



THE REPUBLIC OF SOUTH AFRICA

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

Case No: 2717/2015

In the matter between:

RYNO ENGELBRECHT N.O.

First Plaintiff

YUNUS ABOO BAKER ISMAIL N.O.

Second Plaintiff

SHONA LE ROUX-MARX N.O.

Third Plaintiff

And

RIYAZ MOHEDIEN

Defendant

JUDGMENT DELIVERED ON 31 MARCH 2016

BOQWANA J

Introduction

[1] This is an application to compel the defendant to furnish the plaintiffs with the particulars requested in paragraphs 1 to 3 of the plaintiffs' request for further particulars for the purpose of preparation for trial dated 31 July 2015; and for the defendant to produce for inspection by the plaintiffs, documents referred to in the Rule 35(3) Notice delivered by the plaintiff on 24 July 2015, in accordance with

Rule 35 (6), or to state on oath that such documents are not in his possession, in which event to state their whereabouts, if known to the defendant. Failing compliance, the plaintiffs seek that they be authorised to bring an application for an order striking out the defence of the defendant on the same papers. For convenience parties are referred to as cited in the main proceedings.

[2] The defendant applied for condonation of the late filing of the opposing affidavit to this application. The answering affidavit ought to have been delivered by no later than 19 January 2015 as per Court Order granted by agreement between the parties on 8 December 2015. The defendant cites lack of funds as the reason for the late filing of the answering affidavit. The answering affidavit was only delivered on 19 February 2015, exactly a month after its due date.

[3] In their replying affidavit deposed to by their attorney, the plaintiffs opposed the granting of condonation on the basis that the defendant failed to explain how his financial circumstances changed between 8 December 2015 when he agreed to a timetable for delivery of further pleadings and January 2016 when he was supposed to file answering papers. They allege that they were prejudiced in that they had to deliver replying papers almost immediately in order to avoid a postponement and had prepared their case on the basis that no answering papers would be delivered. The plaintiffs further submitted that the defendants should be liable for wasted costs. During oral argument, Mr Borgström, who appeared for the plaintiffs, did not appear to be strongly taking issue with the application for condonation.

[4] Having considered the explanation given by the defendant and other considerations submitted by the parties, I am satisfied that condonation for the late filing of the answering affidavit should be granted.

Background facts

[5] The plaintiffs are joint trustees of the insolvent estate of Alwyn Bernardus Smit ('Smit'), who was finally sequestered on 8 April 2014. It is averred in the particulars of claim that before the sequestration of his estate, Smit made payments

to the defendant, alternatively for the benefit of the defendant, in the amounts and on the dates set out in annexure “PC2” of the particulars of claim.

[6] It is further alleged that each of these amounts constituted a disposition of his property by Smit, as contemplated in s 2 of the Insolvency Act 24 of 1936 (‘the Insolvency Act’); each of these dispositions was made at a time when the liabilities of the insolvent exceeded the value of his assets; each such disposition was not made for value; alternatively was made with the intention of preferring the defendant above other creditors of the insolvent and had the effect of doing so; and constituted a disposition of his property as contemplated in s 26, alternatively s 29, alternatively s 30 of the Insolvency Act, and each liable to be set aside in terms of the Insolvency Act.

[7] As regards the allegation that Smit made payments to the defendant or for his benefit, the defendant made the following allegation in his plea: *‘Defendant bears no knowledge hereof, does not admit same and puts Plaintiffs to the proof thereof.’*

[8] With regards to the allegation that the alleged payments constituted dispositions, his response was that: *‘Defendant denies that any payment that he ever received from the insolvent may have, at any time, constituted a “disposition” as contemplated herein.’*

[9] He further denied any knowledge of whether the liabilities exceeded Smit’s assets at the time the alleged ‘dispositions’ were made.

