



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

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

2015.03.09.

DATE

[Signature]  
SIGNATURE

CASE NUMBER: A336/14

DATE: 10 March 2015

CORNELIUS GREGORIUS PYPERS

First Appellant

VRYHEIDSFRONT PLUS

Second Appellant

JACOBUS JOHANNES HOFFMAN

Third Appellant

✓

ODENDAAL & SUMMERTON INGELYF

First Respondent

ADRIAAN IZAK ODENDAAL

Second Respondent

---

JUDGMENT

---

MABUSE J:

[1] This is an appeal by the Appellants, the Defendants in the court *a quo*, against the orders of Magistrate K. Naidoo of Magistrate Court Vereeniging in which he:

- 1.1 dismissed an application by the Appellants, then the Defendants, to rescind an order to provide Further Particulars for the purpose of trial;
  - 1.2 struck out the Appellants' then Defendants' defence due to non-compliance with the order in paragraph 1.1 supra; and,
  - 1.3 determining the Respondent's quantum of damages in the Respondents', then the Plaintiffs', defamation action.
- [2] For purposes of ease I shall refer to the parties by the names they called themselves in the court *a quo* where the Appellants were the Defendants and the Respondents the Plaintiffs.
- [3] The battlefield of the parties in *casu* are whether the aforementioned magistrate erred in finding or determining:
- 3.1 that the Defendants had not provided the Plaintiffs with the required particulars as ordered;
  - 3.2 that the Defendants had not shown good cause in their application to rescind the order compelling them to furnish Further Particulars for purposes of trial;
  - 3.3 that the Defendants' defence should be struck out owing to their perceived failure to furnish the Plaintiffs with Further Particulars or put otherwise due to their non-compliance with the order to provide Further Particulars;
  - 3.4 in the light of the fact that their defence had been struck out, that the Defendants had no right under such circumstances to be present while evidence regarding quantum of damages was heard or that their further participation in the trial had come to an end finally;
  - 3.5 in the determination of quantum.

[4] The Plaintiffs opposed the appeal. Their opposition of the appeal is founded on the following grounds that:

- (a) the Defendants did not oppose the initial application at the end of which an order compelling them to provide the Plaintiffs with Further Particulars for trial was made;
- (b) that even after they were ordered to provide Further Particulars the Defendants did not provide the Further Particulars;
- (c) that the Defendants' application for rescission did not show good cause for the rescission of the order to compel in that in it the Defendants failed to set forth their reasons for failing to furnish the Further Particulars and in addition for failing to oppose the application to compel them to furnish Further Particulars, and thirdly and finally why they failed to attend Court on the appointed date for the application to compel. Finally the Plaintiffs support the Magistrate's findings in respect of quantum and contend that it was done in terms of the law.

[5] It needs to be pointed that the point raised in paragraphs 3.1 supra is decisive and that if this Court should find that the magistrate erred in finding that the Defendants had not provided the Plaintiffs with Further Particulars the need to deal with points raised in 3.2 - 3.5 will fall away. This is so because what followed subsequent to 16 March 2012 had its provenance in the order of 16 March 2012.

[6] It is only apposite at this stage to set out the salient facts of this matter.

6.1 By summons issued by the Clerk of the Civil Court Meyerton on 11 March 2011 the Plaintiffs claimed from the Defendants payment of a sum of R50 000.00 from each one of the three Defendants in respect of each of the five claims instituted against them and further ancillary relief.

- 6.2 On 6 May 2011 the three Defendants delivered their notices of intention to defend and their pleas to the Plaintiffs' summons.
- 6.3 On 27 October 2011 the Plaintiffs delivered their replication in respect of the first and third Defendants' pleas.
- 6.4 On 28 October 2011 the Plaintiffs delivered on the Defendants their request for Further Particulars for the purpose of trial.
- 6.5 On 9 November 2011 the Defendants delivered their responses to the Plaintiffs' request for Further Particulars.

[7] These Further Particulars were required, as I already have indicated somewhere supra, by the Plaintiffs to enable them to prepare for trial.

