

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

Case Number : 5185/2011

In the matter between:-

DANIël JOHANNES SMIT

1st Applicant/Plaintiff

ANDRIES JACOBUS KRUGER

2nd Applicant/Plaintiff

PHILLIPUS STEFANUS KRUGER

3rd Applicant/Plaintiff

MARIA MAGDALENA DU PLESSIS

4th Applicant/Plaintiff

and

PHUMELELA LOCAL MUNICIPALITY

Respondent/Defendant

CORAM:

VAN ZYL, J

DELIVERED ON:

26 JANUARY 2015

[1] The applicants are the plaintiffs in the main action and the respondent is the defendant in the said action. For the sake of convenience I will refer to the parties as in the main action.

[2] The main action was enrolled for hearing on Tuesday, 19 August 2014, and subsequent days, but it has since been removed from the roll and re-enrolled.

COURSE OF PROCEDURAL EVENTS:

[3] The pleadings in the main action consist of, *inter alia*, the

plaintiffs' combined summons and particulars of claim, the defendant's plea thereto, as well as a provisional counterclaim.

- [4] The plaintiffs' attorneys served a request for further particulars, dated 2 May 2014, on the defendant's attorneys on 5 May 2014. The defendant did not respond to the said request, whereupon the plaintiffs issued an application to, *inter alia*, compel the defendant to reply to the said request. In that application the plaintiffs furthermore sought an order that the defendant be compelled to reply to a Rule 37(4) questionnaire (which had also been served on the defendant on 5 May 2014), as well as to respond to a Rule 35(3) notice (which had been served on the defendant on 22 May 2014). On 3 July 2014 Mocumie J issued the following order:

- "1. The respondent, in his capacity as defendant in the main action between the parties hereto, is ordered to serve and file within 10 days of service of this Court Order;
 - 1.1 His reply to the plaintiffs' request for further particulars dated 2 May 2014 which was served on the respondent's attorneys of record and filed on 5 May 2014.
 - 1.2 The defendant's reply to the plaintiffs' Rule 37(4) questionnaire which was served on the defendant's attorneys of record and filed on 5 May 2014.
 - 1.3 The defendant's response to the plaintiffs' Rule 35(3) notice dated 22 May 2014 which was served on the defendant's attorneys on 22 May 2014.

2. The respondent pays the applicants' costs in this matter.
3. Leave is granted to the applicants to approach this Court on the same papers, duly amended as far as may be required, for an order to strike out the defendant's notice of appearance to defend and the defendant's defence in the main action, with costs, if the respondent should fail to comply with paragraph 1 or paragraph 2 above."

I pause to mention that in my view the plaintiffs were not entitled to an order regarding the Rule 37(4) questionnaire, but I will leave it at that.

[5] The defendant failed to file its reply to the request for further particulars, whereupon the plaintiffs launched the current application on 4 August 2014 seeking an order that:

- "1. The defendant's notice of appearance to defend and plea in the main action are hereby struck out;
- 2 The respondent is ordered to pay the applicants' costs in the application on the basis as between attorney and own client, alternatively on the scale as between party and party;
- 3 For such further and/or alternative relief as the above Honourable Court may deem meet."

[6] The defendant opposed the application and filed an answering affidavit, in response to which the plaintiffs filed a replying affidavit. The application was, after a postponement, due to be heard on 4 September 2014. The

plaintiffs filed their heads of argument on 27 August 2014. On 29 August 2014 the defendant filed an additional affidavit, requesting that it should serve both as a founding affidavit in seeking leave to file an additional affidavit and as the additional affidavit as such in response to the plaintiffs' replying affidavit and heads of argument ("*the defendant's additional affidavit*"). The defendant simultaneously filed its reply to the request for further particulars, which reply was attached to the additional affidavit as annexure "A1". The defendant also filed its heads of argument on the same day. On 4 September 2014 the application was however postponed by agreement between the parties and certain time frames were agreed upon for the filing of, *inter alia*, the plaintiffs' answering affidavit to the defendant's additional affidavit and furthermore the defendant's replying affidavit thereto, if any.

