



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 8184/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

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

(3) REVISED

DATE: 18 JUNE 2021

SIGNATURE:

In the matter between:

SIMON TUNG-CHENG WU

Applicant

And

ADRIAN GORDON SPENCE

Respondent

In re:

ADRIAN GORDON SPENCE

Plaintiff

And

SIMON TUNG-CHENG WU

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant (hereinafter referred to as the defendant) seeks an order compelling the respondent (hereinafter referred to as the plaintiff) to discover the following documents:

[1.1] in terms of a rule 35(3) notice dated 18 August 2020:

[1.1.1] all emails sent and received by the plaintiff under the email domain of denimhq.co.za and /or denimhq.com for the period 1 August 2016 to date;

[1.2] in terms of a rule 35(3) notice dated 24 August 2020:

[1.2.1] all written recordals including notes and memorandum of the plaintiff in respect of the consultancy work carried out by the plaintiff with third parties for and on behalf Denim HQ (Pty) Ltd, Registration number: 2017/112869/07;

[1.2.2] all written communications including emails sent and received by the plaintiff, his agents or assigns to and from the directors,

officials, employees and agents of Denim HQ (Pty) Ltd,
Registration number: 2017/112869/07 relating to the
consultancy work carried out by the plaintiff;

[1.2.3] all bank statements, ledgers or other financial documentation
of the plaintiff which reflect or record what amounts have been
paid to the plaintiff, his agents or assigns in respect of
consultancy work done by the plaintiff for Denim HQ (Pty) Ltd,
Registration number: 2017/112869/07; and

[1.2.4] the consultancy agreement concluded between the plaintiff
and/or his agents or assigns and Denim HQ (Pty) Ltd,
Registration number: 2017/112869/07.

Background

[2] The plaintiff issued summons against the defendant for payment of an amount of R 3 000 000, 00 and ancillary relief. The amount represents the outstanding purchase price for shares the defendant purchased from the plaintiff in two companies, namely Soviet Group (Pty) Ltd ("Soviet") and Erf 395 Freesia Street Investments (Pty) Ltd for a total purchase consideration of R 20 000 000, 00.

[3] The defendant admits that he has not paid the outstanding R 3 000 000, 00 and pleads that, due to the plaintiff's breach of contract, he is not liable to pay the claimed amount.

[4] According to the defendant's plea, the plaintiff breached the agreement by *inter alia* competing with the defendant's company Soviet through the Lee Cooper brand. As a result, the defendant terminated the agreement.

[5] The defendant instituted a counterclaim in terms of which he claims restitution from the plaintiff.

Point *in limine*: Application is barred

[6] The plaintiff firstly, raises the point that the application is barred. The point emanates from a case management conference that was held on 17 July 2020.

[7] The following was noted in paragraph 5 of the minutes of the meeting:

- "1. The defendant undertook to file its objection, if any, to the plaintiff's amendment, and simultaneously file its R 35(3) notice, if any, by 31 July 2020.
2. If the defendant fails to deliver an objection, or Rule 35(3) notice on or before 31 July 2020, the plaintiff will effect the amendment and all procedural issues will be deemed to be finalised."

[8] The defendant did not file a rule 35(5) notice on or before 31 July 2020 and only filed the two notices in terms of rule 35(3) on respectively 18 and 24 August 2020, after the agreed cut-off date. The notices are therefore barred.

[9] Without showing good cause for its delay, the application should for this reason alone be dismissed.

[10] The defendant does not agree. Firstly, the defendant submits that a party cannot in law be barred from bringing an interlocutory application. Secondly, the defendant points out that the rule 35(3) notice referred to in paragraph 5 refers specifically to a notice pursuant to the plaintiff's notice of amendment.

[11] Furthermore and in paragraph 4 of the minutes, the parties reached the following agreement in respect of interlocutory applications:

"The parties agreed that if any interlocutory applications were anticipated, the parties were to launch the application by uploading same on the CaseLines platform and thereafter transmit an email to Judge Makhubele's registrar informing him of same. In the event that an interlocutory application is launched, Judge Makhubele will determine the date for hearing and impose any time limits and/or directions which the parties must adhere to."

[12] The defendant states that the documents sought in terms of the rule 35(3) notices emanate from the plaintiff's amended plea to the defendant's counterclaim and do not fall under the paragraph 5 agreement.

[13] I agree with the defendant's view and will proceed to deal with the merits of the application.

Documents sought

Legal framework

[14] Rule 35(3) may only be utilised to obtain documents *“which may be relevant to any matter in question”*.

[15] The relevance of documents for purposes of rule 35(3) was formulated in *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 N at 564 A 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.”