- 7.1 In respect of the second defendant the Plaintiffs had pleaded as follows in their third claim:

*"8. Op of omtrent 13 November 2009 het die Tweede Verweerder op sy openbare webwerf 'n document gepubliseer met die opskrif: "VF PLUS" VRA INGRYPING IN MIDVAAL."*

*"19. Bogenoemde dokumente was op datum hiervan nog op die webwerf beskikbaar vir enige lid van die publiek, insluitend inwoners van die distrik van Vereeniging.*

*20. 'n Uitdruk van bogenoemde dokument word hierby aangeheg gemerk aanhangsel C.*

*21. Bogenoemde dokument, soos op die openbare webwerf gepubliseer, bevat die volgende bewerings of innuendo aangaande die Tweede Eiser:*

*21.1.1 dat die Tweede Eiser, met die hulp van sekere ander persone, onregmatig of onbehoorlik opgetree het met grond wat aan Midvaal geskenk is.*

21.1.2 *dat die Eerste en/of Tweede Eisers nie behoorlik rekenskap van trustgelde gegee het nie.*

22. *Bogenoemde bewerings was onregmatig en lasterlik van die Eisers deurdat dit bedoel was en verstaan is om te beteken of insinueer dat Eerste en/of Tweede Eiser oneerlik is of was in hulle optrede as Prokureurs van Midvaal, en/of as afslaers van Midvaal en/of dat hulle in die algemeen in korrupte sake transaksies betrokke was en/of onbehoorlik met trustgeld opgetree het."*

7.2 To the allegations contained in paragraph 22 of the summons as set out above, the Second Defendant had pleaded as follows:

"6

AD Paragraaf 22

*Die Tweede Verweerder ontken dat die beweringe onregmatig en lasterlik is en pleit dat die bewerings nie wesenlik waar is nie, maar ook in die belang van die algemene publiek is alternatiewelik dat die bewerings ook gepreveliveerd is."*

7.3 The Plaintiffs had set out their request for Further Particulars for purposes of trial as follows:

"AD Derde Eis

4.

AD Paragraaf 6 van die Tweede Verweerder se pleit

*Beweerde onreëlmatige grond transaksies.*

4.2 *Gaan die Tweede Verweerder tydens die verhoor poog om te bewys dat die bewerings in paragraaf 21.1.1 van die Besonderhede van Vordering genoem, gelees met aanhangsel 'C' daarvan waar is?*

4.3 *Indien wel ter voorbereiding vir verhoor, benodig die eisers volledige besonderhede van die getuienis en/of dokumente waarop gesteun sal word om die waarheid van die bewerings te bewys, insluitend:*

4.3.1 *volledige beskrywings van die grond of vaste eiendom betrokke by die beweerde (irregular dealings);*

4.3.2 *volledige besonderhede van die aard van die "irregular dealings" en waarom dit na bewering onreëlmatig was, met verwysing na wetgewing of regsbeginself;*

4.3.3 *volledige besonderhede, met verwysing na spesifieke blootgeleegde dokumente, van getuienis wat aangebied sal word om die waarheid van die bewerings te bewys.*

4.4 *Het die Tweede Verweerder voor publikasie van die bewerings enige getuienis ingesamel of ondersoek ingestel na die waarheid aldan nie van die bewerings in paragraaf 21.1.1 van die besonderhede van vordering genoem? Indien wel, word die besonderhede van die uitslag van die sodanige ondersoek en bevindinge verlang.*

*Beweerde onbehoorlike rekenskap van trustgeld.*

4.5 *Gaan die Tweede Verweerder tydens die verhoof poog om te bewys dat die bewerings in paragraaf 21.1.2 van die besonderhede van vordering genoem, gelees met Aanhangsel C daarvan waar is?*

4.6 *Indien wel, ter voorbereiding vir verhoor, benodig die Eisers volledige besonderhede van die getuienis en/of dokumente waarop gesteun sal word om die waarheid van die bewerings te bewys, insluitend*

