

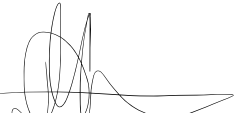
REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 21158/2019

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


.....
SIGNATURE

DATE 27 March 2023

In the matter between:

FAST MOTION TRADE AND INVESTMENT (PTY) LTD

Plaintiff

and

AVON JUSTINE (PTY) LTD

Defendant

JUDGMENT

MAHON AJ

[1] The plaintiff applies for leave to amend its reply to the defendant's request for admissions.

[2] In the request for admissions which was delivered on 20 September 2022, shortly before the commencement of the trial, the plaintiff was asked whether it

would admit the expert report of the Defendant's valuer, Mr Hartman. The plaintiff responded by admitting the report.

- [3] The admission was given in the face of an indication by the defendant that the trial would likely extend beyond a period of 5 days, thus requiring a request for the matter to be designated as one of long duration in terms of the relevant practice directives of this court. The plaintiff's counsel has candidly stated that the admission was given (together with a host of other admissions) in order to ensure that the evidence to be led at the trial would be curtailed so that the requirement to have had the matter designated as one of long duration, could be dispensed with and so that the matter would proceed on the allocated date.
- [4] Two days after this admission was made, and before the trial was set to commence, the plaintiff sought clarification from the defendant's attorneys in respect of two issues in Mr Hartman's report. First, it appeared that Mr Hartman had excluded operating costs and rates and taxes from his rental determination and second, he had not taken account of the approximately 170 open parking bays when making his determination.
- [5] The Defendant's attorney responded to this e-mail on 29 September 2022 by saying firstly, that operating costs had been taken account of by Mr Hartman (but that they excluded municipal consumables such as water, electricity, refuse and sewerage) and secondly, that it was appropriate to exclude the outside parking.
- [6] The plaintiff did not, upon receipt of the defendant's attorney's letter of 29 September 2022 make any attempt to withdraw the admission which it had

given. The plaintiff's counsel, again, candidly stated that this was a deliberate decision which was taken in order to ensure that the allocation of the matter would not be imperilled by the extent of the evidence which would be required to be led.

[7] As it turned out, the matter did not conclude within the allocated 5-day period and was adjourned on a part-heard basis.

[8] The plaintiff now seeks the withdrawal of its admission of Mr Hartman's report by means of the proposed amendment to its response to the request for admissions. The application for leave to amend was launched on 14 March 2023, less than two weeks before the resumption of the trial. No explanation for this delay is proffered in the founding affidavit in support of the application for leave to amend and the delay is acknowledged as being "*regrettable*". During argument, the plaintiff's counsel pointed out to me that the intervening period included the customary holiday period during December and January and urged me to infer that, for this reason, the delay could not be considered to be inordinate.

[9] I am prepared to accept, without deciding the question, that a response to a request for admissions is a "*document*" which, in principle, is capable of amendment as contemplated in Uniform Rule 28. I do so because the decision to which I have arrived in this matter, renders this consideration moot.

[10] Requests for admissions and responses thereto are dealt with in Uniform Rule 37. The Rule contemplates the recordal of admissions made by each party and its purpose, plainly, is to limit the issues and to curtail the scope of the litigation. One way of doing so is by redefining the issues to be tried in the case through

the making of admissions, thereby eliminating one or more of the issues raised in the pleadings.

**See: Price NO v Allied-JBS Building Society 1980 (3) SA 874 (A) at 882D
- H**

[11] Although perhaps not neatly described as “*an agreement*”, a response to a request for admissions nonetheless contemplates an undertaking, whether implied or tacit, that the subject matter of the admission will not be placed in issue at the trial. The opposing party is entitled to accept that undertaking and to rely thereon. In this sense, a response to a request for admissions, like a pre-trial minute, records an agreement and understanding between the parties to that effect.

[12] As a point of departure, I must accept that where a litigant is party to an agreement properly reached by his legal representatives which eliminates certain issues for purposes of trial, he will generally be held to that agreement.

**See: Price NO v Allied-JBS Building Society 1980 (3) SA 874 (A) at 882D
- E; Filta-Matix (Pty) Ltd v Freudenberg and Others 1998 (1) SA 606
(SCA) at 613E - 614D**

[13] However, the nature of the agreement or admission, in each case, must be considered in order to determine whether the party who made the admission can be said to have abandoned his right to pursue the issue in question or to have agreed not to pursue it.

