



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **3123/2016**

In the matter between:

OMEGA CIVILS (PROPRIETARY) LIMITED

Plaintiff/Applicant

and

**C MAX CIVIL CONSTRUCTION & GENERAL
TRADING
TRADING (PTY) LTD**

Defendant/Respondent

HEARD ON: 25 JANUARY 2017

JUDGMENT BY: BOKWA, AJ

DELIVERED ON: 22 FEBRUARY 2018

A. INTRODUCTION:

- [1] This is an Opposed Application by Notice of Motion in terms of Rule 35(7) of the Rules of Court. The Applicant, is the Plaintiff in an action instituted against the Defendant who is the Respondent in this application.
- [2] On 3rd May 2017 Applicant delivered a Notice in terms of Rule 35(3) requesting the Respondent to make available for inspection certain documents in accordance with Rule 35(6) or to state under oath if it did not have such documents in its possession, in which case the Respondent had to state it's whereabouts.
- [3] On 15th June 2016 the Respondent filed a response to the Rule 35(3) Notice by delivering a Notice in terms of Rule 35(6). In the present Application the Applicant contends that the Respondent's responses to Rule 35(3) Notice, do not constitute compliance with the provisions of Rule 35(3). In the circumstances, the Applicant request better discovery.

B. BACKGROUND FACTS:

- [4] The chronology of the relevant facts appears from the papers. During July 2016 the Applicant as Plaintiff issued summons against the Respondent as Defendant for payment of the amount of R5 628 405.76, which claim was based on payments due to the

Applicant on attaining several, specified milestones in terms of the agreement between the Applicant and the Respondent.

- [5] The Respondent was awarded a contract by the Free State Department of Human Settlement to build low cost housing. In furtherance of the said contract, Applicant and Respondent concluded agreements in terms whereof Applicant undertook to perform certain construction works for the Respondent on two sites at Heidedal and Phelindaba. The agreement made specific provision that Applicant would be paid by the Respondent upon reaching certain construction milestones, specific amounts inclusive of both material and labour. The parties were of the same mind that the Applicant would be paid once the Respondent received payment from the Department and in respect of the milestones attended by the Applicant, for which milestones the Respondent would lodge claims to the Department of Human Settlement, Free State, as the main contractor.
- [6] The pleadings have closed in the main action. The Applicant wants to compel the Respondent to provide better discovery, in this interlocutory proceeding.

C. ISSUES FOR DETERMINATION:

- [7] This Court must among others, determine the nature of the relief sought by the Applicant, by scrutinizing the wording of Rule 35(3) with the background facts to the case. In so doing, to determine if

the Respondent has complied with the Rule in its response to Applicant's request.

- [8] More specifically, whether the Rule 35(3) Notice of Applicant describes the requested documents with sufficient accuracy for proper identification and whether the documents requested are relevant to the issues, in the main action.

D. LEGAL PRINCIPLES:

- [9] Rule 35(1) and (2) requires from a party to an action that has been requested thereto, to make discovery on oath of all documents and tape recordings relating to any matter in question in such action which are, or have at any time been in the possession or control of such party.

- [10] If a party is not satisfied with the other party's discovery, it may make use of the procedure provided for in Rule 35(3) to obtain inspection of documents which that party believes are in the possession of the other party and which are relevant to any matter in question. Rule 35(3) provides that:

"(3) 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 subrule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him."

[11] The object of discovery was stated in **Durbach v Fairway Hotel Ltd**¹ to be, to ensure that before the trial, both parties are made aware of all the documentary evidence that is available. Discovery of such documents are intended to assist the parties and the court to discover the truth and, in doing so, to contribute to a just determination of the case.

[12] In **Herbstein & van Winsen** it was stated² that

"Our law recognises that proper mutual discovery in litigation of contemporary documentary material which is often more valuable than the oral testimony."

And, furthermore, 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 but which may fairly lead to an enquiry relevant to the issues."

[13] In applications under 35(7), the court has a discretion whether or not to compel discovery or inspection. This discretion is clear from the wording of the subrule, which provides that:

"If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection and aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss a claim or strike out the defence."

¹ 1949(3) SA 1081 (SR) at 1083.