4.6.1 *volledige beskrywings van elke geval waar die eisers na bewerings nie behoorlik rekenskap van trustgeld gegee het nie, met verwysing*

*na datum van ontvangs van sodanige gelde, die bron daarvan, en die bedrag daarvan;*

*4.6.2 volledige besonderhede van die aard van die beweerde versuim in elke geval, met verwysing na wetgewing of regsbeginsels;*

*4.6.3 volledige besonderhede, met verwysing na spesifieke blootgelegte dokumente, van getuienis wat aangebied sal word om die waarheid van die bewerings te bewys."*

7.4 With regards to the first and third Defendants the Plaintiffs had made a request for Further Particulars as follows:

*"4.3 Gaan die verweerders tydens die verhoor poog om te bewys dat die bewerings in paragraaf 21.1.1 van die besonderhede van bogenoemde, gelees met aanhangsel C daarvan waar is?*

*4.4 Indien wel, ter voorbereiding vir verhoor benodig die eisers volledige besonderhede van die getuienis en/of dokumente waarop gesteun sal word om die waarheid van die bewerings te bewys insluitend;*

*4.4.1 volledige beskrywings van die grond of vaste eiendom betrokke by die beweerde "irregular dealings";*

*4.4.2 volledige besonderhede van die aard van die "irregular dealings" en waarom dit na bewering onreëlmstig was met verwysing na wetgewing of regsbeginsels;*

*4.4.3 volledige besonderhede met verwysing na spesifieke blootgelegde dokumente, van getuienis wat aangebied sal word om die waarheid van die bewerings te bewys.*

*Beweerde Onbehoorlike Rekenskap van Trustgeld*

4.5 Gaan die verweerders tydens die verhoor poog om te bewys dat die bewerings in paragraaf 21.1.2 van die besonderhede van vordering genoem, gelees met aanhangsel C daarvan waar is?

4.6 Indien wel, ter voorbereiding vir verhoor, benodig die Eisers volledige besonderhede van die getuienis en/of dokumente waarop gesteun sal word om die waarheid van die bewerings te bewys, insluitend;

4.6.1 volledige beskrywings van elke geval waar die Eisers na bewering nie behoorlik rekenskap van trustgeld gegee het nie, met verwysing na datum van ontvangs van sodanige gelde, die bron daarvan, en die bedrag daarvan;

4.6.2 volledige besonderhede van die aard van die beweerde versuim in elk geval, met verwysing na wetgewing of regsbeginsels;

4.6.3 volledige besonderhede, met verwysing na spesifieke blootgelegde dokumente, van getuienis wat aangebied sal word om die waarheid van die bewerings te bewys."

[8] The first and third Defendants responded as follows to the abovementioned request for Further Particulars by the Plaintiff:

"4

*AD Paragraaf 9 van die Verweerders se pleit*

4.1 Ja;

4.2 Nee;

4.3 Ongetwyfeld ja, slegs nadat en indien Eisers kan slaag om te bewys dat daar hoegenaamd 'n onus op Verweerders is om te antwoord en te getuig.



*4.4.1 Sien paragraaf 2.1 hierbo;*

*4.4.2 Sien paragraaf 2.1 hierbo;*

*4.4.3 Sien paragraaf 2.1 hierbo;*

*4.5 Ja, slegs nadat en indien Eisers kan slaag om te bewys dat daar hoegenaamd 'n onus op Verweerders is om te antwoord ten te getuig.*

*4.6.1 – 4.6.3 Sien paragraaf 2.1 hierbo."*

[9] The second defendant had replied as follows to the Plaintiffs' request for Further Particulars:

"4

*AD Paragraaf 6 van die Tweede Verweerder se pleit*

*4.1 Ja, slegs nadat Eisers kan slaag om te bewys dat daar hoegenaamd 'n onus op Verweerders is om te antwoord op en te getuig.*

