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

Case No. : 5185/2011

In the matter between:-

DANIEL JOHANNES SMIT	First Applicant
ANDRIES JOCOBUS KRUGER	Second Applicant
PHILLIPUS STEFANUS KRUGER	Third Applicant
MARIA MAGDALENA DU PLESSIS	Fourth Applicant

and

PHUMELELA LOCAL MUNICIPALITY	Defendant

REASONS FOR JUDGEMENT

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[1] The applicants sought an order that the defendant/ respondent's appearance to defend in the main action be struck out with costs, including the costs in the main action by reason of respondent's failure to make proper discovery. After hearing the application on 1 and 15 August I made an order that the respondent pay the costs of this application. The applicants now seek the reasons for that order.

[2] In the main action the applicants, accountants practising in partnership seek payment of R2 932 109 in respect of services rendered to the respondent municipality. The defendant in its plea denied liability and lodged a provisional

counter claim for damages in which it demands R6 056 483,30 from the applicants.

[3] The present application in which the applicant seeks an order striking out the respondent's notice of appearance to defend was launched on 8 May 2013. The respondents filed an answering affidavit and provisional counter application on 27 May 2013. On 30 May 2013 Mhlambi AJ afforded the applicants leave to file an opposing affidavit and replying affidavit. On 28 February 2013 this court ordered the respondent to serve and file before 20 March 2013 his response to the applicants' Rule 35(3) notice. On 20 March 2013 the respondent replied to the Rule 35 notice, as per annexures PPJS 3 – PPJS 10 attached to the founding affidavit in this application.

[4] Plaintiffs' Rule 35(3) notice reads as follows:

> "Kindly take notice that the Defendant is hereby required to make available to the Plaintiffs for inspection in accordance with Rule 35(6) the documents set out below, or to state on oath within 10 (ten) days from receipt of this notice, that such documents are not in its possession and which event the Defendant shall state its whereabouts:
>
> 1. The Defendant's financial statements for its financial year 2010/2011;
>
> 2. The Defendant's monthly trial balances for the financial year 2010/2011;

3. The Defendant's general ledge for the financial year 2010/2011;

4. All journal entries made by the Defendant for the financial year 2010/2011;

5. Documentation in support of all expenses and disbursements incurred by the Defendant for the financial year 2010/2011;

6. The Defendant's monthly Bank reconciliations for the financial year 2010/2011;

7. The Defendant's VAT reconciliations for the financial year 2010/2011;

8. The Defendant's asset register as was made available to the Auditor-General for the financial year 2010/2011;

9. The Defendant's monthly debtor control accounts for the financial year 2010/2011;

10. The Defendant's monthly creditor control account for the financial year 2010/2011;

11. All contracts and accepted tenders in respect of capital expenses incurred by the Defendant during the financial year 2010/2011;

12. The Defendant's valuation roll of properties for the year 2010/2011;

13. Minutes of meetings of the trustees of the Krynaauwlust Trust for the financial year 2010/2011;

14. Financial statements for the financial year 2010/2011 of the Krynaauwlust Trust;

15. All work documents and notes compiled by Plaintiffs and handed to the Defendant at the termination of Plaintiff's mandate and in respect of the financial year 2010/2011;

16. All correspondence between the Auditor-General and the Defendant consisting of:
    (i) Exceptions;
    (ii) Management letters;
    (iii) Final Auditor-General report;

    and pertaining to the Defendant's audit for the financial year 2010/2011;

17. Minutes of meetings between Defendant and Auditor-General pertaining to the Defendant's audit for the financial year 2010/2011.

DATED at JOHANNESBURG on 7th day of DECEMBER 2012."

The 1st response, dated 20 March 2013 is as follows:

"2.

ADD PARAGRAPH 1

The 2010/2011 sets of the annual financial statements is provided as requested by the plaintiff's attorney.

3.