- [7] On 11 September 2014 the plaintiffs duly filed their answering affidavit to the defendant's additional affidavit ("*the plaintiffs' additional affidavit*") and both parties filed supplementary heads of argument. The defendant did not file a replying affidavit thereto.
- [8] It is evident from the plaintiffs' Rule 37(4) questionnaire that they addressed 34 questions/enquiries to the defendant. In the plaintiffs' request for further particulars, the following was stated in paragraph 1 thereof:

"Insofar as it may be contended that the Plaintiffs' questions as contained in the Rule 37 notice constitute requests for

further particulars rather than pre-trial questions, the Plaintiff repeats, as if incorporated herein, all of such pre-trial questions.”

In addition thereto, further requests were also made in four additional paragraphs numbered 2 to 5. As stated earlier both these documents had been served on the defendant’s attorney of record on 5 May 2014.

- [9] In response to the Court Order of 3 July 2014 by Mocumie J, the defendant’s attorney of record filed a reply to the plaintiffs’ Rule 37(4) questionnaire, as well as a response to the plaintiffs’ Rule 35(3) notice, on 18 July 2014 and 17 July 2014 respectively. No reply was filed to the request for further particulars. However, the defendant opposed the instant application on the basis that such reply had indeed been filed. In this regard Mr Bahlekazi, the defendant’s attorney of record, stated the following in paragraph 7.20 of the defendant’s answering affidavit:

“In the meantime the Rule 37 request and the request for further particulars have also been answered and I append the reply hereto as annexures “O1” and “O2”.”

The said annexure “O1” however consists of the plaintiffs’ Rule 37(4) questionnaire and their request for further particulars, whilst annexure “O2” is the defendant’s reply to the plaintiffs’ Rule 37 questionnaire. No reply to the request for further particulars was attached to the answering affidavit, as also alluded to by the plaintiffs in their replying affidavit.

[10] In the defendant's additional affidavit Mr Bahlekazi tendered the following explanation and apology for this failure:

- “12. After the heads were filed and the brief was delivered to Counsel appearing for the respondent, I was requested to attend Counsel's chambers urgently. Counsel pointed out that he could not find the reply to the Rule 21 request which should also form an annexure to the answering affidavit. He pointed out to me that this point was also raised in the replying affidavit and was prominently relied upon in the heads of argument which was filed on behalf of the applicants earlier the day (Wednesday, 27 August 2014). Counsel requested me to let him have a copy of the reply to the Rule 21 request which had been filed and served.
13. I explained to counsel that the same matters were dealt with in the Rule 37 request and that the particulars had been supplied in the reply to the Rule 37 request, hence the instruction that the requests had been complied with.
14.
15. When the answering affidavit was drawn up, I instructed counsel that the particulars had been supplied and I would attend to attaching the replies to the affidavit. ...
16. During consultation on Wednesday, 27 August 2014, counsel however drew my attention to the Rule 27 and 37 requests and pointed out that the first question in the Rule 21 request related to the matters raised in the Rule 37 request, but that the further request contained

in paragraph 2 to 5 appeared to be additional requests.

17. I then realised that I had misread the request completely.

18. This was truly an error in judgment on my behalf.

19. I also understand why the applicant persists with the application.

20. I can do no more than humbly beg that the Court not strike out the respondent's defence due to this *bona fide* error by me.

21. ...

22. The respondent tenders the applicants' taxed costs of this application.

23. The Rule 21 questionnaire will be filed and served simultaneously with this affidavit and before this matter serves before the Court. I append the reply hereto as **Annexure "A1"**.

24. ...

25. I have also been informed by counsel that a reply should in any event have been filed, even if the two requests contained similar content, even if just to refer to the particulars or replies already advanced.