[10] In regard to the plaintiffs’ averments that each such disposition was not made for value or was made with the intention to prefer the defendant above other creditors of the insolvent and constituted a disposition as contemplated in the relevant provisions of the Insolvency Act; and was liable to be set aside, the defendant pleaded as follows: *‘Defendant bears no knowledge hereof, does not admit same and puts Plaintiffs to the proof thereof. In amplification Defendant pleads that he has never received from Defendant (sic), at any time material hereto, any payment without value, made to him by the insolvent for the purpose of*

preferring one creditor above the other, same having the effect of doing so, and that such payment, if received by the Defendant, may have constituted a disposition as contemplated by the Insolvency Act, and further denies that any such payment, if received; falls to be set aside.'

[11] On 31 July 2015, the plaintiffs delivered a Request for Trial Particulars for the purpose of preparing for trial, where full particulars of all payments made by Smit to the defendant or for his benefit at the time when these were made from 1 January 2010 to 8 March 2014 were requested. I will not state all the particulars requested in detail as those adequately appear in the request for further particulars document. What is important to mention, however, is that the plaintiffs required full particulars regarding each payment made to the defendant by Smit during the stated period. Reasons for such payments made were also requested.

[12] The defendant delivered his Reply to the Plaintiffs' Request on 12 October 2015 where he stated that: *'Defendant indicated in its plea that it "may" have received payments and "if" same was received it would not constitute payment without value. Defendant can categorically state that it has received none of the payments specified in the Plaintiffs annexure "PC2"'*

[13] The plaintiffs were not satisfied with this answer hence the bringing of this application. Key to this application is an affidavit deposed to by Smit which is attached to the founding affidavit. In it Smit alleges that he made 27 payments to the defendant and/or for the defendant's benefit as set out in annexure "PC2" of the plaintiff's particulars of claim. He attached bank statements pertaining to the alleged 27 payments.

[14] He alleges further that these payments were made to the bank accounts nominated by the defendant. Some of these alleged payments had certain references to "M & R Wholesalers" and "Fish City" and to an account number [47.....]. These payments, he alleges, were made at the request of the defendant.

[15] It is submitted by the plaintiffs that the particulars sought in the request are strictly necessary to enable the plaintiffs to prepare for trial and that the defendant

cannot refuse to provide such particulars based on a denial that any payments were received by him.

[16] The plaintiffs were also not satisfied with the defendant's discovery affidavit. They delivered a Notice in terms of Rule 35(3) of the Uniform Rules requiring the defendant to disclose and make available for inspection:

‘1. All documents and correspondence relating to any payments made by or on behalf of the defendant to Alwyn Bernardus Smit (‘the insolvent’) and payments received by or on behalf of the defendant from the insolvent during the period 1 January 2010 to 8 March 2014.’

2. All statements in respect of all bank accounts utilised for the payments or receipt of payments referred to in 1.’

[17] In reply to the Plaintiff's Notice in terms of Rule 35 (3) the defendant stated as follows:

‘Defendant has no documentation in his possession that reveals any payments made to the Defendant and / or correspondence relating to payments made by the Defendant to Alwyn Bernardus Smit. Likewise the defendant does not have any bank statements relating to the payments aforesaid.’

[18] According to the plaintiffs it is clear that payments were made to bank accounts nominated by the defendant and that he cannot avoid producing his personal bank statements or bank statements in respect of other accounts conducted by him in another name by simply making a bald denial that any payments were received by him.

[19] It is submitted on behalf of the plaintiffs further that the defendant's answering affidavit says very little and simply regurgitate the vagueness that is contained in the plea. It does not deal with the allegations contained in Smit's affidavit by denying or admitting or even giving an explanation thereto. Because of that, so argue the plaintiffs, Smit's allegations remain uncontroverted and should be taken as correct.

