



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

CASE NO: 58093/13

23/2/18

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

22/02/2018...
DATE

H. Constanter
SIGNATURE

In the matter between:

ZWELENKOZI LENNOX MATSHAYA

Applicant/Plaintiff

and

TPO CONSULTING (PTY) LIMITED

First Defendant

TOLPLAN INVESTMENTS (PTY) LIMITED

Second Defendant

WILLEM JOHANNES PIENAAR N.O.

Third Defendant

WILLEM JOHANNES PIENAAR

Fourth Defendant

TOLPLAN (PTY) LTD

Fifth Defendant

JUDGEMENT

Matter heard on: 15 February 2018

CONSTANTINIDES AJ:

1. The applicant has launched applications to compel further and better discovery and further and better trial particulars. The applicant is the plaintiff and the first to fifth respondents ("the respondents") are the defendants in the action under the above case number. Both matters were set down simultaneously to be dealt with at the present hearing.
2. At the outset I wish to make certain comments for purposes of "housekeeping" and for future reference.

The court file was in total disarray due to the following:

- 2.1. All the notices were thrown into the file without being properly secured and without a proper index.
- 2.2. The Respondents heads of argument were not filed in the court file.
- 2.3. This displays a total disregard for compliance with the practice directives and the judicial officer hearing the matter as a lot of time is wasted attempting to decipher which documents and bundles are relevant to the applications being heard.
- 2.4. In cases where two applications are to be heard by the same judge it will be prudent to compile a consolidated bundle of the relevant documents and the heads of argument of all the parties and to index and paginate same.

3. I shall deal with each of the applications separately.

4. The applicants have alleged that:

“2. ... The respondents have complied only partially with the notice in terms of Rule 35(3) and with a request for further particulars for trial ...”¹

4.1. In the notice of application in terms of rule 35(7) the plaintiff seeks an order that:

The Defendants be compelled to deliver their supplementary discovery affidavit and to discover seven categories of documents detailed in prayers 2.1 to 2.7 of the notice of motion.

5. The plaintiff has filed a detailed affidavit setting out the reasons for launching the present application.

6. The answering affidavit was deposed to by the director of the first defendant wherein he also acts as representative of the third defendant and is cited in his personal capacity as the fourth defendant. He deposes to the answering affidavit on behalf of all the defendants. What is relevant in the defendants' answering affidavit is the following:

**“6. SUMMARY OF DEFENDANTS' GROUNDS OF OPPOSITION
AND REASONS THEREFORE:**

6.1 Upon receiving the application, the Defendants' attorney

¹ Applicant's Combined Heads of Argument: Application to compel further and better discovery, Application to compel further and better trial particular – page. 2.

of record carefully perused and considered the content of the application.

6.2 *As an initial response on the Defendants' behalf, Mr Leander Opperman, the Defendants' attorney of record, sent the attached letter to Mr Saltzman, a copy of which is annexed hereto marked annexure 'WJP1'.*

6.3 *I reiterate and confirm the content of numbered paragraph 3 of annexure 'WJP1' which is a summary, albeit not conclusive, of the points to be raised by the Defendants in opposition to the application.*

.... Certain common or recurring themes appear from the defendants' responses (namely

- (a) *"impermissible interrogatory;*
- (b) *an abuse aimed at eliciting documents Plaintiff is not entitled to bearing in mind the cause of action as pleaded by the Plaintiff; and*
- (c) *the application being a fishing expedition on the part of the Plaintiff.)"*²

7. The relevant portion of "WJP1" reads as follows:

"1. We refer to your client's:

1.1 rule 35(7) application; and

² Para 6. Page 24 of the respondents' answering affidavit Rule 35(7) application

1.2 *application entitled: 'Notice of Motion' (sic) served on our offices on 31 January 2017 ('the applications').*

2. *We place on record that:*

2.1 *you were furnished with an unsigned copy of the supplementary discovery affidavit of Mr Willie Pienaar on behalf of the defendants via email during the afternoon of 30 January 2017 and a signed version of a supplementary discovery affidavit was served on your correspondent on 31 January 2017;*³

8. Therefore prayer 1 of the notice of application in terms of rule 35(7) has become academic as a supplementary discovery affidavit was indeed served on the plaintiff's attorneys so I decline to grant that order.
9. It is common cause that the first defendant disposed of its shares in the fifth defendant to the Willem J Pienaar Trust (the third respondent) and to Willem J Pienaar (fourth respondent) on 1 March 2009. The plaintiff has alleged that the aforesaid disposal was null and void, and was not at arms' length and falls to be set aside.
10. The defendants have alleged that the first defendant's shareholding in the fifth defendant (Tolplan (Pty) Limited) as at the 1st March 2009 was valued at R9,724 million.

³ Email message from Adams and Adams dated 2 February 2017, page 39, respondents' answering affidavit.