*4.1.1 Sien 2.1 hierbo;*

*4.1.2 Sien 2.1 hierbo;*

*4.1.3 Sien 2.1 hierbo;*

*4.3 Ja, en sien 2.1 hierbo.*

*4.4 Ja, slegs nadat Eisers kan slaag om te bewys dat daar hoegenaamd 'n onus op Verweerders is om te antwoord en te getuig.*

*4.5.1 Sien 2.1 hierbo;*

*4.5.2 Sien 2.1 hierbo;*

*4.5.3 Sien 2.1 hierbo;*

*4.5.4 Sien 2.1 hierbo;*

*4.5.5 Sien 2.1 hierbo;*

*4.5.6 Sien 2.1 hierbo;*

*4.5.7 Sien 2.1 hierbo;*

4.6 *Ja, en sien 2.1 hierbo.”*

[10] The Defendants contend that the Plaintiffs were not entitled to the Further Particulars requested.

[11] On 26 January 2012 in the chambers of the aforementioned magistrate the parties held a pre-trial conference in terms of s 54(2) of the Magistrates Court Act 32 of 1944 (“the Act”). Firstly during the aforementioned pre-trial conference the Plaintiffs indicated that they were of the opinion that the Defendants had not pleaded the defence of relative privilege properly and sufficiently. The Defendants in turn indicated that they had elected to deliver an amendment on the question of relative privilege. With regard to the furnishing of Further Particulars this is what was recorded during the aforementioned pre-trial conference:

*“4 Request for Further Particulars*

*The Defendants will provide Further Particulars to the Defendants’ (sic) request for the purpose of preparing for trial. The reply is limited to the request for Further Particulars to the Defendants’ plea on the Plaintiffs allegations set out in paragraphs 21.1.1 and 21.1.2 of the Further Particulars.”*

It was contended by counsel for the Plaintiffs that according to the abovementioned entry the Defendants had undertaken to provide the Plaintiffs with the required particulars as set out in the minutes.

[12] On 27 February 2014 the Plaintiffs delivered on the Defendants’ attorneys a notice of motion in which they sought an order compelling the Defendants to deliver the required Further Particulars. This notice of motion was brought in terms of Rule 16(4) of the Magistrate Court Rules. In the said notice of motion the First and Third Defendants were required to deliver

the particulars contained in paragraphs 4.4 to 4.6 of the Plaintiffs' request for Further Particulars and the Second Defendant was required to deliver the particulars referred to in paragraphs 4.2 to 4.6 of the Plaintiffs' request for Further Particulars. The application to compel the Defendants to furnish Further Particulars was founded on the affidavit of one Adriaan Izak Odendaal ("Odendaal"). The Defendants contended that it was this affidavit that was of great concern to them because it contained untruths. The notice of the application to compel the Defendants to furnish Further Particulars was set down for hearing on 16 March 2012. The Defendants contended that after they had received the said application they delivered Further Particulars on the Plaintiffs on 15 March 2012. On the same date, the Plaintiffs wrote a letter to their attorneys in which they acknowledged that they had received the Further Particulars. In the same letter they indicated though that the particulars they had been furnished with were not sufficient and that they would proceed with the application to compel on 16 March 2012. Despite the fact that the Defendants had been notified that the application to compel them to furnish Further Particulars was set down for 16 March 2012, despite furthermore the fact that the Defendants' attorneys had been informed in a letter dated 15 March 2012 by the Plaintiffs' attorneys that the Further Particulars that the Defendants had furnished on the aforementioned date were not sufficient and despite thirdly furthermore the fact that in a letter of the same date of 15 March 2012 from the Plaintiffs' attorneys to the Defendants' attorneys the Defendants were informed that the Plaintiffs would go ahead with the application to compel them to furnish Further Particulars, there was no appearance for the Defendants when the application came before court for hearing on 16 March 2012. The Court accordingly granted the order that the Plaintiffs sought. The Defendants were then at an obligation to furnish the required particulars within 10 days of 16 March 2012.