26. I accept that it should have been done. I was content that the particulars were advanced and that the Court Order had been complied with. I laboured under the erroneous belief that the particulars were answered and

that there should not be any further prejudice to the applicants.

27. I made a mistake and I am embarrassed about it. I tender my apology.
28. I never intended to prejudice the applicants or disrespect this Court or its orders. This was not obstructive conduct by the respondent. It was a lapse in my judgment and a wrong reading of the Rule 21 request.
29. I respectfully submit that it is in the interest of justice that the additional affidavit be received so that the matter can be fully canvassed and the Court apprised of all relevant facts when called upon to exercise its discretion.
30. ...
31. I respectfully submit that my conduct does not deserve that the respondent no longer be able to defend this matter at trial with the advantages of evidence and cross-examination.
32. Wherefore I respectfully pray that the application be dismissed and the respondent be ordered to pay the taxed costs of the application on the scale as between attorney and client.”

See Application Papers, p. 80 – p. 83.

[11] The plaintiffs’ additional affidavit, deposed to by the plaintiffs’ attorney of record, Mr Herbst, contains, *inter alia*, the

following averments and legal contentions on p. 129 – 135 of the application papers:

“6.

A document which purports to be a reply to the plaintiffs' request for further particulars on trial was annexed as Annexure "A1" to the "**founding and additional affidavit**" dated **29 August 2014**.

7.

As is evident from the said document, it is abundantly clear that there was no proper compliance with the order of Court dated 3 July 2014, with specific reference to paragraph 4 of the plaintiffs' request for further particulars and the last line of paragraph 5 thereof dated **2 May 2014** (see page 39 of the Pleadings Bundle).

8.

The plaintiffs are gravely prejudiced by the inadequacy of the particulars, because the trial particulars supplied do not conform to the requirements which further particulars for purposes of trial are designed to satisfy.

9.

The inadequate particulars amounted in substance to no particulars at all.

10.

The provisional counterclaim appears to be, if not entirely illusory, at least nebulous in the extreme, and these criticisms are applicable to the plea as well.

11.

It is nonsensical and incomprehensible how the defendant can hope to establish any damages when it relies for its purported damages on contradictory and inherently inconsistent indications and calculations, which render the plea and counterclaim vague and embarrassing in the extreme.

12.

I refer to the following discrepancies:

- 12.1 In paragraph 8.13 of the plea (on p. 35 of the Pleadings Bundle) it is alleged that the respondent suffered damages in the amount of **R6 million**, being the amount that the defendant needs to pay to other service providers (auditors) to rectify the defective services rendered by the plaintiff. The defendant added: **'Defendant refers to its provisional counterclaim.'**
- 12.2 In clause 13 of the provisional counterclaim (see p. 104 of the Pleadings Bundle) it is stated as follows:
"As a result of the plaintiffs' breach of contract and defective services rendered, the defendant suffered damages in the amount of R6 000 000.00 consisting of the costs of a new service provider that the defendant is obliged to appoint to rectify the plaintiffs' defective performance."
- 12.3 In paragraph 4 of the reply to plaintiffs' request in terms of Rule 21, (see Annexure **"A1"**,p.86) it is stated as follows:
"....To date the amount of R1 845 225.00 has been paid to rectify the plaintiffs' defective service delivery and the rectification process is still not complete. The defendant will amend the plea and provisional counterclaim to substitute the amounts claimed with this amount."
- 12.4 In Annexure **"A1"** appended to the further particulars (p.89), the amounts set forth in the **"ledger enquiry"** amounts to **R1 845 225.00**.

12.5 The quotation for the defective work to be remedied as referred to Annexure “A1” to the Founding and Additional Affidavit by Bahlekazi (on page 111 of the papers) amounts to **R1 108 536.00**.

13.

The fact that these inadequate, insufficient and inconsistent particulars were filed or would be allowed to be filed, has put the plaintiffs in a position worse than the one they were in before any reply was made as ordered by the Court.

14.

