



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

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2021.04.23

DATE

SIGNATURE

CASE NUMBER: 10953/18

DATE: 23 April 2021

THULANI ZULU

Applicant

V

RED ANT SECURITY RELOCATION AND EVICTION SERVICES (PTY) LTD

Respondent

JUDGMENT

MABUSE J

[1] This is an opposed interlocutory application to compel further discovery of specified documents. The Applicant, Thulani Zulu, seeks, against the Respondent, Red Ant Security Relocation and Eviction Services (Pty) Ltd, by notice dated 7 August 2019 an order compelling the Respondent to reply to the Applicant's notice in terms of Rule 35(3) of the Uniform Rules of Court (the Rule 35(3) notice) within 10 (ten) days of service of the court order on the Respondent. The Applicant also seeks costs order for the application.

- [2] For purposes of convenience, I shall refer to the Applicant as the Plaintiff and the Respondent as the Defendant.

THE BACKGROUND

- [3] On or about 13 August 2018 the Plaintiff's attorneys caused a notice in terms of Rule 35(3) to be served on the Defendant's attorneys. The pleadings had, at that stage, reached *litis contestatio*. In the said notice, the Plaintiff had required the Defendant to make available, for the inspection of the Plaintiff in terms of Rule 35(6), certain documents, in addition to the documents the Defendant had disclosed in the Defendant's discovery affidavit dated 21 June 2018 and served on the Plaintiff's attorneys on 25 June 2018. In the event that the Defendant did not have such documents in its possession, the Defendant was required, to state under oath, that such documents were not in its possession and to specify where such documents were, if known to the Defendant.

- [4] Rule 35(3) notice specified such documents as being:

- "4.1 All instructions received from the Sheriff Westonaria for the months of April 2017 and May 2017;*
- 4.2 all invoices delivered to the Sheriff Westonaria for the months of May 2017 and June 2017."*

- [5] Jan Petrus Allen ("Mr Allen") prepared a reply by way of an affidavit on behalf of the Defendant to the said application to compel. He stated in his founding affidavit that in his notice in terms of Rule 35(3) the Plaintiff required the documents set out in paragraph 4 supra. He then pointed out that in his Particulars of Claim ("POC"), in particular in paragraph 4.1 the Plaintiff had pleaded that:

"On or about the 3rd of May 2017 and at or near Lenasia, Gauteng, the Plaintiff was ... assaulted by members and/or employees of the Defendant"

On this basis the Defendant objected to the documentation requested in the Plaintiff's notice in terms of Rule 35(3) on the basis that the requested documentation was inconsistent with the Plaintiff's pleaded case, on the following grounds:

- “5.1 the Sheriff Westsonaria is situated outside of the jurisdictional area of Lenasia;*
- 5.2 the period for which the information is sought is not limited to the date of 3 May 2017;*
- 5.3 no basis is laid in the Particulars of Claim to infer or involve the Sheriff Westsonaria and/or any nexus between the Defendant and the Sheriff Westsonaria;*
- 5.4 in addition, the reference to an area being “at or near Lenasia” is inconsistent with the request for documentation related to the Sheriff Westsonaria.”*

The Defendant then refused to provide the Plaintiff with the requested information simply on the basis that the documentation requested was not relevant to the matters in question.

- [6] On 28 August 2018 the Plaintiff's attorneys wrote a letter to the Defendant's attorneys in which they observed that the only issue that the Defendant's attorneys had raised in their reply was the relevance of the documents requested. In their said letter they referred the Defendant's attorneys to a paragraph in the unreported judgment of Acting Judge Van der Byl in **Visser and Others v Vardakos Attorneys and Others (14355/2010) [2012] JAGPPHC 98 (8June 2012)** where the said Judge had stated that:

“There is, relevancy being the only issue, no reason why the Plaintiffs are not entitled to inspect the documents in order to satisfy themselves whether or not the documents are indeed relevant.”