Analysis

[20] The entitlement by a party to particulars for the trial derives from Rule 21 of the Uniform Rules. Rule 21 (2) provides that after the pleadings have closed any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. In terms of Rule 21 (4) *‘[i]f the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet.’*

[21] The purpose of further particulars for trial is trite. It is to prevent surprise, to ensure that a party is told with great precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations and not to tie the party down and limit his or her case unfairly at the trial.¹

[22] It has been found that the request would therefore relate to pleaded issues and would not raise further or new issues between the parties.² The purpose of the request therefore is to clarify issues already defined in the pleadings in order to facilitate better preparation.

[23] While in general the purpose of particulars for trial is not to elicit evidence or information which will be canvassed at the trial,³ at times furnishing of particulars may involve disclosure of evidence. Frequently the furnishing of particulars might result in the disclosure of evidence and that has been held not to be a ground for refusal of an order to compel particulars.⁴ However, *‘[n]o hard and fast rule can be laid down as to the degree of particularity that is required; the*

¹ *Thompson v Barclays Bank DCO* 1965 (1) SA 365 (W) at 369D-E; *Lotzoff v Connel and another* 1968 (2) SA 127 (W) at 129 C- D; *Erasmus, Superior Court Practice, Second Edition, Van Loggerenberg, Volume 2 at DI-252*

² See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of RSA and Others* 1999 (2) SA 279 (TPD) at 317 D

³ *Carte v Carte* 1982 (2) SA 318 (D) at 319 C-D

⁴ *Brett v Schultz* 1982 (3) SA 286 (SE) at 292H-293B and *Lotzoff v Connel and another* supra at 129 D-E.

*Court exercises its discretion upon the facts of each case; and the decision in one case is no safe guide to the solution of another unless the relevant facts are identical.*⁵ Ultimately the court retains a discretion as to whether it should grant or refuse an order compelling discovery. A party is accordingly not entitled to an order compelling a reply as of right should the opposing party fail to deliver further particulars timeously or sufficiently. Such a party must set out information to enable the Court to consider whether or not to exercise its discretion in its favour.⁶

[24] The second leg of the application to compel deals with discovery and is intertwined with the request for further and better particulars as both deal with the payments allegedly paid to the defendant by Smit as set out in annexure “PC2” of the particulars of claim. In this regard, much of the applicant’s argument was devoted to the defendant’s failure to produce the bank statements required in terms of the plaintiffs’ Rule 35 (3) Notice and that uncontroverted evidence existed as evidenced by Smit’s affidavit that payments set out in PC2 were made to the or for the benefit of the defendant by Smit.

[25] 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 in accordance with sub-rule 6, or 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.

[26] Rule 35 (6) provides that a party may by notice require the other party to make available for inspection any documents or tape recordings disclosed in terms of sub-rules (2) and (3). The latter shall then, within five days, deliver a notice in which he or she will state a time within five days of the date of delivery of the notice when the documents or tape recordings may be inspected. The party wishing

⁵ *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 947 D - E

⁶ *Szedlacsek v Szedlacsek; Van Der Walt v Van Der Walt; Warner v Warner* 2000 (4) SA 147 (E) at 150 A-B

to inspect shall be entitled at the time therein stated and for a period of five days thereafter, during normal business hours and on any one of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof.

[27] In terms of Rule 35(7) 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 a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.

[28] As to the request for further particulars, the defendant denied knowledge of the plaintiff's claim that he received any payment without value, and averred that if any payment may have been received, such payment did not constitute a voidable disposition which fell to be set aside in terms of the Insolvency Act. He further put the plaintiffs to the proof of the fact that payments were made to him and that such constituted payments without value. The defendant's response to the request for trial particulars, however, was that he received none of the payments specified in annexure "PC2" of the particulars of claim.

[29] Mr Borgström submitted that the plea and the defendant's reply to the request for further particulars are contradictory and that contradiction has not been explained. In his words, no attempt is made to explain the change of heart. According to him, the defendant has delivered a deliberately confusing, contradictory and evasive plea and the answers he provided both to the discovery and further particulars' request are insufficient.