The defendant (the respondent) had recklessly embarked upon a counterclaim which, judging from the inadequate, insufficient and contradictory particulars supplied, it had not the slightest hope of being able to prove.

15.

At the hearing of this application, the applicants will therefore pray not only for the striking out of the plea, but also for the striking out of the respondent's provisional counterclaim under "**further relief**" as prayed for. in prayer (c) of the notice of motion.

16.

In paragraph 8.13 of the plea (on page 35 of the pleadings) the respondent refers to its provisional counterclaim, thereby indicating that same should be read with its plea, and in fact incorporating same into the the plea as if *mutatis mutandis* set forth therein.

17.

The inadequacy of the particulars has a direct bearing on the counterclaim for want of non-compliance with the provisions of Rule 18(10), which provides that a plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the *quantum* thereof.

18.

The incomplete and defective statement by the respondent (the plaintiff in reconvention) in paragraph 13 (see Bundle of

Pleadings, p. 104) of the provisional counterclaim relating to its alleged damages, does not comply with the peremptory provisions of Rule 18(10) and accordingly constitutes an irregular pleading; and it is furthermore excipiable and stands to be struck out.”

- [12] With regards to the additional affidavits, counsel were *ad idem* that it is in the interest of justice and fairness that leave be granted for the filing of the said affidavits and that it should be received in evidence. I concur with their submissions in this regard and such leave is hereby granted.
- [13] From the aforesaid additional affidavit of the plaintiffs, also read with their supplementary heads of argument, it is evident that the plaintiffs’ persistence with the current application is no longer based upon the defendant’s initial failure to reply to the request for further particulars, nor upon the defendant’s late reply thereto, but upon insufficient compliance with the Court Order of Mocumie, J of 3 July 2014. Mr Ploos van Amstel, appearing on behalf of the plaintiffs, also confirmed this during the presentation of his argument. In my view this is a very responsible attitude considering the explanation by Mr Bahlekazi regarding the circumstances that led to his failure to timeously file the said reply in accordance with the Court Order of 3 July 2014 and his *bona fide* mistake in this regard. I accept his explanation and his apology tendered to the Court. Insofar as it may be necessary, the defendant’s late filing of its reply to the plaintiffs’ request for further particulars, is condoned.

[14] In these circumstances the plaintiffs are not debarred from relying on these “new” grounds for the relief sought, moreover so because these grounds have been fully canvassed in the papers. Mr Snellenburg, appearing on behalf of the defendant, did not attempt to argue to the contrary either, in my view correctly so. See THE WANSON COMPANY OF SOUTH AFRICA (PTY) LTD v ESTABLISSEMENTS 17 CONSTRUCTION DE MATERIAL THERMIQUE SOCIETE ANONYME 1976 (1) SA 275 (T) at 280 – 281.

CONTENTS OF THE RELEVANT PLEADINGS:

[15] In paragraphs 8.13 and 9.7 of the plea the following averments are made:

“8.13 As a result of the Plaintiffs' afore-mentioned breach of contract, the Defendant suffered damages in the amount of R6 million being the amount that the Defendant needs to pay to other service providers (auditors) to rectify the defective services rendered by the Plaintiff. Defendant refers to its Provisional Counterclaim.

9.7 The Plaintiffs breached the so-called second agreement by failing to keep to the strict timelines causing the Defendant to suffer damages since the Defendant had to appoint another service provider to complete the tasks and to render the services which were not rendered by the Plaintiffs.”

[16] Paragraphs 4 and 5 of the plaintiffs' request for further

particulars read as follows:

- “4. With reference to paragraph 8.13 of the Plea, the Defendant is required to provide full particulars of how the amount of R6m is made up (or alternatively any other such amount as the figure of R6m may be amended to in due course) and to provide documentary proof in support thereof.
5. With reference to paragraph 9.7 of the Plea, full particulars are required of the replacement service provider(s) that the Defendant allegedly appointed, including copies of all resolutions pertaining to the appointment of such service provider(s), copies of agreements entered into between the relevant parties, quotations provided by the relevant service provider(s) as well as all and any documentary proof regarding the services rendered by such services provider(s).”