- [7] The purpose of referring the Defendant's attorneys to the said paragraph was to persuade them to comply with the Plaintiff's Rule 35(3) notice and to show them what the authorities state on relevance even if they objected to producing the documents, notwithstanding the Defendant's view that such documents were not relevant. The Plaintiff was keen to receive the said documents and to verify whether or not they were relevant. In addition, and in an effort to persuade the Defendant's attorneys to comply with the Plaintiff's Rule 35(3) notice, the Plaintiff's attorneys forwarded to the Defendant's attorneys a copy of an article in the

Daily Sun newspaper of 5 March 2017. In the light of the said article, the Plaintiff's attorneys implored the Defendant's attorneys to furnish them with a proper reply on or before Thursday 11 September 2018 failing which the Plaintiff's attorneys threatened that they would bring an application to compel and for an order of costs on attorney and client scale. The Defendant's attorneys again failed to respond to the said letter. Even if the Defendant's attorneys refused to produce the said documents on the basis of lack of relevance, they were still obliged to provide the Plaintiff's attorneys with the said documents.

- [8] On 25 October 2018 the Plaintiff served his notice of intention to amend his POC on the Defendant's attorneys. The purpose of the amendment was to delete the whole of paragraph 4.1 of the Plaintiff's POC and to replace it with the following paragraph:

"On or about the 3rd of May 2017 and at or near Protea Industrial Park within the jurisdictional area of sheriff Westonaria, the Plaintiff was unlawfully and intentionally assaulted by the members and/or employees of the Defendant, whose names and further particulars are unknown to the Plaintiff by shooting the Plaintiff numerous times with rubber bullets."

The amendment on behalf of the Plaintiff was merely to introduce specificity in the pleading apropos the place of the incident. That amendment neither changed nor amended the Plaintiff's cause of action.

The other purpose of the amendment was to tackle the objection of relevance that the Defendant had raised in Mr Allen's affidavit regarding the information requested in the notice of motion was inconsistent with the pleaded case, particularly that:

- "8.1 the sheriff Westonaria is situated outside the jurisdictional area of Lenasia;*
- 8.2 the period for which information is sought is not limited to the date of 3 May 2017;*
- 8.3 no basis is laid in the Particulars of claim to infer or involve the sheriff Westonaria and/or any nexus between the Defendant and the sheriff Westonaria;*
- 8.4 in addition, the reference to an area being "at or near Lenasia" is inconsistent with the request for documentation relating to the sheriff Westonaria."*

As there was no objection to the contemplated amendment it was effected accordingly.

Of course, service of a notice of intention to amend has the effect of reopening the pleadings. The pleadings were therefore re-opened on 25 October 2018. On 3 December 2018 the Plaintiff delivered an application to compel compliance with Rule 35(3) notice. Mr Holmner concedes in the replying affidavit that it was an oversight from the Plaintiff's side to do so, because firstly, the pleadings had just reopened on 25 October 2018 by the Plaintiff's delivery of the notice of intention to amend and secondly, the parties were still engaged in the amendment of pleadings process.

[9] As a result the Plaintiff had no choice but to withdraw "the first application" and to tender costs. By "the first application" Mr Holmner referred to the notice to compel delivered on 3 December 2018. Subsequent to the said withdrawal, the Defendant served its notice of intention to amend its pleadings on the Plaintiff's attorneys on 4 December 2018. Its amended pages of its plea were delivered on 18 January 2019. After being served with the amended pages of the Defendant's plea on 18 January 2019, the Plaintiff was convinced that the parties had reached *litis contestatio*. So, on 5 April 2019 the Plaintiff's attorneys sent correspondence to the Defendant's attorneys and informed them that since the pleadings had again become closed, the Plaintiff requested the Defendant to comply with the Rule 35(3) notice which the Defendant had neglected. This correspondence went unanswered.

[10] On 15 August 2019 the Plaintiff's attorneys delivered the application to compel. The Plaintiff's would seek an order in terms of which the Defendant would be compelled to reply to the Plaintiff's notice in terms of Rule 35(3) within 10 court days of service of the court order on the Defendant. This notice to compel was dated 7 March 2019.