[30] It was accepted on behalf of the plaintiffs that the defendant's reply to the request for further particulars constitutes part of the pleadings. That being the case, it is difficult to see how the response that : *'Defendant can categorically state that it has received none of the payments specified in Plaintiff's [sic] annexure "PC2"'* should not be accepted as the defendant's answer to the questions regarding payments that are alleged as those he received from the plaintiffs. The Defendant submits that to the extent that there was any confusion in his plea regarding

whether or not payments were received by him or for his benefit, he has made it clear that he received none of the payments in PC2 which form the foundation of the plaintiffs' claim.

[31] The position would have been different had the defendant not given a reply denying receiving payments set out in PC2.

[32] To the extent that a complaint is raised that the plea was confusing or contradictory or vague and embarrassing, that is a different complaint. The plaintiffs did not raise an exception regarding this. I agree that they were not obliged to raise an exception; they were within their rights to request further particulars, which they did. Mr Borgström argued that an exception would have failed, in any event, because the plea was not vague and embarrassing but deliberately evasive.

[33] An answer which now forms part of the pleadings has been delivered, which seeks to clarify averments made in the plea (whether or not the plaintiffs agree with the answer is a different issue). I am not sure if matters can be taken beyond that, and on what basis could the court compel the defendant to give answers on payments that he alleges he never received, i.e. those listed in PC2 of the plaintiffs' particulars of claim, which form the basis of the plaintiffs' claim.

[34] The plaintiffs' request for further and better particulars is clearly based on Smit's affidavit who seeks to show that he made the payments contained in PC2 to the defendant and illustrate those by attaching bank statements to his affidavit. The averments in this affidavit did not form part of the pleadings. I disagree that the Plascon-Evans rule⁷ bears any relevance to these interlocutory proceedings. The court is not called upon to resolve on the disputed evidence between the parties, at this stage. To ask the court to accept Smit's evidence as uncontroverted and to order the defendant to admit, deny or offer explanation on the basis of Smit's affidavit would be taking things too far, in my view. What compounds the difficulty in this case is that the defendant has offered a reply denying that

⁷ *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) ; [1984] 2 All 366 (A)

payments were made to him.

[35] I therefore do not see how the defendant can be forced to change his reply, based on the information contained in Smit's affidavit. If he alleges that he did not receive the payments alleged in the particulars of claim, as he has done so in his reply to the request for further particulars, what more can the court do in those circumstances? It seems to me the issues raised in Smit's affidavit are indeed matters that should be canvassed at trial. To the extent that the plaintiffs are dissatisfied with the defendant's denial that he received those payments or his alleged 'change of heart' as it were between his plea and reply, those are matters which he can be cross-examined on. He would also have the opportunity to test Smit's allegations. I therefore decline in these circumstances to exercise my discretion in favour of the plaintiffs by granting an order compelling delivery of further particulars as sought by them in this application.

[36] Turning to the issue of discovery, Mr Borgström argued that the court does not have to determine whether payments were made, all that is required is for the court to compel the defendant to deliver the bank statements and if he does not have those or if they are not in his control or lost, to say so under oath.

[37] Whilst I have found that it would not be appropriate to make an order on the basis of Smit's affidavit, I am persuaded by the argument that it is not sufficient for the defendant to state in a form of a notice that he has no documentation in his possession relating to any payments made by Smit to him and that he does not have any bank statements relating to the payments as aforesaid.

[38] Putting aside Smit's affidavit, bank statements of all bank accounts for payments made by or on behalf of the defendant to Smit and payments received by or on behalf of the defendant from Smit during the period 1 January 2010 to 8 March 2014, were required by the plaintiffs in their Rule 35 (3) Notice dated 24 July 2015. I disagree with Mr Fisher when he says that the plaintiffs have never asked for bank statements. Annexure A to the Rule 35 (3) Notice bears that request, in my view.