[17] In response to both the aforesaid paragraphs the defendant stated as follows in paragraph 4 of its reply:

“The Plaintiff is referred to Annexure “1” hereto, being a summary of payments from the Defendant’s ledger as well as Annexure “2” regarding the replacement service provider and resolutions pertaining to the appointment and the service level agreement. To date the amount of R1 845 225.00 has been paid to rectify the Plaintiffs’ defective service delivery and the rectification process is still not complete. The Defendant will amend the Plea and provisional counterclaim to substitute the amounts claimed with this amount.”

CONTENTIONS ON BEHALF OF THE PLAINTIFFS:

[18] Mr van Amstel, during his argument, repeated the legal arguments already advanced in the plaintiffs' additional affidavit. I therefore do not deem it necessary to repeat same herein. I will however refer to the additional arguments presented by Mr van Amstel and the case law, if any, he relied upon.

[19] Mr van Amstel referred to the aforesaid WANSON-judgment and submitted, correctly so, that proper compliance with the order of Mocumie J, means that the defendant was compelled to respond to the request for further particulars in a manner that complies with Rule 21(4); hence, such particulars as are strictly necessary to enable the plaintiffs to prepare for trial. In the said judgment the following is stated at 279:

“Such an order does not mean that any form of reply will suffice, nor does it mean that every particular request need be given. The applicant has the right in terms of the Rule to call for only such particulars that may be strictly necessary for ...preparation for trial; and it is the duty of the respondent in terms of the Rules to deliver them sufficiently, that is to supply those particulars which were requested and which are strictly necessary for the stated purpose. When the Court, therefore, orders a respondent to reply to the applicant's request, it orders him to do what the Rules require him to do.”

Mr van Amstel subsequently submitted that the particulars provided by the defendant are so inadequate and insufficient that they do not comply with the order of Mocumie J, as they do not conform to the requirements which further particulars

for purposes of trial are designed to satisfy. In this regard he referred to the following remarks by Galgut, J in THOMPSON v BARCLAYS BANK D.C.O. 1965 (1) SA 365 (W) at 369:

“In examining the above contentions one should not overlook the purpose of further particulars for trial, these are (a) to prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations....; (c) having regard to the above, nevertheless not to tie the other party down and limit his case unfairly at the trial....”

[20] It was submitted by Mr van Amstel that these inadequate, insufficient and inconsistent particulars have put the plaintiffs in a position worse than the one they were in before any reply was provided at all. As a result the plaintiffs are not in a position to prepare for trial and will not be able to proceed to trial without the further particulars having been adequately provided. Mr van Amstel argued that the plaintiffs still do not know how the figure, even the proposed amended figure, is calculated as the plaintiffs have not been informed in what respects their work has allegedly not been properly done. The plaintiffs did not provide particulars, nor documentary proof, of which services were rendered by the other service provider(s).

[21] Mr van Amstel submitted that considering the history of this matter, the defendant has shown a total disregard of its procedural obligations in terms of the Rules of Court. Furthermore, by not properly complying with the Court Order,

the defendant knew what the plaintiffs remedy would be, namely the striking out of the defendant's notice of appearance to defend and its plea. Despite this knowledge the defendant showed a total disdain for the Rules of Court and the Court Order of Mocumie, J. In view of all these circumstances and relying on the WANSON-judgment, Mr van Amstel contended that the defendant's notice of appearance to defend and its plea should be struck out. Mr Van Amstel also submitted that should I grant such an order, I should, as a natural consequence of such an order, also grant judgment in favour of the plaintiff. (He furthermore contended that the defendant's provisional counterclaim should also be struck out, but I will return to this issue later herein.)