[11] In support of this application to compel compliance was an affidavit dated 12 August 2019 by Barend Jacobus Steyn Holmner ("Mr Holmner").

11.1 He relied on the Rule 35(3) notice that the Plaintiff's attorneys had served on the Defendant's attorneys on 13 August 2018. He states that:

“On or about the 13th of August 2018 I caused a Notice in terms of Rule 35(3) to be served on the Respondent/Defendant’s attorneys, at which stage the pleadings were duly closed, requiring the Respondent/Defendant to make available certain documentation, in addition to the document’s disclosed in the discovery affidavit for inspection in accordance with the Rule 35(6);”

11.2 Mr Holmner explains further that on 27 August 2018, the Defendant’s attorneys delivered the Defendant’s reply to the Plaintiff’s Rule 35(3) notice. This is the reply referred to in paragraph [5] *supra*.

11.3 He states in his affidavit furthermore that on 28 August 2018 he forwarded correspondence to the Defendant’s attorneys in which he informed them that their reply to the Plaintiff’s notice in terms of Rule 35(3) did not comply with the provisions of Rule 35(3) in particular that the issue of relevance was not sufficient reason not to produce the requested documents for the Plaintiff’s inspection. In terms of the said correspondence, the Plaintiff’s attorneys requested the Defendant’s attorneys to comply properly with the Rule 35(3) notice. They granted the Defendant’s attorneys an indulgence until 11 September 2018 to properly respond failing which they would launch an application to compel.

11.4 On 5 April 2019 the Plaintiff’s attorneys sent another letter to the Defendant’s attorneys and requested proper compliance within 10 calendar days of 5 April 2019 with the Plaintiff’s Rule 35(3) notice. It is the Plaintiff’s case that the Defendant has failed to comply with the said Rule 35(3) notice.

[12] The Defendant opposes the application to compel. On 21 August 2019 the Defendant’s attorneys delivered their notice to oppose the Plaintiff’s application to compel. The notice to oppose was followed on 31 January 2020 by an answering affidavit deposed to by Mr Jan Petrus Allen (“Mr Allen”). According to Mr Allen, this is the second application to compel. In paragraph 6 he states that:

“The Applicant persisted, forcing the Respondent to serve its answering affidavit by 7 February 2019. The Applicant thereafter withdrew the application on 13 February 2019 and tendered costs. The matter was accordingly removed from the unopposed roll.”

In the answering affidavit Mr Allen took the view that the application he was responding to was the second such application. This is correct. It will be recalled that the first such application was the one delivered on 3 December 2018 but which was, as pointed out, subsequently withdrawn.

The current application was stillborn

[13] Furthermore he took the view that the current application was stillborn and that the Rule 35(3) notice, that led to the previous application and that also served as a basis for the current application, cannot be revived. The notice in terms of Rule 35(3) that Mr Allen claims cannot be revived is the one that the Plaintiff’s attorneys served on the Defendant’s attorneys on 13 August 2018. Mr Allen claims furthermore that by tendering costs, the Plaintiff conceded that the Rule 35(3) notice and application premised thereon were bad.

[14] I do not have in the court file any record of the notice of withdrawal of the Rule 35(3) notice and the Applicant’s application to compel, referred to by Mr Allen. Considering the notices filed of record and the averments contained in the affidavits, it appears to be incorrect that the Plaintiff’s attorneys withdrew both the 35(3) notice and the application to compel compliance with it, in other words, the Rule 35(3) notice that was served on the Defendant’s attorneys on 13 August 2018.

[15] For the following reasons I find it extremely difficult to accept Mr Allen’s version that the Plaintiff’s attorneys withdrew “the Rule 35(3) notice and the application premised thereon.” (See paragraph 7 of the answering affidavit). Firstly, it is highly unlikely that the Plaintiff’s attorneys could have withdrawn the Rule 35(3) notice after they had so doggedly pursued it. Secondly, Mr Holmner made it very clear in his replying affidavit that what was withdrawn was the “first application” to compel. He has furnished valid reasons why the said

explanation application was withdrawn. Nowhere does he state that the Plaintiff's attorneys withdrew the notice in terms of Rule 35(3).