See: National Union of Metalworkers of South Africa and Others v Driveline 2000 (4) SA 645 (LAC) at para [84]

- [14] This is necessarily a fact-based enquiry which is dependent upon the facts of each case.
- [15] The plaintiff's counsel accepted that the scope and ambit of the admission in this matter is such that it would preclude the plaintiff from placing Mr Hartman's conclusions in issue at the trial, unless it were permissibly withdrawn. Having considered the admission and the contents of Mr Hartman's report, I consider Mr Baguley's acceptance of this position to be perfectly correct.
- [16] In light of the fact that the admission made by the plaintiff constitutes an implied or tacit undertaking not to place Mr Hartman's conclusions in issue, I turn to the question of whether the plaintiff is permitted to resile from that undertaking. In doing so, I am mindful of what was stated by Harms JA in **Filta-Matix (Pty) Ltd v Freudenberg and Others 1998 (1) SA 606 (SCA) at 613E - 614D** to the effect that "*to allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation...*" [my emphasis].
- [17] What will constitute special circumstances must similarly be determined with reference to the facts of each case. Useful guidance is provided in the unreported judgment of Mokose J in **PMG v MEC for Health, Gauteng Province 2019 JDR 1729 (GP) at paras [55] to [58]**, to which I was referred by the defendant's counsel, Mr Smit. It appears from this judgment that the plaintiff must at least:
- [17.1] furnish an explanation, sufficiently full, of the circumstances under which the concession was made and why it is sought to be withdrawn;

[17.2] satisfy the court as to its *bona fides*; and

[17.3] show that in all the circumstances, justice and fairness would justify the withdrawal.

[18] To this, I would add that, in order for the circumstances to be “*special*” (adopting the nomenclature embraced by the Supreme Court of Appeal), the plaintiff would have to advance an atypical set of facts which would distinguish it from any other case where an admission was given simply on the basis of a lack of appreciation for its import or for the fact that its withdrawal would not occasion any prejudice.

[19] It is that consideration, namely, the absence of prejudice, which the plaintiff submits should incline me to the grant of the amendment. However, I do not consider it appropriate to do so for the following reasons:

[19.1] Firstly, the mere absence of prejudice is not the test. The Supreme Court of Appeal has endorsed the view that, “*special circumstances*” are required. No such circumstances are present. The fact that the admission may have been given in the context of a late revelation by the defendant that the trial might be one of long duration does not constitute “*special circumstances*”. When faced with this revelation, the plaintiff was put to an election. It could have refused to give the admission and placed the proposed hearing date in jeopardy. It did not do so. Instead, it elected to make the admission and did so with full knowledge of the risks and consequences. Moreover, it must be remembered that despite Mr Hartman’s report being in issue until the

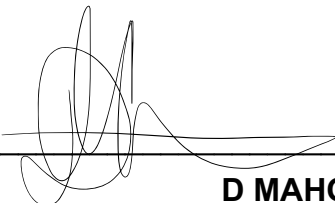
admission was given, the plaintiff itself had taken no steps to procure the services of an expert to deal with Mr Hartman's report;

[19.2] Secondly, I am not satisfied that the defendant is not prejudiced. Due to the lateness of the application, the defendant has been unable to fully investigate the issue in time for the re-commencement of the trial. In addition, the plaintiff has already concluded the evidence of at least one witness whom the defendant says it would have cross-examined on the issue had the admission not been made. To recall such a witness after his evidence has concluded, particularly in a part-heard trial, is not, in my view, a satisfactory outcome.

[20] In all the circumstances, I am not satisfied that special circumstances exist which warrant the withdrawal of the admission given in the context of Rule 37 of the Uniform Rules of Court. Justice and fairness do not, in my view, justify the withdrawal of the admission on the grounds advanced by the plaintiff.

[21] I accordingly make the following order:

[21.1] The plaintiff's application for leave to amend its reply, dated 26 September 2022, to the defendant's request for admissions, is dismissed with costs.



D MAHON
Acting Judge of the High Court
Johannesburg

APPEARANCES:

For the plaintiff: Adv D Baguley

Instructed by: Slabbert Venter Yanoutsos Inc.

For the defendant: Adv M Smit

Instructed by: Cliffe Dekker Hofmeyr Inc.

Date of hearing: 27 March 2023

Date of judgment: 27 March 2023