ADD PARAGRAPH 2

Smit Chartered Accountants had unlimited access in the Municipality's Financial System (Abakus) during the preparation of the 2010/11 financial statements and they are in possession of the Trial Balance.

4.

ADD PARAGRAPH 3

Smit Chartered Accountants had unlimited access in the Municipality's Financial System (Abakus) during the preparation of the 2010/11 financial statements and they are in possession of the General Ledger.

5.

ADD PARAGRAPH 4

All journal entries were prepared and captured in both the financial statements (CaseWare) and Financial System (Abakus) Trial balance by Smith Chartered Accountants.

6.

ADD PARAGRAPH 5

The Defendant did not compile the financial statements for 2010/11 and this service was rendered by Smit Chartered Accountants and documentation in support of all expenses is in their possession.

7.

ADD PARAGRAPH 6

It was expected from Smit Kruger Chartered Accountants to ensure that daily and monthly bank reconciliations were performed as they were in the municipality every day from 8h00 until 16h30 and they should be able to provide the reconciliation.

8.

ADD PARAGRAPH 7

Refer paragraph 6 above. The same response is applicable to paragraphs 8 to 11.

9.

<u>ADD PARAGRAPH 12</u>

The valuation roll is provided.

10.

<u>ADD PARAGRAPH 13</u>

The Municipality officials were not the Trustees of this Trust and therefore did not attend any meeting.

11.

<u>ADD PARAGRAPH 14</u>

The financial affairs of the Trust were handled by their own Accountants and the plaintiff must request the financial statements from the Trustees.

12.

<u>ADD PARAGRAPH 15</u>

The Plaintiff handed over both hard and soft copies of the financial statements to the Defendants and the Auditor General for audit and these statements are provided (refer paragraph 5).

13.

<u>ADD PARAGRAPH 16</u>

The final management letter and audit report for the year ending 30 June 2011 are provided. Exceptions are included in the final management letter.

14.

<u>ADD PARAGRAPH 17</u>

The Plaintiff is at liberty to approach the office of the Auditor General and request copies of the minutes of meetings held."

[5] The applicants' attorney found the response inadequate and addressed a letter to the respondent's attorney seeking due compliance with the court order. On 26 April 2013 the

respondent served a supplementary reply to the Rule 35(3) notice. PPJS 13 – 19. The reply reads as follows:

"**AD PARAGRAPH 2 up and including 9 thereof:**

5. The documentation referred to in the items under reply are too voluminous to identify or contain in a schedule and/or to append as annexures to this reply. The Applicants/ Plaintiffs are herewith advised, in terms of the provisions of Rule 35(3) read with (6), that they and/or their attorney are entitled to inspect the said documents and make copies of relevant documents against tender of the reasonable costs pursuant thereto, at the Respondent's premises, on Tuesday, 30 April 2013, at 10h00. Should more time be needed, the Respondent will accommodate the Applicants.

AD PARAGRAPH 11 thereof:

6. The documentation referred to in the items under reply are too voluminous to identify or contain in a schedule and/or to append as annexures to this reply. The Applicants/ Plaintiffs are herewith advised, in terms of the provisions of Rule 35(3) read with (6), that they and/or their attorney are entitled to inspect the said documents and make copies of relevant documents against tender of the reasonable costs pursuant thereto, at the Respondent's premises, on Tuesday, 30 April 2013, at 10h00. Should more time be needed, the Respondent will accommodate the Applicants.

AD PARAGRAPH 13 and 14 thereof:

7. As far as the Defendant is aware, it is not in possession of the said documents and are referred to. The said trust and or their accountants should be in possession of the documents.

AD PARAGRAPH 15 thereof:

8. The items requested are vague to such an extent that the Defendant cannot reasonably be expected to know what documents it needs to discover. Defendant however invites the Applicants and/or their attorney to its offices on Tuesday, 30 April 2013, at 10h00 to inspect the documents which were handed over by the Plaintiff to the Defendant. Copies can be made against tender of the reasonable costs pursuant to such copies and a schedule can then be drawn up.

