff is requested to indicate where the warning signs referred to in her particulars of claim should have been erected. I am of the view that such information is not strictly necessary for the defendant to properly prepare for trial. Such information would be a matter for evidence, and may even amount to an opinion on the part of the plaintiff, in any event.

[49] At paragraph 19 the defendant sought information as follows:

> "19. No replication was filed and so the Plaintiff is taken to deny the allegation in the Defendant's plea that the area was cordoned off with danger tape. In regard to this denial:
>
> 19.1 Is it alleged that the Plaintiff and/or Mr. Lutzen and/or Lothar Hoefie did not see any danger tape:
>
> 19.1.1 Before the incident?
> 19.1.2 After the incident?
> 19.1.3 At all?
>
> 19.2 If any of the above persons did at any time see the danger tape, where and when precisely did they see the danger tape?"

[50] The background to this request is that in the pleadings the plaintiff has denied the defendant's allegation that there was danger tape erected at the time of the incident. According to the defendant, this denial can only mean that the plaintiff positively avers that there was no danger tape in place.

[51] It is trite that a party is not entitled to further particulars for trial in relation to a bare denial. [15] If, however, the denial necessarily involves an implied and affirmative

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[15] *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1960 (1) SA 446 (W) at 448; *Hardy v Hardy* 1961 (1) SA 643 (W) at 646; *Swart v De Beer* 1989 (3) SA 622 (E) at 625.

allegation, the position is otherwise, for in such a case the mere fact that the allegation is not stated in words will not preclude the court from ordering particulars.[16]

[52] Regardless of whether or not the plaintiff's denial amounts to a positive averment, I am of the view that the fact that she has denied the presence of danger-tape means that she has set up a clear framework with sufficient precision for the parties to prepare for trial, and in particular for the defendant to not to be taken by surprise at trial. The further particulars sought in this regard can only be a matter for evidence in respect of which the defendant will neither be embarrassed nor unable to properly prepare for trial if these particulars are not granted to it.

[53] At paragraph 22, the defendant's request is as follows:

> "22. Defendant's discovered item 2.13 (a socio medical report dated 21 February 2020 by Dr Gronau to MH Plus Insurance, Ludwigsburg) makes reference to the Plaintiff as the "insured" and deals with the issue of the duration of the Plaintiff's incapacity to work. In this regard:
> 22.1 To whom at the insurer was the above report directed?
> 22.2 What are the "assessment bases" mentioned in paragraph 1?
> 22.3 Precisely what documentation was submitted to the insurer in support of the Plaintiff's claim? Full details of all such documents are required.
> 22.4 Was the Plaintiff's claim accepted or rejected by the insurer? If it was accepted in what amount and on what date was the relevant claim paid?"

[54] The plaintiff refused to furnish these particulars on the basis that they are not strictly necessary for purposes of preparation for trial, and in any event, constitute evidence. The plaintiff's complaint is that the requested particulars relate to the issue of duration of incapacity to work, which in turn relates to quantum and not merits, and is accordingly not relevant. In addition, the plaintiff points out that there would be no reason why the defendant could not make the necessary enquiries relating to the report directly from its source.

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[16] *Hardy v Hardy* 1961 (1) SA 643 (W) at 646H–647, cited with approval in *Swart v De Beer* 1989 (3) SA 622 (E) at 625G–I. See also *Snyman v Monument Assurance Corporation Ltd* 1966 (4) SA 376 (W) at 379H–380A; *Lotzoff v Connel* 1968 (2) SA 127 (W) at 129E–G.

[55] Given that the document which forms the basis of these requests is from the defendant's own discovered item, it is understandable why the plaintiff argues that the queries should be directed to the source of the document. That, however, is not a test for allowing or refusing discovery. In circumstances where most if not all the information requested in this request is within the plaintiff's first-hand knowledge, I do not think it unreasonable for her to be requested to supply such information. I am furthermore of the view that, although the particulars requested amount to evidence which can be elicited during the trial, the defendant will be prejudiced in its preparation for trial if the plaintiff is not ordered to comply with the request. And as I have already indicated elsewhere, I do not agree that the documents can be said to be irrelevant simply because the plaintiff is of the view that the particulars requested pertain to quantum and not to merits.

[56] In the circumstances, the plaintiff should comply with the request at paragraph 22 of the defendant's notice.

G. ORDER

[57] In the circumstances the following order is made:

a. The defendant shall comply with the plaintiffs Rule 35(3) Notice dated 31 August 2022, and shall pay the costs related to that application.

b. The plaintiff shall comply with paragraphs 7 and 8 of the defendant's Rule 35(3) Notice dated 5 September 2022, and shall pay the costs related to that application.

c. The plaintiff shall comply with paragraph 22 of the defendant's Rule 21 notice dated 5 September 2022. Each party is to pay its own costs related to this application.

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N. MANGCU-LOCKWOOD

Judge of the High Court