[13] There are a few disconcerting factors about the Defendants' conduct. I pointed it out in paragraph 10 supra that the attitude of the Defendants was that the Plaintiffs were not entitled to the Further Particulars they requested in respect of which they had approached the Court to compel the Defendants to furnish them. Furthermore the Defendants complained that in a letter dated 15 March 2012 the Plaintiffs' attorneys indicated to their attorneys that the particulars that they had furnished were not sufficient for the purposes they were required. The Defendants contend that it was not for the Plaintiffs to determine whether or not the required particulars furnished were sufficient but that that was the duty of the Court. When the Plaintiffs approached the Court with an application to compel them to furnish the very same particulars they complained but they failed to attend Court. By failing to attend Court on 16 March 2012 the Defendants forfeited the opportunity to raise the sufficiency of the Further Particulars they had furnished the Plaintiffs with. On one hand they complained that it was not for the Plaintiffs to determine whether or not the particulars requested were sufficient, while on the other hand they complained that the Court would determine whether or not the particulars were relevant. The Plaintiffs have furnished no reason whatsoever why they failed to attend Court on 16 March 2012 in order to challenge the application to compel them to furnish Further Particulars.

[14] Instead of complying with the Court order of 16 March 2012, on 3 April 2012 the Defendants brought an application to rescind the order of Court of 16 March 2012. The founding affidavit of the first defendant was used in support of the First and Second Defendants' applications to rescind the order of 16 March 2012 while the Third Defendant's affidavit was used in support of its application. Suffice to mention that the application for rescission was dismissed. I wish to point out, at this stage, that on 16 April 2012 the Plaintiffs delivered their affidavit in which they firstly opposed the Defendants' application to rescind the order of

16 March 2012 and secondly brought an application to strike out the Defendants' defence due to non-compliance with the order of the Court and in particular with Rule 16(4) of the Rules of Court.

- [15] According to the Defendants, the application for rescission of the order of the Court of 16 March 2012 was predicated on three grounds. In the first ground the Defendants contended that they had on 8 or 9 November 2011 furnished the Plaintiffs with the requested Further Particulars and that such Further Particulars were delivered accordingly. Secondly they contended that contrary to paragraph 3(a) of the affidavit of Odendaal in the Plaintiffs' application to compel, the magistrate, when making an order at the pre-trial conference that the Defendants should furnish the Plaintiffs with the Further Particulars requested in paragraphs 4.4 to 4.6 of the Plaintiffs' Request for Further Particulars in respect of the First and Third Defendants and paragraphs 4.2 to 4.6 of the Request for Further Particulars in respect of the Second Defendant, did not specify the date on or before which such Further Particulars were to be furnished. Thirdly they contended that contrary to the contents of paragraph 3(b) of the same affidavit of Odendaal, the magistrate had not ordered, at the pre-trial conference, that the particulars so requested should be furnished within 15 days of the order. On these bases they contended that when on 16 March 2012 the Court made an order compelling them to furnish Further Particulars it did not have the correct facts before it as the Plaintiff had misstated the facts. They contended furthermore that although they had been served with the Further Particulars on 9 November 2011 and 15 March 2012 the Plaintiffs wrote a letter to their attorneys on 15 March 2012 in which firstly they acknowledged receipt of the Further Particulars on 15 March 2012 but in which secondly they indicated that such Further Particulars were insufficient. In their view the order of March 2012 was erroneously granted.

[16] In the application for rescission of the order of 16 March 2012 which was granted in their absence the Defendants failed to set out in their application their reasons for failing to attend Court on 16 March 2012. At the hearing of the application for rescission this point was raised by the Plaintiffs that the Defendants had, in their application for rescission of the said order, failed to tender an explanation as required by the Rules of Court why they failed to appear at Court on 16 March 2012. It was further contended that the Defendants had not gone into the merits of the matter.

