



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: GQEBERHA]**

CASE NO. 601/2017

In the matter between:

STAPELBERG VERVOER CC t/a MILL TRANS

Applicant/Defendant

and

NORDICBAU MASTER BUILDER & RENOVATOR CC

Respondent/Plaintiff

JUDGMENT

JOLWANA J:

[1] This judgment concerns two applications that were heard at the same time. The first one is in respect of trial particulars and the second one is about further discovery. Both the trial particulars and further discovery were requested in the appropriate fashion but were however rebuffed. There was no issue raised regarding non-compliance with any of the rules.

[2] The applicant trades as a transport contractor. The respondent had purchased two telehandler machines from a third party for purposes of renting them out to the film industry in order to generate income. The applicant was contracted to transport the said machines from Gqeberha to the respondent's premises in Cape Town in November 2015. One of the two machines was damaged while being loaded in a

vehicle for purposes of transportation. At some point the applicant paid the reasonable costs of repairing it. The second telehandler machine was damaged beyond repairs following an accident involving the vehicle used to transport it which occurred on the way to the respondent's premises while being transported by the applicant in its vehicle. The applicant also paid for the replacement of the second machine which had to be written off.

[3] The respondent's claim is now in respect of loss of rental income allegedly suffered during the period in which the two telehandler machines were not available to be rented out by the respondent to the film industry resulting in loss of income. This is a period of 144 days for the one machine and 137 days for the second one according to the pleadings. The respondent alleges that it would have been able to rent out both machines for half of each period and generated income which it could not during the whole time the two telehandler machines were out of commission. I consider it necessary to briefly set out the requested information for a proper appreciation of the pertinent issues in each application.

The trial particulars.

[4] In the request for further particulars for trial the applicant requested the following trial particulars:

1. A detailed calculation of the income, expenditure and profit on each telehandler machine rented out to third parties during the period 2013 to 2019.
2. A work sheet for each machine the respondent owns for the period 2013 to date.
3. The average income for each machine the respondent owns which it received from 2013 to date.

[5] It was the refusal by the respondent to provide these further particulars which led to the applicant launching this application to compel the provision of the same. The reason cited by the respondent in its refusal to provide the requested further particulars is that what the respondent's expert report has provided is sufficient and that the requested further particulars form part of the evidence. Its main contention is that the request constitutes a mere fishing expedition for information that is not necessary for trial preparation.

[6] There does not seem to be any reason cited why the requested particulars were not provided to the applicant beyond the respondent's skepticism about the need therefor. It appears from the answering affidavit that part of the reasons for the refusal was that the requested information is for a period spanning over 3 years before the date of the damage and 4 years subsequently. Beyond that, there is no issue raised about the information either not being available or the respondent being somehow unable to provide it to the applicant as requested.

[7] What the respondent does not seem to appreciate is the fact that a party to proceedings must be given as much leeway as possible within reason to prove its case or disprove that of its adversary. The use of the words "strictly necessary" in the rule must be understood in the context of Rule 21 creating a mechanism of ensuring that the parties are enabled to ventilate the issues between them without being hamstrung by not having access to available documents. I must however point out that the applicant's affidavit is rather terse and on the face of it deficient to some extent. This makes it difficult for the court to appreciate why the requested particulars should be provided and why the court should exercise its discretion in its favour in light of the deficient averments contained in the founding affidavit. The reliance by the applicant on the respondent not having a reason for its refusal seems to miss this point as Mr

Bands who appeared for the respondent submitted, a point also well made in his heads of argument.

[8] In *Szedlacsek v Szedlacsek* 2000 (4) SA 147 (ECD) at 150 A-C Leach J expressed the applicable legal position in the following terms with which I am in respectful agreement:

“It is clear from the final words of this subrule ... that this Court retains a discretion to grant or refuse an order for the delivery of further particulars. An applicant 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, but must set out sufficient information to enable the Court to consider whether or not to exercise its discretion in his favour. It is impossible to lay down any test which can be slavishly applied to determine whether an order compelling delivery should be granted as each case must turn upon its own particular facts and circumstances, but it seems to me that in most cases it would probably be wholly insufficient for a party seeking relief under Rule 21 (4) to rely solely upon the other party’s failure to timeously comply with the ten-day time period laid down by Rule 21 (2).”

[9] Mr Marais who appeared for the applicant did file very useful and detailed heads of argument which threw a lot of light on why the particulars should be provided which in some way ameliorated the inadequacies in the applicant’s affidavit. However, this is not how it should be. The full basis for the application must be set out in the affidavit so that the court is placed in a position of properly exercising its discretion. Lest I am misunderstood, I am not suggesting that a party needs to prove if and how the information will be used during trial. However, its relevance to the issues that arise in the pleadings must be established. The documents sought are clearly relevant in my view even considering the inadequacies in the founding affidavit. The respondent itself has also not given any reason why this Court should exercise its discretion in its favour and dismiss the application. In fact there does not appear to be any cogent reason at all at least in the answering affidavit. I am accordingly of the view that the applicant

should succeed in its application for an order compelling the provision of the requested information. However, the period covered in the request appears to be excessive unnecessarily. I consider a period of 2 years before and 2 years after the date of the incidents to be reasonable.