[16] It would appear that the Defendant's attorneys have completely misconstrued or misunderstood what was withdrawn on 13 February 2019. In his replying affidavit, Mr Holmner made it very clear that on 3 December 2018 he served an application to compel on the Defendant's attorneys. It is this application to compel that he calls the "first application". It is this application to compel that the Plaintiff's attorneys served on the Defendant's attorneys while the parties were involved in the amendment process. Now, more importantly, it is this application to compel that the Plaintiff's attorneys withdrew because it was mistakenly served during the stage in which the parties were engaged in the process of amending the pleadings.

[17] It is important to point out and emphasize that the fact that when the Plaintiff's attorneys withdrew the first application or the application to compel that was served on 3 December 2018, they did not thereby withdraw the notice in terms of Rule 35(3) that was served on 13 August 2018. It remained in place and active. Consequently, it is wrong to think that a withdrawal of the application to compel served on 3 December 2018 amounted to a withdrawal of the notice in terms of Rule 35(3) and a subsequent application to compel.

[18] In the circumstances, because the Plaintiff's attorneys have not withdrawn the notice in terms of Rule 35(3) but the first application, which is the application to compel that they had served on 3 December 2018. It was not necessary for the Plaintiff's attorneys to serve a fresh Rule 35(3) notice as contended by the Defendant's attorneys and argued by Advocate DH Wijnbeek, counsel for the Defendant. The Plaintiff was at large to proceed with the next step in the procedure.

THE APPLICANT CONCEDED THAT THE RULE 35(3) WAS BAD

(See paragraph 9 of the answering affidavit).

[19] Mr Allen makes an allegation that the Plaintiff's attorneys have conceded that the Rule 35(3) was bad. Having scanned both the founding affidavit, the replying affidavit and the correspondence exchanged between the attorneys, I have been left with a view that no such a concession exists. In the absence of any reference to a document in which such a confession is contained, I find it extremely difficult to accept the existence of such a concession. On the contrary, Mr Holmner has denied, in the replying affidavit, that there was any such concession. In the result, this Court finds that nowhere in the papers before it did the Plaintiff's attorneys concede that the Rule 35(3) notice was bad. Consequently, the allegation by Mr Allen that the Plaintiff's attorneys have conceded that the Rule 35(3) was bad lacks merit.

THERE WAS DUE COMPLIANCE WITH RULE 35(3) NOTICE.

[20] It is the Plaintiff's counsel's case that the discovery made by the Defendant was incomplete. According to him, the Defendant was selective in respect of the documents it chose to discover. The Defendant objects to furnishing the documents set out in the Plaintiff's notice in terms of Rule 35(3) merely on the grounds of relevancy.

[21] While it is the Defendant's counsel's case that the Defendant has duly complied with the Plaintiff's Rule 35(3) notice it is at the same time the Plaintiff's counsel's case that the Defendant has failed to respond to the Rule 35(3) notice as required by the Uniform Rules of Court. In terms of Rule 35(3) a party is required to either make the said documents available for inspection in terms of sub-rule (6), if such a party has the relevant documents in his possession or if he does not have the documents in his possession but knows where they are to state under oath within ten days that such documents are not in its possession, in which he or it must state their whereabouts, if known. Rule 35(3) provides that:

"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 sub-rule (6) or to state under oath, within ten days, that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.”

The Defendant has not complied with Rule 35(3). I have formed the view that the Defendant's affidavit as referred to in paragraph [5] supra does not constitute proper compliance with Rule 35(3).