THE DEFENDANTS CONTENTIONS:

- [22] Mr Snellenburg submitted that the history of this matter is not indicative of a disregard by the defendant of the court rules and its procedural obligations. He referred in some detail to the respective previous applications in support of his submission.
- [23] For his main contention as to why the relief sought by the plaintiffs should not be granted, Mr Snellenburg referred to the formulation of paragraphs 4 and 5 of the request for further particulars. He submitted that the manner in which those paragraphs have been formulated determines the nature of the answer thereto. He pointed out that in paragraph 4 of the request the question itself, firstly,

foreshadowed a possible amendment, and secondly, it only requested details as to how the figure (or intended amended figure) is made up and documentary proof thereof, which details the defendant provided.

- [24] With regard to the particulars requested in paragraph 5, Mr Snellenburg submitted that the applicant did not ask which services had been rendered by the other service provider(s) – they only requested documentary proof regarding the services rendered (which, Mr Snellenburg submitted, strictly speaking should in any event have rather been requested under Rule 35).

CONSIDERATION OF SUBMISSIONS:

Ad paragraph 4 of the request for further particulars:

- [25] Regarding the discrepancy in the amount of damages which the plaintiffs referred to in paragraphs 12.1 to 12.4 of their additional affidavit, it is evident from the defendant's reply to the request for further particulars that the defendant intends to amend the amount of damages, both in the plea and in the provisional counterclaim in order to correspond with the figures reflected in Annexure "1" attached to the further particulars. Mr Snellenburg in my view correctly argued that such an amendment was indeed foreseen by the plaintiffs in paragraph 4 of their request for further particulars. The amendment will therefore remove the current discrepancies.

- [26] In paragraph 12.5 of their additional affidavit the plaintiffs referred to a further alleged discrepancy. However, from a

proper reading of the “*quotation*” to which the plaintiffs refer, it is evident that the fee for the project “amounts to R1 108 536-00 including VAT and disbursements for year period ending 30 June 2012”. See Application Papers, p. 111. Underneath the aforesaid where the detailed amounts are reflected, the column dealing with disbursements reads “disbursements (10% estimate) with maximum of 25% of the project fees”. This entry is already an indication that the total costs of the remedial work would therefore not necessarily have been restricted to the amount of R1 108 536-00. I therefore do not consider this figure to necessarily be contradictory to the amount of R1 845 225-00 just because it differs from one another. Had proper (factual as opposed to or in addition to documentary) further particulars been requested by the plaintiffs (which aspect I will deal with in more detail shortly), this alleged discrepancy could and would probably have been dealt with by the defendant.

- [27] The manner in which paragraph 4 of the plaintiffs’ request for further particulars had been formulated, has the result that the essence of that request is to “provide full particulars of how the amount of R6M is made up”. No mention was made of the alleged defective services as such. On a plain reading thereof it only refers to the calculation of the amount. The defendant responded to this by referring to the payment of the total amount of R1 845 225-00 (the contemplated amended figure) and also by referring to Annexure “1” to the further particulars. Annexure “1”, in my view, indeed reflects the particulars of how the amount of R1 845 225-00 is made up. Nothing more was requested from the defendant,

wherefore the defendant cannot be blamed for not having provided any additional particulars in this regard.

Ad paragraph 5 of the request for further particulars:

[28] When the formulation of paragraph 5 of the plaintiffs' request for further particulars is considered, it is in my view evident that the only factual particulars which were requested, are "full particulars..... of the replacement service provider(s) that the defendant allegedly appointed". The rest of the request in paragraph 5 only deals with documents. No factual particulars were requested regarding the services which the plaintiff had allegedly failed to perform and/or the alleged services rendered by the other service provider.

[29] I consequently have to agree with the argument of Mr Snellenburg that the formulation of the respective requests determines which particulars the defendant was compelled to supply. In the absence of any request for factual (as oppose to documentary) particulars regarding the respective services, the defendant was under no obligation to have supplied same.