[39] Mr Fisher submitted that a request to discover bank statements is justifiable but should have been done before coming to court. I do not follow this argument, Annexure A of the plaintiffs' Rule 35 (3) Notice is quite clear that all statements in respect of all bank accounts utilised for the payments or receipt of payments referred to above were requested. If any specificity was required by the defendant about the bank statements required, nothing stopped him from asking the plaintiff for further information in that regard. Instead he filed a notice in response to the Rule 35 (3) notice stating that he had no such documents in his possession and likewise with the bank statements. There was no indication that he never understood what was asked of him, he responded to the request by saying he did not have the documents required.

[40] The wording of Rule 35(3) notice appears to be unequivocal, in my view. If the defendant had misunderstood it as being too broad, unclear on unspecific he should have said so. The defendant never showed any misunderstanding regarding what was required of him. He responded to the notice by stating that he did not have those in his possession by way of notice. Furthermore, the claim is clearly about payments made to him or for his benefit by Smit as set out in PC2. Annexure A of the Rule 35 (3) notice states which bank statements are required and for which period.

[41] In terms of Rule 35 (3), the party who believes that there are other documents which may be relevant to any matter in question in the possession of any party thereto, may give notice to the latter requiring him to make the same available for inspection in accordance with sub-rule (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.

[42] To illustrate the importance of compliance with the rules dealing with discovery, it has been held in relation sub-rules 1 and 2 of Rule 35 that even an attorney cannot make discovery required on affidavit on behalf of his client, except in very special circumstances and the attorney is in a position of his own personal

knowledge to make a comprehensive affidavit.⁸ In regard to the relevant sub-rule (3), objections to an attorney deposing to the discovery affidavit were held to be equally valid as in sub-rules 1 and 2.⁹ It was held in *Rellams (Pty) Ltd* supra that ‘Rule 35 (3) concerns documents not yet discovered and clearly contemplates an affidavit other than and additional to one made under Rule 35 (1)....[t]he plaintiff is at least entitled to be informed in proper form if the documents called for are in the defendant’s possession and if their relevance is being disputed. This has not been done and the application calling upon the defendant to comply with Rule 35 (3) should accordingly have been granted.’¹⁰ (Underline for emphasis)

[43] It follows therefore that replying to the plaintiffs’ notice in terms of Rule 35 (3) by way of a notice or a document through an attorney cannot constitute sufficient response and is not compliant with the rule. Rule 35 (3) clearly contemplates an affidavit by the defendant and stipulates that the plaintiffs must require the defendant to, inter alia, ... 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. In the circumstances, relief sought for compliance with Rule 35 (3) must succeed.

[44] On the issue of costs, it seems appropriate, in my view, to leave that issue for determination at a later stage by the trial court in view of my findings on the relief sought. Same should apply with regard to the condonation application.

[45] I therefore make an order as follows:

1. Late filing of the answering affidavit is condoned.
2. The application for relief directing the defendant to furnish the plaintiffs with the particulars requested in paragraphs 1 – 3 of the plaintiffs’ request for further particulars for the purpose of preparation for trial dated 31 July 2015 is refused;

⁸ *Erasmus Superior Court Practise*, Second Edition, Van Loggerenberg, Volume 2, Juta D1- 459

⁹ See *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 at 558 G – 559D and *Richardson’s Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E)

¹⁰ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* supra at 559 C - D

3. The application in respect of the Rule 35 (3) discovery relief against the defendant succeeds and the defendant is directed to, within ten days of this order, produce for inspection by the plaintiffs in accordance with Rule 35 (6), the documents referred to in the plaintiffs' Rule 35 (3) Notice dated 24 July 2015, or to state on oath that such documents are not in his possession, in which event to state their whereabouts, if known to the defendant.

4. Costs are to stand over for later determination.

N P BOQWANA

Judge of the High Court

APPEARANCES

For the Plaintiffs: Adv D Borgström

Instructed by: Biccari Bollo Mariano Inc., Cape Town

For the Defendant: Adv W Fisher

Instructed by: Sylvester Vogel Attorneys, Rondebosch c/o Keith Hamblin & Co., Cape Town