[17] The magistrate pointed out that by its nature the application by the Defendants to rescind the court order of 16 June 2012 should have been brought in terms of Rule 49(7) of the Rules of Court. This Rule provides that:

*"All applications for rescission or variation of judgments other than default judgments must be brought on notice to all the parties, supported by an affidavit setting out the grounds on which the applicants seek rescission or variation and the Court may rescind or vary such judgment if it is satisfied that there is good reason to do so."*

[18] It would appear that the Defendants might still have brought this application in terms of Rule 49(1) because firstly the word "judgment" also refers to "an order". Secondly the order of 16 March 2012 was made in their absence. Rule 49(7) relates to the rescission of judgment or orders set out in s 36 of the Act which the magistrates may set out suo moto. Be that as it may it behoves the applicant who invokes the provisions of Rule 49(7) to furnish the Court with "*good reasons*" why the Court should set aside the impugned judgment.

[19] Whether acting in terms of Rule 49(1) or 49(7) the duty is on the applicant to explain his or her failure to appear at the hearing of the application that led to the order it wants to rescind. In other words it is not enough for the applicant to say *"I have good reasons to have such-and-such an order set aside"*. The applicant still has to furnish satisfactory reasons why he was not present at Court. The Defendants were obliged at least to furnish the Court with an explanation of their default sufficiently full to enable the Court to understand how it came about that they failed to be at Court on 16 March 2012, and assess their conduct and motives. See *Silber vs Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 A*. In the absence of such explanation the requirements of *"good reason"* has not been satisfied.

[20] The Defendants' contention that they had already served the Plaintiffs with the required particulars on 9 November 2011 and 15 March 2012 has, in my view, some merits and needs to be investigated. It is not for the Plaintiff to decide whether or not the particulars furnished were insufficient for purposes of trial nor is it for the Defendants to decide whether the particulars furnished were sufficient. That duty falls within the domain of the Court. In *Hardy v Hardy 1961(1) SA 643(2)*, Munnik AJ had this to say at p. 643 H – 646 A:

*"That the court has inherent power to order particulars for the preparing for trial is a wide established principle which has been laid down in numerous cases."*

See *Barnett v Cameron 1930 WLD 7*.

[21] The duty was on the Defendants to appear before the Court and to challenge the Plaintiffs' entitlement to the Further Particulars requested. There was clearly a dispute between the parties with regard to the sufficiency or insufficiency of the particulars provided and that dispute could only be resolved by intervention of the Court where the parties were entitled to ventilate the issues.

[22] We need to pause here and consider what the Court should have had before it when on 16 March 2012 it considered the application to compel. We know that on the said date only the Plaintiffs' legal team was present at Court. A recording of the proceedings of 16 March 2012 was not in the file before us. We are therefore unable to establish from the appeal record the nature of the documents before the Court. As far as we are concerned on 16 March 2012 when the Plaintiffs' application in terms of Rule 16(4) came before the Court, the Court file should have contained, among others:

- (a) the Defendants' Further Particulars served on the Plaintiffs on 9 November 2011 and which were filed with the clerk of the Court on the same date;
- (b) the pre-trial minutes of 26 January 2012 in which paragraph 4 thereof is of relevance and;
- (c) the Defendants' Further Particulars served on the Plaintiffs on 15 March 2012 and delivered at the clerk of the Court on the same date.

[23] According to the Magistrate Court's file the Further Particulars that the Defendants delivered on 15 March 2012 should have been placed before the magistrate. If they were not before the magistrate, the Plaintiffs' legal representatives should have informed the Court that the Defendants had served them with such Further Particulars on 9 November 2011 and 15 March 2012. The magistrate would then have stood the matter down and requested the clerk of the Civil Court to hand over to him the Defendants' Further Particulars, alternatively the magistrate might have decided to deal with the matter on the basis of a copy of the Further Particulars which had been served on the Plaintiffs. It is clear that these documents were not in the Court file on 16 March 2012 for in his judgment dated 13 June 2012 the Magistrate remarked as follows at paragraph 7:



*“The reply to further particulars which the Defendants allege to have supplied are still not before court.”*

Quite clearly what the magistrate meant here was that the Defendants' replies to the Plaintiffs' request for further particulars were not before Court. It could not be that the Defendants had failed completely to furnish Further Particulars. The said remark by the magistrate also makes it clear that, despite the fact that they had been served with a copy of the Further Particulars on 15 March 2012 and had acknowledged receipt thereof in their letter dated 15 March 2012, the Plaintiffs' representatives did not alert the Court about that fact. The Court itself never pointed out to the Defendants' counsel on 11 May 2012 that the Defendants had failed to deliver their Further Particulars.