[30] I have to agree with Mr van Amstel's convincing argument that the current factual further particulars are inadequate for the plaintiffs to properly prepare for the trial. They unfortunately have only themselves to blame. Had the request for further particulars been drafted more carefully and meticulously, the plaintiffs would probably not have been in this unfortunate and frustrating situation.

[31] Having said that, there is the remaining aspect regarding the requested documentation. The plaintiffs did in fact request “all and any documentary proof regarding the services rendered by such service provider(s)” in paragraph 5 of the request for further particulars. This request was not complied with by the defendant as it failed to attach any such documents to its reply, nor did it aver that no such documents exist. Although Mr Snellenburg raised the issue that such documents should have been requested in terms of Rule 35(3), that was not the defendant’s response or “defence” in its reply to the request, nor in the current application. In my view it therefore cannot be entertained as a defence at this late state in the current proceedings.

[32] The further contention of Mr Snellenburg was that it should be considered whether the plaintiffs are indeed prejudiced by the defendant’s failure to have supplied the documents regarding the services the other service provider(s) rendered. In this regard he emphasised that the plaintiffs can only be prejudiced if the documents regarding such services rendered are necessary to enable them to prepare for trial. I agree with Mr Snellenburg that this aspect should indeed be considered. Although the plea regarding the plaintiffs’ defective performance was pleaded in the alternative, it constitutes the defendant’s main defence should it be found that a valid agreement had in fact been concluded between the parties. When one considers the purpose of further particulars for trial, it is evident to me that the requested documents are very relevant and necessary in order to remove the element of surprise for the plaintiffs and

to inform the plaintiffs with greater precision what the defendants are going to prove in order for the plaintiffs to properly prepare their case to combat counter allegations.

[33] Mr Snellenburg argued that should it be found that the defendant failed to supply the aforesaid documents and that they should have been supplied, it will be very drastic to close the Court's doors to the defendant by striking out its defence and counterclaim. Mr Snellenburg submitted that I should exercise my discretion in favour of the defendant by rather ordering the defendant to reply to that specific part of the request before a specified date.

[34] Mr van Amstel, on the other hand, persisted with his argument that the defendant's notice of appearance to defend and counterclaim should be struck out (as well as its provisional counterclaim and that further consequential relief should also be granted).

[35] I cannot agree with Mr van Amstel's contention regarding the striking out of the notice of appearance to defend and the plea. Considering the findings I have already made herein, the defendant's failure is confined to the single "group" of documents requested in the last line of paragraph 5 of the request for further particulars. The defendant's failure in this regard should be seen against the background of the plaintiffs' failure to have requested factual details regarding the services rendered by the other service provider(s). Had those documents been supplied, the plaintiffs, on probabilities, would in any event still have been in need of

the factual particulars (which had not been requested) as well in order to properly prepare for the trial.

[36] In addition to the aforesaid, I also take into consideration that the alleged repudiation of the agreement with the consequential damages is not the only defence advanced in the plea. Not only is the *locus standi* of the plaintiffs in dispute, but the defendant also disputes the (valid) conclusion of the agreement as such and also raises payment as a defence.

[37] In these circumstances and in the exercising of my discretion I deem it appropriate and in the interest of justice to grant the defendant a further opportunity to reply to the aforesaid particular part of the request for further particulars, but to also provide the plaintiffs with a remedy should the defendant fail to adhere to the relevant order. Furthermore I also consider it practical and in the interest of justice to simultaneously grant the plaintiffs a further opportunity to request further particulars pertaining to the defendant's plea. This I deem apposite in an attempt to avoid a situation where the plaintiffs, because of their initial deficient request, will possibly still not be in a proper position to prepare for the trial despite having received the aforesaid documentation from the defendant.

[38] In view of my findings already alluded to above, Mr van Amstel's persistent submission that the provisional counterclaim should (also) be struck out, cannot be adhered to. In addition thereto the requested relief can in my view in

any event not be entertained considering, *inter alia*, the following:

38.1 No further particulars were requested pertaining to the provisional counterclaim as such. I regard the fact that the defendant in paragraph 8.13 of its plea referred to its provisional counterclaim not enough to counter the aforesaid absence of such a request. The conditional counterclaim is a substantive and independent claim on its own.