- [22] This sub-rule provides the procedure for a party dissatisfied with the discovery of another party to ask for a better discovery. In **Swissborough Diamond Mines v Government of the Republic of South Africa, 1999 (2) SA 279 TPD at 321 F** the Court had the following to say:

“As indicated above, Rule 35(3) provides the procedure for a party dissatisfied with the discovery of another party. He requires the former party to give notice to the latter party to make the documents or tape recordings available for inspection in accordance with Rule 35(6). Rule 35(6) requires the notice to be, as near as may be, in accordance with Form 13 of the First Schedule. Form 30 requires the production for inspection of “the following documents referred to in your affidavits.” It is obviously designed for inspection of discovered documents. It must be adapted to deal with the situation envisaged in Rule 35(3). In particular, the degree of specificity of the documents that the party dissatisfied with, the discovery must comply with the notice must be determined. The importance of this requirement cannot be understated. A party can clearly be severely prejudiced by a notice which does not exhibit the necessary degree of specificity. Failure to comply with the notice can result in an order compelling compliance, and failure to comply thereafter can result in the claim being dismissed or defence being struck out in terms of Rule 36(7).”

- [23] The intention of the sub-rule is to provide for a procedure to supplement discovery which has already taken place but which is alleged to be inadequate. In **MV Urgup; Owners of the MV Urgup v Western Bulk Carriers (AUST) 1999 (3) SA 500 CPD at 515 B-C** the Court had the following to say:

“As to the alternative relief claimed by the Respondents which, as I have said, would in effect be an order in terms of uniform rules 35(3) or 14 compelling the Applicants to make available for inspection and copying the documents listed in Annexure A to the notice of motion, this may be dealt with fairly shortly. These sub-rules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent’s possession or under his control which may be relevant to the issues and which he is able to specify with some degree of precision. In the case of Rule 35(3) the intention is a supplement discovery which has already taken place but which is alleged to be inadequate.”

THE DOCUMENTS REQUESTED ARE IRRELEVANT

[24] Rule 35(2) provides that:

“The party required to make discovery shall within twenty days or within the time stated in any order of a Judge make discovery of such documents on affidavit as near as may be in accordance with Form 11 of the first schedule, specifying separately –

- (a) such documents and tape recordings in his possession or that of his agent other than the documents or tape recordings mentioned in paragraph (b);*
- (b) such documents and tape recordings in respect of which he has a valid objection to produce;*
- (c) such documents and tape recordings which he or his agent had but no longer has in its possession at the date of the affidavit.*

A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices shall be omitted from this schedule.”

The provisions of this sub-rule are peremptory. In this regard see **Van Vuuren v Agricura Laboratoria (Edms) Bpk 1974(2) SA 324 NC at 327H**. In this matter this is what the Court has to say about discovery affidavits:

“Blootleggingsverklarings is belangrike dokumente en die voorlegger moet bewustelik die nodige inligting verstrek welwetende dat hy met ‘n plegtige verleiding van ‘n belangrike dokument te make het wanneer die eedsverklaring gedoen word.”

(Discovery affidavits are important documents and the deponent must consciously supply the necessary information well knowing that when he takes the oath he is dealing with a solemn execution of an important document).

[25] Now I wish to quote copiously from Uniform Rules of Court by Nathan Barnard and Brink 3rd Edition, at page 218:

“The affidavit of discovery must be in accordance with Form 11 of the First Schedule to the rules. This requires the documents to be listed in two schedules, the first being in respect of documents still in the possession or power of the deponent, and the second being in respect of documents no longer in his possession or power. The first of these schedules is again to be divided into two parts: the first part being in respect of which no claim for privilege or other objection to produce is made, and the second being in respect of documents to which such an objection attaches.”

[26] Now the documents referred to in Rule 35(2)(b) are such documents which are privileged for instance. Now it is not the Defendant's case that in its discovery affidavit it raised any valid objection on the basis of relevance against the documents which are the subject of this application to compel. Nowhere in its discovery affidavit did the Defendant raise any objection based on relevance against the documents requested by the Plaintiff. If a litigant objects to producing a document, he must do so in a discovery affidavit and must also set out valid reasons for such refusal. If such a litigant holds a view that the documents are not relevant, it must be stated so in the discovery affidavit.