11. Therefore the applicant states the following:

*"14.4 The minutes of the meeting will reveal the motivation behind the dividend declaration by the fifth defendant of R1 077 169.00, will give insight into the value of the fifth defendant and will assist in testing the veracity of the alleged 'valuation' of the first defendant's shareholding in the fifth defendant. Simply stated, the size of a dividend - declared against profits – will provide a strong indication of the true value of the shares in question."*⁴

12. The respondents have countered the aforesaid explanation stating that the plaintiff is embarking on *"a fishing expedition..."* The defendants have indicated in their rule 35(3) response that the *"required dividend declaration is not relevant to the issues on the pleadings."*⁵

13. The request for the annual financial statements including all and any withdrawn statements of the fifth defendant for the years ended 28 February 2010 to 2014. The defendants have stated that they refuse additional discovery of anything more than the 28th February 2010 financials in which the defendants have allegedly made discovery of in the supplementary discovery affidavit which appears as item 1 under schedule C on the last page of the document. I am amenable to granting only the annual financial statements of the fifth, second and third defendants only for the year ending the 28th February 2010 as the aforesaid discovered

⁴ Para. 14 Page 8 of the applicant's founding affidavit.

⁵ Paragraphs 6.5.1.7.1 and 6.5.1.7.2 of the respondents' answering affidavit, page 28.

documents are only “draft” financial statements for the year ending 28 February 2010.

14. It is my view that to insist on further statements is indeed a fishing expedition on the part of the plaintiffs. I am satisfied with the plaintiff’s explanation that “22. ...*The annual financial statements will reveal whether the first defendant’s shares in the fifth defendant have been disposed of, other than at arms’ length and importantly, whether the valuation provided is accurate.*”⁶
15. I am not convinced that the plaintiff is entitled to utilize the present action which according to the plaintiff is to “*quantify his damages as a result of the unlawful (and in fact illegal) disposal of the first defendant’s shareholding in and to the fifth defendant.*”⁷
16. In prayer 2.4 the plaintiff requests annual financial statements (including all and any withdrawn statements) of second defendant for the years ended 28 February 2008 to 2014. The defendants have in item 1 under schedule “C” of their discovery affidavit⁸ stated that they refuse additional discovery of anything more than the 28th February 2010 financials which they have made in their supplementary discovery. However, I am in agreement that the plaintiffs are entitled to only the financial statements for the year ending the 28th February 2010 in respect of the second defendant.
17. Counsel for the plaintiffs was unable to motivate why he would be entitled

⁶ Paragraph 22, page 10 of the founding affidavit.

⁷ Paragraph 24, page 10 of the founding affidavit.

⁸ Annexure “WJP6”, page 77 of the defendants’ answering affidavit.

to any further financials in view of the fact that the shares were disposed of on the 1st March 2009.

18. The motivation of the plaintiff for such an extensive discovery from before the disposal of the shares on the 1st March 2009 up to the year 2014, is as follows:

“29. It is necessary to have access to the annual financial statements for all of the years in order to understand the ‘Toplan’ group structure and to test the veracity of the defendants’ allegations regarding the shareholders of each company. ...”

19. The plaintiff furthermore wishes to ascertain

“30.1 The accuracy of the defendants’ allegation regarding the ‘unbundling’ of the first defendant’s shares;

30.2 whether the defendants’ accountants, Van Sitterts, accurately recorded and described the version of events described in already discovered documents;

...

30.4 how the ownership (or rather, inter-ownership) of shares in the various ‘Tolplan’ companies is reflected over the years;

...

30.6 how dividends from the various ‘Tolplan’ companies were

*accounted for over the years...*⁹

20. Based on how the present cause of action is pleaded, it is my opinion that the plaintiffs are entitled to the final financial statements for the year ending 28 February 2010 in respect of the second defendant. Therefore I shall make an order in this regard as Item 1 of the defendant's schedule "C" in the defendants supplementary affidavit reflects "draft" financial statements. The Defendants are to provide the **final** financial statements for year end 28 February 2010 only in respect of the second defendant.
21. Prayer 2.5 requests the annual financial statements "*including all and any withdrawn statements*" of the third defendant (the Willem J Pienaar trust) for the years ended 28 February 2008, to 2014. Once again for purposes of brevity I am not going to reiterate what I have stated hereinabove. The same applies. I am only prepared to grant an order in respect of the final financial statements for the year ending 28 February 2010 in respect of the third defendant.

" ...

The Plaintiff alleges that :

39. *The departure of the first defendant's erstwhile BEE shareholder in 2007 is, however, material and relevant to the plaintiff's cause of action:*

39.1 *It is the plaintiff's version that he was excluded from the operation*

⁹ Plaintiff's founding affidavit, pages 12 to 13.

of the first defendant, despite being a shareholder and a director. He was effectively put forward to be a "black face" for the defendants;.....