38.2 Mocumie J did not grant leave that the Court may be approached regarding the striking out of the provisional counterclaim. In fact, in that application no relief was sought by the plaintiffs regarding the provisional counterclaim at all.

38.3 The alleged non-compliance with Rule 18(10) should have been raised by means of an exception at the pleading stage of the proceedings. Non-compliance with Rule 18(10) was a relevant argument in earlier years when a request for further particulars for purposes of pleading was still permissible, but in my view not in the case of particulars for purposes of trial.

[39] What I do however intend to do, is to specifically grant leave to the plaintiffs to request further particulars pertaining to the defendant's provisional counterclaim as well. Considering the history of this action, it is clearly in the interest of the administration of justice that the parties hereto be assisted in

the procedural process of getting this matter ripe for trial in order for it to be finalised as soon as possible.

COSTS:

[40] Mr van Amstel submitted that the defendant should be ordered to pay the costs of the application on an attorney and client scale (he did not persist with the request for attorney and own client costs as originally requested in the plaintiffs' supplementary heads of argument). He submitted that it should be ordered as a mark of disapproval of the defendant's radical departure from and disregard of the basic rules of practice and procedure. He furthermore contended that in the circumstances of this case it is fair and just to make such an order in an effort to ensure that the plaintiffs should not be out of pocket for having embarked upon litigation as the defendant left them no other choice.

[41] Mr Snellenburg conceded that because the plaintiffs were left with no option but to have approached the Court by means of the current application for appropriate relief, the defendant should be ordered to pay the costs of the application. Although he also conceded that it may be appropriate for me, in the exercising of my discretion, to order that such costs are to be paid on an attorney and client scale, he submitted that should it be so ordered, it should be done to ensure that the plaintiffs are not out of pocket in respect of expenses caused to them by this litigation, and not as a form of punishment.

[42] I agree that it is evident that the defendant's failure to firstly comply with the request for further particulars and to secondly provide all the requested particulars, necessitated this application and thereafter the filing of the additional affidavits. The conduct of the defendant and/or its attorney of record pertaining to the circumstances that led to this application was not of a nature that I deem it necessary or appropriate to punish the defendant by means of a punitive costs order. I do however agree with Mr van Amstel's submission and Mr Snellenburg's concession that such an order is indeed appropriate in the circumstances of this application solely to ensure that the plaintiffs are recouped. See NEL v WATERBERG LANDBOUWERS KO-OPERATIEWE VEREENIGING 1946 AD 597 at 607.

[43] The following orders are therefore made:

1. The respondent/defendant is ordered to comply with the last sentence of paragraph 5 of the applicants' /plaintiffs' request for further particulars, being to provide "all and any documentary proof regarding the services rendered by such services provider(s)", within 5 days of service of this order on the respondent's/defendant's attorney's office.
2. Leave is granted to the applicants/plaintiffs to approach this Court on the same papers, duly supplemented, for an order to strike out the respondent's/defendant's notice of appearance to defend and its plea in the main action, with costs,

should the respondent/defendant fail to comply with paragraph 1 above.

3. Leave is granted to the applicants/plaintiffs to file an additional request for further particulars regarding the plea and/or the provisional counterclaim of the respondent/defendant, should they deem it necessary.
4. The respondent/defendant is ordered to pay the costs of the application on a scale as between attorney and client.

C. VAN ZYL, J

On behalf of Applicants/Plaintiffs: Adv C. Ploos van Amstel SC
Instructed by:
Hill, McHardy & Herbst Inc.
BLOEMFONTEIN

On behalf of Respondent/Defendant: Adv N. Snellenburg
Instructed by:
Bahlekazi Attorneys
BLOEMFONTEIN