[27] Once a party that has been requested to produce documents has set out the reason for so refusing, such as the reason that the documents are irrelevant, the requesting party may proceed with the next step. He may follow the judgment of Van der Byl in **Visser and**

Others v Vardakos Attorneys and Others (14355/2010) [2012] JAGPPHC 98 (8 June 2012) at para [10] where the Court took the view that the issue of whether or not a document is relevant should not be left to the decision of the party that is requested to produce it alone. The requesting litigant should be given the document so that he must himself decide whether the documents are indeed not relevant. In other words, it is not enough for a party that is requested to produce a document just to claim that the documents are irrelevant and refuse to produce them. The requesting party is entitled to have access to those documents so as to enable it to decide whether or not the documents are irrelevant. In the circumstances, it is compulsory for the party so requested to furnish the requesting party with such documents so as to put that requesting party in a position to do their own examination. In the afore going judgment the Court stated that:

“There is, relevancy being the only issue, no reason why the Plaintiffs are not entitled to inspect the documents in order to satisfy themselves whether or not the documents are indeed relevant.”

[28] A litigant who engages the other litigant as referred to in Rule 35 has the right to utilise s 35 in order to obtain access to the documentation in the possession of the other litigant. If he elects to rely on s 35 and is not satisfied with the discovery made, he must discharge the onus by proving on a balance of probabilities that the documents exist and are relevant.

[29] Again, according to AJ van der Byl, if a litigant is adamant that the documents requested are not relevant, he should not refuse to produce them when so requested. Relevance is, according to him, a matter that can be decided at trial. He had the following to say:

“In any event the relevancy of the documents can more efficiently be addressed at the hearing of the trial and more particularly when the documents are sought to be introduced into evidence.”

This is the option that is available to the Defendant.

[30] In the heads of argument prepared by Adv Rip, counsel for the Plaintiff, referred the Court to a judgment of **Compagnie Financiere Et Commerciale du Pacifique v Peruvian Guano Co. (1982) 11 QPD 55** which dealt with the approach that a Court should adopt when deciding whether a document is relevant to a matter at issue before it. It stated 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.”

Therefore, in determining whether a document is relevant, the Court will accordingly have regard to whether the document requested may directly or indirectly enable the parties seeking the document to advance his own case or damage the case of the adversary. According to counsel for the Plaintiff, relevancy obviously needs to be decided with reference to the issues as defined in the pleadings, the purpose of which is to advise the adversary what his case against them is and what the case they are required to meet is. See in this regard **SN Neon Advertising (Pty) Ltd v Claude Neon Lights SA Ltd 1968 (3) SA 381 (W) at 385A-C**. Relevancy needs to be determined without being too fastidious with reference to the issues raised in the pleadings, in this regard see **Swissborough Diamond Mines v Government of RSA 1999 (2) SA 279 (T) at 317A-E**, but making allowance for documents which may enable a party to advance his case, even though not pertinently relevant to the issues raised in the pleadings. It is the Plaintiff’s case that the documents requested in terms of Rule 35(3) will most certainly advance his case and damage the Defendant’s case by playing the Defendant on the scene. In my view, there is no valid reason why the documents requested by the Plaintiff should not be made available to the Plaintiff. In my view, the Defendant has not given any valid reason why he withholds any of the documents so requested.

MR ALLEN TOOK THE VIEW THAT THERE IS NOTHING TO DISCOVER

[31] The provenance of this view is the fact that the Plaintiff has amended his POC by alleging that the incident that constitutes his cause of action took place at Protea Industrial Park. The Defendant contends that it has, in its plea, denied any presence at Protea Industrial Park. Its approach is therefore that, because it has denied any presence at Protea Industrial Park, it is for that reason not obliged to comply with the Plaintiff's Rule 35(3) notice. Denying in one's plea the allegations made by the Plaintiff in the POC constitutes no justification for a litigant to refuse to produce documents when so requested. In my view, no merits at all subsists in this contention that there is nothing to discover.