AD PARAGRAPH 17 thereof:

9. The Defendant does not presently have the minutes of the meetings between it and the Auditor General in its possession. The minutes should be in possession of the Auditor General."

[6] When the matter served before me on 1 August 2013 I was of the view that the matter could be resolved if the applicants sent representatives to look for the documents under supervision of and with the help of a representative of the respondent. I therefore made the following order:

"**IT IS ORDERED THAT:**

1. The matter is postponed to **15 AUGUST 2013** to be placed before Honourable Judge Kruger;

2. The respondent to ensure that Mr Moremi is present as from **Monday**, **5 August 2013** at **10:00** at offices of the respondent in order to assist the applicants to identify and

find the appropriate documents and make those available to the applicants;

3. Applicants are to file an affidavit setting out details of the inspection by **Monday**, **12 August 2013** at **12:00**;

4. Costs of today are reserved to **15 August 2013**."

[7] The applicants filed an affidavit giving details of the visit to the respondent's offices on 5 August 2013. It appeared that although the respondent's municipal manager, Mr Moremi, was initially not very co-operative, he did later co-operate and also his staff. As the applicants' attorney puts it:

> "Although the personnel were found to be accommodating and friendly they unfortunately did not know where to find the required documentation".

His affidavit continues:

> "3.4 The applicants were referred to the rooms (safes) which allegedly contained all the documents. Photographs were taken of these rooms and the contents thereof and I annex hereto five photographs marked:
>
> 3.4.1 Office in front of safe at the respondent's offices;
>
> 3.4.2 Part of the safe at the respondent's offices;
>
> 3.4.3 The other part of the safe at the respondent's offices;
>
> 3.4.4 The shed at the respondent's offices where, I have been informed, the old documents are stored;
>
> 3.4.5 Another part of the shed where allegedly the old documents are stored."

[8] The photographs attached to the affidavit show files stacked haphazardly in various places or rooms without any apparent filing system.

[9] Mr Cilliers, for applicants referred me to **<u>Copalcor Manufactures (Pty) Ltd and Another v FDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)</u>** 2000 (3) SA 181 (W) at 194C-F from which it appears that where a party has a large volume of documents in its custody it should arrange those documents in proper chronological order and properly number the documents. Mr Cilliers did not refer to a reported case in which a court set aside a notice of appearance to defend or dismissed an action after finding discovery of a large volume of documents inadequate.

[10] Mr Snellenburg for respondent contended that Rule 35(3) only requires a party to make documents available for inspection in accordance with rule 35(6). Mr Snellenburg pointed out that the respondent is neither obstructive nor unwilling to comply with the court order to make discovery. There are practical difficulties. There are large volumes of documents and respondent has difficulty to identify them.

[11] It seemed to me to be a relevant consideration that the applicants were the auditors of the respondent. They had therefore worked with the documents now required. It appeared to me that this was a case in which the applicants would be able to point out to the respondent's representatives the documents they required. That was the reason for my order on 1 August 2013. Mr Snellenburg

pointed out that documents which have not been discovered could also not be used by the respondent.

[12] After hearing argument on 15 August 2013 I was of the view that respondent could do no more to find the documents. At the trial applicants will probably be able to show that some documents are not available due to the fault of the respondents, and seek an adverse inference against the respondent. The respondent's filing system was inadequate, and that was the reason why respondent was ordered to pay the costs.

[13] It is not the function of the court or the intention of Rule 35(3) to penalize a defendant for its defective filing system by means of an order for dismissal of its defence.

[14] It was ordered that:

1. Respondent pay the costs of this application, including the costs incurred on 30 May 2013.

A. KRUGER, J

On behalf of Applicants: Adv H.J. Cilliers
Instructed by:
Hill McHardy and Herbst Inc.
BLOEMFONTEIN

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

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