[24] It is not in dispute that copies of the Defendants' Further Particulars were served on the Plaintiffs on 9 November 2011 at 10h58 and 15 March 2012 at 12h00 respectively. This is clear from pages 77, 82, 94 and 98 of volume 1 of the appeal record. It is also clear from the same pages that on the same dates the original documents were filed at Court. This is clear from the official stamp of the Clerk of the Civil Court which bears the dates of 9 November 2011 and 15 March 2012.

[25] The said Further Particulars set out what was delivered on 15 March 2012 and filed with the Clerk of the Court on the same date. I venture to state the following. This is in respect of the First and Third Defendants' Further Particulars as requested on 27 February 2012:

*“1.*

*AD Paragraaf 21.1.1 (4.4.1)*

*1.1 Die blootleggingsverklaring bevat alle onvolledige besonderhede van die vaste eiendom, betrokke by die “irregular dealings”.*

2.

AD Paragraaf 4.4.2

*Die blootleggingsverklaring van die verweerders bevat volledige eedsverklaring wat die derde verweerder van die aard en omvang van die "irregular dealings" omskryf. Die Openbare Beskermer se verslag verwys oor na sekere wetgewing en regsbeginsels.*

3.

AD Paragraaf 4.4.3

*Die blootleggingsverklaring bevat alle en volledige besonderhede van die vaste eiendomme, betrokke by die "irregular dealings". Spesifieke getuienis sal bo- en behalwe die dokumentêre bewyse aangebied word, die inhoud waarop die eiser nie geregtig is nie omdat dit juis getuienis is.*

4.

AD Paragraaf 4.5

5.

AD Paragraaf 4.6

*Die enigste bewys wat die verweerder tans ook oor beskik is vervat in paragraaf 1(D) van die Staatspresident se proklamasie nommer R22,2011 gedateer 20 Mei 2011 (vervat in blootleggingsverklaring) in die Openbare Beskermer se verslag van 8 November 2011.*

AD Paragraaf 4.6.1

*5.2 Dit is inligting wat nie benodig word vir voorbereiding van verhoor nie en is in elk geval getuienis binne die eisers en hulle kliënte, Midvaal Plaaslike Munisipaliteit, se besonderde kennis.*

AD Paragraaf 4.6.2

*5.3 Die enigste bewyse wat die verweerder tans ook oor beskik is vervat in paragraaf 1(d) van die Staatspresident se proklamasie nommer R33,2011*

*gedateer 20 Mei 2011 (vervat in blootleggingsverklaring) in die Openbare Beskermmer se verslag van 8 November 2011.*

AD Paragraaf 4.6.3

*Eisers is nie geregtig op hierdie besonderhede nie en kan sekerlik self die blootleggingsdokumente bestudeer.”*

[26] The Further Particulars furnished on behalf of the second defendant also contained similar responses. If the magistrate had all the necessary documents before him, including the Further Particulars delivered by the Defendants on 9 November 2011 and 15 March 2012 his duty would have been to decide whether the particulars furnished were sufficient or not and not whether or not the Defendants complied with the Plaintiffs' request. There is in the file no proof that when the magistrate made the order of 16 March 2012 he had the benefit of the Further Particulars that the Defendants had delivered on the aforementioned dates. It is accordingly our unanimous view that the order of 16 March 2012 was granted erroneously. It follows therefore that all the subsequent orders that the Court made after 16 March 2012 ought to be set aside.