*39.3. The value received by the erstwhile BEE shareholder for his shares in 2007 will further illustrate whether the 'disposal' of the shares by the first defendant was at arms' length, or not."*¹⁰

22. For cautionary purposes, I am only prepared to grant an order in respect of the general ledger accounts in the books of the second defendants reflecting their investment in the first defendant for the years ended 28 February 2009 and 2010 years. (prayer 2.6)
23. Prayer 2.7 of the notice of motion requests the general ledgers for the year end 28 February 2008 to 2010 in respect of the first, second, third and fourth defendants.
24. The defendants have stated that the documents requested are "*overbroad and not specific*" and are not required for purposes of preparing for trial.
25. The plaintiffs have motivated the request for the aforesaid by stating that:

*"48. ... the general ledgers in the books of account are required for the very same reason that the annual financial statements are required ..."*¹¹
26. Item number 51 of the defendants' supplementary affidavit provides for:

¹⁰ Paragraphs 39.1 and 39.3, pages 15 and 16 of the plaintiff's founding affidavit.
¹¹ Paragraph 49, page 18, plaintiff's founding affidavit.

*"Extract from the general ledger account in the books of the second defendant reflecting the investment in the first defendant for year ended 28 February 2010."*¹²

27. The defendants furthermore state in their answering affidavit the following:

*"6.5.1.15.1 ... the documents in respect of the third defendant do not exist ..."*¹³

28. However I shall order that the general ledger account for the year end 28 February 2010 of the fourth defendants also be discovered by the defendants.

29. It is trite that it is only in exceptional circumstances that the court should go behind the parties' discovery affidavit.

30. I am in agreement with the defendants relating to the fact that the general ledgers requested for the 2008 financial year are not relevant to the plaintiff's cause of action.

31. The plaintiffs allege the following in their replying affidavit:

"9.1 Ad paragraph 5.3

9.1.1 The 2011 application has not been abandoned. It has been stayed pending the outcome of this action.

9.1.2 If and when the action is resolved (and depending on the

¹² Page 74 of the defendants' answering affidavit.

¹³ Page 35 of the defendants' answering affidavit.

outcome of the action), the 2011 application will be pursued.”¹⁴

32. In my opinion the aforesaid statement appears to confirm the respondents’ allegations that the claim for certain documentation is merely a “*fishing expedition*” for purposes of enabling the plaintiff to quantify his damages.
33. A court, in the exercise of its discretion, must remain alert to the potential abuse of the discovery process. This may arise if the procedure is utilized in *terrorem* to debilitate a respondent by requiring it to incur exorbitant expenses and to tie up large numbers of qualified staff and lawyers.¹⁵
34. The court may wish to balance the expedition of allying the existence or otherwise of the document to be tested during the main trial against the prejudice of being unable to properly prepare for the trial itself.¹⁶
35. Having heard the parties and having considered the matter, I make the following order:

1. The defendants are compelled to discover alternatively, to make available to the plaintiff in accordance with rule 35(6):

- 1.1 The minutes of the meeting in which the dividend of R1,077,169.00 that appears in the annual financial statements of the fifth defendant dated 28 February 2009 was approved;

¹⁴ Paragraph 9.1, plaintiff’s replying affidavit, page 84.

¹⁵ See: **Makate v. Vodacom (Pty) Ltd 2014 (1) SA 191 (GSJ) at 200 E – F.**
Erasmus Superior Court Practice, Vol 2, D1-476 [Service 1, 2016]

¹⁶ Erasmus Superior Court Practice, Vol 2, D1-476 [Service 1, 2016]

- 1.2 The journal entries, general ledger accounts and all and any documents relating to or reflecting cash payment relating to the dividend of R1,077,169.00 and how the said dividend was paid;
 - 1.3. The final Annual financial statements including all and any withdrawn statements, of the second, and fifth defendants for the year ended 28 February 2010;
 - 1.4. The general ledger accounts in the books of the second defendant reflecting their investment in the first defendant for the year ended 28 February 2010;
 - 1.5. The general ledgers for the year end 28 February 2010 in respect of the first, second, and fifth defendants.
 - 1.6. The defendants are afforded 30 business days from the date of this order to comply with prayers 1.1 – 1.6 above;
2. In the event of the defendants failing to comply with prayers 1.1 – 1.6 above, the plaintiff is entitled to re-enrol this application, on the same papers, duly supplemented, for an order striking out the defendants' plea and requesting default judgment in favour of the plaintiff.
3. The defendants are ordered to pay the costs of this application.

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Acting Judge of High Court

Gauteng Division Pretoria

22nd February 2018

Attorneys for the Plaintiff:

Saltzman Attorneys

Counsel for the Plaintiff:

Adv. J Daniels

**Attorneys for the First and
Second Defendants:**

Adams & Adams

**Counsel/Attorney for the
First and Second Defendants:**

Adv. E C Labuschagne SC