The Rule 35 (3) application.

[10] In terms of its Rule 35(3) notice the applicant sought from the respondent documents such as the financial statements and asset register since 2013 to date, all telehandler contracts with any other parties from 2013 to 2019, debtors ledger for 12 months since November 2015, bank statements from November 2015 to a period of six months thereafter, booking cancellations, if any, for plaintiff's telehandlers for 2015 and 2016, written proof, if any, that the respective two telehandlers were in fact booked for the period relevant to the claim. The applicant also sought a service history and logbooks for all the respondent's telehandlers from 2013 to 2016.

[11] It seems to me that some of the information requested is over an excessive period. However, beyond that the respondent seems not to have a proper basis for its refusal to make the discovery save for its reference to the request being a fishing expedition. This characterization of the request for discovery cannot be a proper basis for objection or refusal without more. The applicant explains in its replying affidavit that it needs these documents to inform itself of the trends in the respondent's industry with which I take it that it may not necessarily be familiar. Furthermore, the documents will enable the applicant's own expert to engage more meaningfully with the report of the respondent's expert report which has been filed. This should assist the trial to run much more smoothly and thus facilitate the speedy finalization of the matter with as little hiccups as possible.

[12] The legal position relating to further discovery is explained in some detail in *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (TPD) at 316 E-G as follows:

“The requirement of relevance, embodied in Rule 35(1) and 35(3), has been considered by the Courts on various occasions. The test for relevance, as laid down by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, has often been accepted and applied. See for example, the Full Bench judgment in *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A, where it was held that:

‘After remarking that it was desirable to give a wide interpretation to the words “a document relating to any matter in question in the action”, Brett LJ stated the principle as follows:

“It seems to me that every document relates to the matter in question in the action 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 to damage the case of his adversary. I have put in the words ‘either directly or indirectly’ because, as it seems to me, 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 a document which may fairly lead him to a train of enquiry which may have either of these two consequences.” (My underlining)

[13] What immediately becomes apparent from the principles articulated above is that what the respondent regards as a “fishing expedition” and therefore irrelevant may very well be useful to the applicant in advancing its own case or poking holes in the respondent’s case. Even if it turns out not to be so useful after all, that is something that may become clearer during the trial itself. How the trial court deals with documents sought and discovered which later turn out not to be relevant is something else. It surely cannot be up to the one party to determine in advance for its adversary, which documents are relevant and which ones are not.

[14] Doing so would be contrary to the adversarial nature of our court proceedings. The documents in question do not seem to relate to anything else other than the business of telehandlers of the respondent for which it claims damages for loss of income in its pleadings. These are not documents relating to anything that has nothing to do with the business of telehandlers that the respondent conducts and for which it claims loss of income. There has been no indication as to why any of the documents required should be considered as irrelevant. In fact it seems to me that if anything, it is the respondent itself that seems to be overly cautious and skeptical about how the documents may be useful to the applicant, something that it is not entitled to do. The applicant's contention that these documents will enable it to engage its own expert meaningfully as it seeks to prove its defence or even damage the case of the respondent is not without basis. It was never argued that the applicant is not entitled to the documents for this purpose or that the documents are not otherwise available.

[15] I have therefore come to conclusion that the applicant must succeed in both applications subject to the rider that where the applicant seeks documents for a period in excess of two years before or after, the period should be limited to a two-year period either way from the date of each incident. There is no reason why the costs should not follow the result.

[16] In the result the following orders shall issue:

1. The respondent is hereby directed to sufficiently reply to paragraphs 4, 5 and 7 of the applicant's request for further particulars for trial dated 2 November 2020 within 10 days of the granting of this order.

2. In the event of the respondent failing to comply with the above order the applicant is granted leave to approach this Court on the same papers, suitably amplified for an order dismissing the respondent's claim.
3. The respondent is directed to reply to the applicant's notice to discover in terms of Rule 35 (3) dated 26 January 2022 within 10 days of the granting of this order.
4. In the event of the respondent failing to comply with the order referred to in 3 above the applicant is granted leave to approach this Court on the same papers suitably amplified for an order dismissing the respondent's claim.
5. The respondent is ordered to pay costs of both the application to compel further particulars and the application to compel further discovery.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant: P.T. MARAIS

Instructed by: GREYVENSTEINS INC.

GQEBERHA

Counsel for the respondent: D.S. BANDS

Instructed by: WELGEMOED ATTORNEYS c/o LAWRENCE MASIZA & VORSTER

GQEBERHA

Date heard: 20 October 2022

Delivered on: 01 November 2022