[32] Counsel for the Plaintiff referred the Court to **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th Edition 1997**. The learned author state 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 which may fairly lead to an enquiry relevant to the issues."

In the premises the fact that it has denied an allegation will never be a reason for refusing to discover documents, especially in the situation where the documents to discover had been specified.

THE RULE 35(3) NOTICE WAS ISSUED AT A STAGE WHEN THE PLEADINGS WERE NOT CLOSED

[33] It is not clear as to what informed Mr Allen that the Plaintiff's Rule 35(3) notice was served on the Defendant's attorneys before the pleadings were closed. According to Mr Holmner the Defendant's plea was served on the Plaintiff's attorneys on 24 April 2018. According to him furthermore the pleadings became closed on 17 May 2018. The Plaintiff's rule 35(3) notice was served on the Defendant's attorneys on 13 August 2018, long after the pleadings had become close. It is therefore not correct that the Plaintiff's Rule 35(3) notice, that was

served on 13 August 2018, was so delivered before the pleadings were closed on 17 May 2018. No merits exist in this contention. I was referred to the judgment of **Natal Joint Municipality Pension Fund v Endumeni Municipality [2012] 2 ALL SA 262 (SCA) paras 14-15**. I wish to quote copiously from the said paragraphs:

*“[14] The origin of the concept of *litis contestatio* is the formulary procedure of the Roman law in which the litigants appeared before the praetor, who formulated the issues that the judge had to decide. Once the issues had been formulated the stage of *litis contestatio* was reached. In *Government of the Republic of South Africa v Ngubane 1972 (2) SA 601 (A)* at 608 D-E Holmes JA said:*

*‘In modern practice *litis contestatio* is taken as being synonymous with close of pleadings, when the issue is crystallised and joined ... And in modern terminology, the effect of *litis contestatio* is to “freeze the plaintiff’s rights as at that moment”.’*

*There is no problem with this formulation when parties abide by their pleadings and conduct the trial accordingly. Frequently, however, they do not do so because other issues arise that they wish to canvass and either formally, by way of an amendment to the pleadings, or informally, as in the present case, the scope of the litigation is altered. Here the defendant sought to add new issues specifically relating to the validity of the amendment that introduced the proviso. Up until then the parties were at one that the proviso was in force and available to be relied on by the Fund, subject to the issues around its interpretation. If the plaintiff’s rights were frozen at the close of pleadings the basis would have been that the proviso was in force. It would make a mockery of the principles of *litis contestatio* to permit Endumeni to depart from its previous stance by challenging the validity of the proviso, but to bind the Fund to a factual situation at the close of pleadings that had altered by the time that Endumeni sought to challenge the validity of the proviso.*

*[15] The answer is that when pleadings are re-opened by amendment or the issues between the parties altered informally, the initial situation of *litis contestatio* falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of *litis contestatio* was conceived.”*

I have therefore formulated a view that the Plaintiff’s Rule 35(3) notice was served on the Defendant’s attorneys at a stage when the pleadings were closed.

[34] In the result, I find that the Defendant is not entitled to withhold any documents required by the Plaintiff. There exists on the Defendant an obligation arising from the application of Rule 35(3) notice to discover and make available each of the documents listed in the Plaintiff's Rule 35(3) notice. The Plaintiff was not obliged to be content with what the Defendant's attorneys' affidavit as referred to in paragraph [5] supra. He is entitled to the disclosure of every document which directly or indirectly affects his case.

[35] In the result, the following order is made:

1. **The Defendant is hereby directed to make available for inspection and copying the documents listed in the Plaintiff's notice in terms of Rule 35(3) dated 10 August 2018.**
2. **The Defendant is hereby directed to pay the costs of this application.**



PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Adv AA Basson

Instructed by:

Loubser Van Wyk Inc.

Counsel for the Respondent:

Adv DH Wijnbeek

Instructed by:

Allen & Associates Attorneys
c/o Weideman Attorneys

Date on the opposed roll before Mabuse J: 9 March 2021

Date of Judgment: 23 April 2021