[27] Rule 16(4) provides that:

*“If a party who has been requested in terms of this Rule to furnish any Further Particulars fails to deliver them timeously or sufficiently, the party requesting the same may apply to (the) Court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the Court may make such order as it deems fit.”*

[28] It is accordingly incumbent on the complaining party firstly:

- (a) to disclose to the Court that he or she or it has been furnished with Further Particulars as requested;
- (b) that such Further Particulars are not sufficient for the purposes for which they are desired;
- (c) to set out clearly why it contends that the Further Particulars served on her or him or it are not sufficient for the purposes for which they are desired.

The purpose of doing so is twofold. Firstly it is to enable the Court to determine whether the particulars furnished are sufficient and, if not, whether Further Particulars required are relevant or would be sufficient. There is at this stage a duty on the presiding officer to painstakingly peruse the Further Particulars and to assess whether the Further Particulars furnished are relevant, where relevance is an issue, or sufficient, where that element is an issue, and having done so, to make an appropriate order. This may involve a comparative analysis of the Further Particulars Requested and the Further Particulars furnished. Secondly it will enable the defendant to identify the nature of the Further Particulars required to enable him or her or it to decide whether to refuse, on lawful grounds, to furnish such Further Particulars and challenge their request or to comply with the request.

[29] As indicated already the plaintiff's Rule 16(4) application requires the First and Third Defendants to deliver the particulars in paragraphs 4.4 to 4.6 of its request for Further Particulars for trial and the second defendant to deliver the particulars referred to in paragraphs 42 to 46 of the same request for Further Particulars. The Plaintiffs were furnished with Further Particulars on 9 November 2011 and 15 March 2012. There is no complaint in the application in terms of Rule 16(4) about the insufficiency or baldness of the particulars furnished. The complaint that the particulars were bald only appeared in the heads of argument of the Plaintiffs' counsel. In my view the application that served before

the Court on 16 March 2012 was flawed in as much as the plaintiff failed to acknowledge in their affidavit that certain Further Particulars had been served on them on both 9 November 2012 and 15 March 2012; secondly that the affidavit failed to set out the respects in which the Further Particulars were insufficient or the respects in which they contended that the request had not been fully complied with.

[30] Finally it is correct, and we agree with the Defendants, that Odendaal did not place the correct facts in his affidavit before the Court especially with regard to paragraphs 3(a) and 3(b) of the supporting affidavit for the application in terms of Rule 16(4). Firstly we could not find the order that magistrate Naidoo made that the defendant should furnish Further Particulars referred to in paragraph 4 of the pre-trial minutes of 26 January 2012. Section 54(2) of the Act requires the magistrate to make an “order”. Secondly even if it be shown that the Magistrate made an order on 26 or 30 January 2012 nowhere did he stipulate the date on which such Further Particulars as referred to in item 4 of the pre-trial minutes should be furnished. In other words the magistrate did not set out the time limits within which the order relating to item 4 of the pre-trial minutes should be complied with by the Defendants. This contradicts directly Odendaal’s affidavit.

[31] In the result we make the following order:

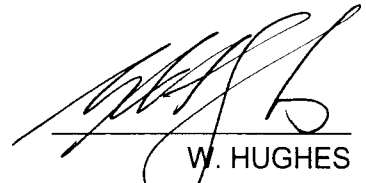
1. The appeal is upheld.
2. The order of the court *a quo* in which it dismissed the appellants’ application to rescind the court order of 16 March 2012 is hereby set aside in its place is replaced the following:  
  
“The application for rescission of the order of 16 March 2012 is hereby granted.”
3. All subsequent orders the court *a quo* made based on its order of 16 March 2012 are hereby set aside.

4. The cost of this appeal shall be costs in the action.



P.M. MABUSE  
JUDGE OF THE HIGH COURT

I agree



W. HUGHES  
JUDGE OF THE HIGH COURT

Appearances:

*Counsel for the Appellants:*

*Adv. FJ van der Westhuizen*

*Instructed by:*

*Peters Attorneys*

*Counsel for the Respondents:*

*Adv. SD Maritz*

*Instructed by:*

*Odendaal & Summerton Inc.*

*Date Heard:*

*5 September 2015*

*Date of Judgment:*

*10 March 2015*