² The Civil Practice of the Supreme Court of South Africa 4th Edition (1997)

(See Venmop 275 (Pty) Ltd v Cleverland Projects (Pty) Ltd 2016 (1) SA 78 (GJ) at par [29]³; Continental Ore Construction v Highveld Steel and Vanadium Ltd at 594 – 595.)⁴

E. CONTENTS OF THE RELEVANT PLEADINGS:

[14] The Applicant's Notice in terms of Rule 35(3) is marked **annexure "CDE3"** on page 154 of the paginated bundle. The Respondent is requested to provide documentation for inspection by the Applicant and the following were stated:

- "1. *In terms of the rule 35(3) notice, the applicant requested the respondent to make the following documents available for inspection in accordance with rule 35(6) or to state on oath that such documents are not in its possession, in which event the respondent shall, if known to him, state their whereabouts.*"
- "2. *Proof of all payments received by the Defendant from the Free State Department of Human Settlements as payment for invoices delivered to it by the Defendant in the furtherance of the Departments reconstruction and development programme pertaining to RDP houses constructed at Heidedal, such proof to include all payments made by the Department in respect of the project thus far.*
3. *Proof of all payments received by the Defendant from the Free State Department of Human Settlements as payment for invoices delivered to it by the Defendant in the furtherance of the Department's reconstruction and development programme pertaining to RDP houses constructed at*

³ Venmop 275 (Pty) Ltd v Clerlad Projects (pty) Ltd 2016 (1) SA 78 (GJ) at par [29]

⁴ Continental Ore Construction v Highveld Steel and Vanadium Ltd at 594 - 595

Phelindaba, such proof to include all payments made by the Department in respect of the project thus far.

4. *The Defendant is requested to supply the Plaintiff with all quotations and proof of payment for rectifying the deficient work pleaded by the Defendant in its plea dated the 9th of December 2016.*
5. *The Defendant is requested to the (sic) supply the Plaintiff with all photographs in its possession reflecting the deficiencies in the Plaintiff's work as pleaded n the Defendant's plea dated the 9th December 2016."*

[15] The Respondent's responses to the Notice of Applicant is captured on page 157 of the paginated bundle as **annexure "CDE4"**. In it's Notice in terms of Rule 35(6) dated 15 June 2017 the Respondent states as follows:

"KINDLY TAKE NOTICE that in response to the Plaintiff's notice in terms of Rule 35(3) dated the 3rd of May 2017, the Defendant attaches hereto copies of all quotations and proof of payments as requested. In regard to the payments received from the Free State Department of Human Settlements, the Defendant's affidavit in regard thereto will be served shortly."

F: CONTENTIONS ON BEHALF OF THE PLAINTIFF (APPLICANT)

[16] Mr Pienaar represented the applicants. During argument he repeated the legal arguments already advanced in the Plaintiff's affidavit. I shall not repeat all his arguments here safe for what is relevant in his submissions for the conclusion I have reached. In his submissions he summarized the Respondent's opposition to the Applicant's application as follows:

- "5.1 The ambit of the dispute between the applicant and the respondent in the main action is, if indeed the invoices were rendered to the respondent, whether the respondent had received payment for the specified invoices from the Department⁵;*
- 5.2 The issues in the matter and all documents discovered can therefore only be related to the specified invoices and payment claims contained in the summons⁶.*
- 5.3 The documents requested in terms of the applicant's rule 35(3) notice, inasmuch as it do not only relate to the said invoices and payments thereof, are not relevant to the issues in question⁷.*
- 5.4 The rule 35(3) notice does not clearly specify which documents the application requires⁸;*
- 5.5 The applicant cannot, by means of an application to compel, seek photographs of the work, being also something which the respondent stated in its affidavit is not in the respondent's possession.⁹"*

[17] Mr Pienaar made the submission that the Respondent's responses do not comply with the provisions of Rule 35(3) and 35(6) and furthermore that the applicant is entitled to a proper response as contemplated in Rule 35(3). He wants the court to hold the Respondent responsible for the costs incurred in respect of this application.