Merits

[16] In support of the application, the defendant referred to the plaintiff’s plea to his counterclaim in which the plaintiff *“admits that he consults a party which sells and distributes “Lee Cooper” branded apparel”*, but denies that he has breached the agreement by competing with Soviet.

[17] According to the defendant, it remains incumbent on him, for purposes of his counterclaim to prove that:

[17.1] the parties agreed that the plaintiff would not in any capacity compete with Soviet, or do or cause anything that would adversely affect the value of the business of Soviet; and

[17.2] the plaintiff did in fact breach this term of the agreement.

[18] In order to prove the above the documents are according to the defendant:

"29.1 ... relevant to the pleaded issues and in particular will either prove or disprove the relationship between the plaintiff and the third party Denim HQ (Pty) Ltd, and whether it was a term of the agreement that the plaintiff was prohibited from competing with Soviet;

29.2 may contain information which will either directly or indirectly enable the defendant to advance his own case or damage the plaintiff's case."

[19] The plaintiff opposes the application on two grounds, namely:

[19.1] the documents sought relate to common cause facts;

[19.2] the documents are not in his possession.

Common cause facts

[20] The plaintiff submits that he admitted in his plea to the defendant's counterclaim that he competed with Soviet, as a result, this issue is no longer in dispute and the defendant is not entitled to the requested documents.

[21] The following allegations in the defendant's counterclaim is germane to the requested documents:

"2.2 The material express alternatively implied further alternatively tacit terms of the agreement were the following:

....

2.2.5 the plaintiff would not compete in any capacity whatsoever with Soviet, either directly or indirectly for at least the duration of the agreement; and

2.2.6 The plaintiff would not do anything or cause anything to be done that would adversely affect the value or business of Soviet."

"

4.

4.1 During or about July 2017 the defendant discovered that the plaintiff had breached the terms of the agreement in or more or all of the following ways:

4.1.1 the plaintiff competed, and still competes, with Soviet through the Lee Cooper brand;

4.1.2 the plaintiff interfered with the contractual relationship between Soviet and its employees and/or agents."

[22] The plaintiff pleaded as follows to the allegations contained in paragraph 4.1:

"11. The plaintiff admits that:

*11.1 for the period between 1st February 2017 and 30th July 2020 he consulted to
Denim HQ (Pty) Ltd (in liquidation) ("Denim HQ");*

*11.2 until Denim HQ ceased doing business on 30th July 2020, Denim HQ
manufactured and sold "Lee Cooper" branded apparel and by doing so,
Denim HQ competed with Soviet."*

[23] The admission is not directed at the allegation that *"the plaintiff"* competed with Soviet through the Lee Cooper brand, but that Denim HQ to which he consulted did.

[24] In view of the plaintiff's pleaded case, that he only consulted to Denim HQ, the requested documents do pertain to an issue in dispute, in that it might shed light on the plaintiff's true relationship with Denim HQ, which might in turn leads credence to the defendant's allegation that the plaintiff competed with Soviet.

[25] In the premises, I am of the view that the requested documents do pertain to an issue in dispute and should be discovered in terms of rule 35(3).

Documents not in plaintiff's possession

- [26] The plaintiff submits that the requested documents, particularly those relating to the domain name Denimhq.com, pertains to the private and confidential information of Denim HQ and does not belong to him nor is it in his possession.
- [27] The defendant, however, in the rule 35(3) notice dated 18 August 2020 requests emails sent and received **by the plaintiff**. It is difficult to contemplate that the plaintiff will not have emails sent and received by him in his possession.
- [28] The same applies for the documents requested by the defendant in the rule 35(3) notice dated 24 August 2020. The plaintiff may in any event in answer to the rule 35(3) notice declare with reference to each and every document, which document is not in his possession and state the whereabouts of the specified document.
- [29] The same pertains to documents that are, in the plaintiff's view, privileged. Form 11 of the Uniform Rules of Court makes provision for such documents to be identified and discovered in the second part of the schedule attached to the discovery affidavit.
- [30] In the premises, there is no merit in this ground of opposition.

COSTS

[31] There exists no reason why costs should not follow suit.

ORDER

[32] In the premises, I grant the following order:

1. The respondent is ordered to comply within ten (10) days from date of this order

with the applicant's rule 35(3) notices respectively dated 18 August 2020 and 24

August 2020.
2. The respondent is ordered to pay the costs of the application.



A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. To the left of the signature is a large, stylized circular mark.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

3 May 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES:

18 June 2021

APPEARANCES

Counsel for the Plaintiff/Respondent

Advocate H.A. van der Merwe and

Advocate A. Pillay

Instructed by:

Senekal Simmonds Incorporated

Counsel for the Defendant/Applicant:

Advocate R. S. Shepstone

Instructed by:

Errol Goss Attorneys