⁵ P. 220 to 221, par 7.1 to 7.7

⁶ P. 221, par 7, 10

⁷ P. 222, par 8.2

⁸ P. 223, par 8.2.2 to 8.2.5

P. 225, par 8.2.1011

G: CONTENTIONS ON BEHALF OF THE DEFENDANT
(RESPONDENT)

- [18] Mr Grobler who appeared on behalf of the Respondent submitted that Rule 35(3) was adequately answered by the Respondent, such documents having been furnished by the Respondent on 23rd February 2017. He submitted that the Respondent did not have any other documents in its possession related to the request. He submitted that in any event the further documents under request were not relevant for the purpose of a dispute and as such the Notices was defective in as far as it does not define what "proof" the Applicant wanted.

H: ANALYSIS

- [19] In this case Mr Pienaar on behalf of the Applicant contended that the Respondent did not provide or make the necessary documents which constitute proof of payments as contemplated in the Rule 35(3) Notice available to the Applicant namely bank statements reflecting actual payments received from the Department including audited financial statements proving receipt of funds from the Department.
- [20] The party who is not satisfied with the discovery has the onus of proving on the probabilities that the documents exist or are relevant. (See **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa** at 320C.)

- [21] An ordinary meaning of the words used in Rule 35(3) lays the two grounds on which such a notice may be served for it to be valid. First, a party must believe. Secondly the document sought must be relevant. The Applicant must lay sound grounds for its believe.
- [22] *In casu*, the Applicant rely on an oral agreement between itself and the Respondent in respect of a tender awarded by the Free State Department of Human Settlement to the Respondent. In terms of this contract, the Applicant undertook subcontracting works with the reciprocal obligation on the Respondent to pay Applicant on milestones reached. Two certificates certified by the engineer revealed an amount of R2 604 723.82 for Heidedal and R2 446 398.51 for Phelindaba as still outstanding, and owed to the Applicant.
- [23] In its plea, the Respondent alleges that it would remunerate the Applicant with funds received from work performed from the Department. Furthermore, Respondent allege that the work rendered by Applicant in respect of both sites was defective. To my mind, Applicant has objectively laid the basis for requesting these documents. They are relevant for proving payments including any defective work which Respondent has pleaded. It is conceivable that evidence in the form of photo's may be used by the Respondent to disproof or at best, minimize the Applicant's claim. The relevance of the documents will inevitably enable the Applicant to advance its own case and to proof its damages against the Respondent.

- [24] The Respondent has not raised any valid objections to not producing such documents.

"In MLAMLA v MARINE & TRADE INSURANCE COMPANY 1978 (1) SA 401 (E) at 402 it was found that "the right of a party to an action to resist discovery is a limited right existing only in certain well-defined circumstances" for instance, where the document "is covered by legal professional privilege" or "if it would disclose the party's evidence" or "if it would be injurious to the public interest if it were to be disclosed."

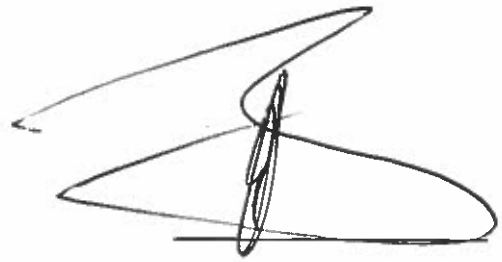
I: CONCLUSION

- [25] I am satisfied that the Applicant has described the document under request with sufficient accuracy to be able to be identified within a genus. In the premise I take the view that the Applicant is entitled to a better discovery affidavit from the Respondent. In the absence of any allegations of possible prejudice, I am inclined to exercise my discretion in favour of the Applicant and to order the Respondent to provide a better discovery to the Applicant.

- [26] **In the premises I make the following order:**

- 26.1 That the Defendant be ordered to furnish a proper reply to Plaintiff's Rule 35(3) Notice served on the Defendant's attorneys on the 3 May 2017, and that a reply to such Notice be delivered within 10 days from the date of the granting of this Order;
- 26.2 That failing delivery of the reply as aforesaid, Plaintiff will be entitled to apply for the dismissal of Defendant's defence, on the same papers duly supplemented, if needs be.

26.3 That the Defendant be ordered to pay the costs of this Application.

A handwritten signature in black ink, consisting of a large, stylized 'B' shape with a vertical line through the center, and a horizontal line at the bottom.

I R O BOKWA, AJ

On behalf of plaintiffs : Adv. T Pienaar
Honey Attorneys
Bloemfontein

On behalf of defendants: Adv. S. Grobler
Lovius Attorneys
Bloemfontein