



**IN THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

|                        |                                                                                   |
|------------------------|-----------------------------------------------------------------------------------|
| (1)                    | REPORTABLE: <b>Yes</b>                                                            |
| (2)                    | OF INTEREST TO OTHER JUDGES: <b>Yes</b>                                           |
| (3)                    | REVISED.                                                                          |
| <u>23 January 2024</u> |  |
| DATE                   | SIGNATURE                                                                         |

**CASE NUMBER: 236/2021**

In the matter between: -

**ENDRESS AND HAUSER (PTY) LTD**

Applicant

and

**ZAMANGWANE (PTY) LTD t/a ZMG-WATECH**

Respondent

*In re* the main action between: -

**ENDRESS AND HAUSER (PTY) LTD**

Plaintiff

and

**ZAMANGWANE (PTY) LTD t/a ZMG-WATECH**

Defendant

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**JUDGMENT**

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## GREYLING-COETZER AJ

### Introduction

[1] This is an opposed application to compel the respondent to deliver documents sought in terms of Rule 35(3).

[2] In terms of the Rule 35(3) notice, the applicant called for the following: -

*“1. The written agreement between the defendant and Emalahleni local municipality in respect of the water treatment works.*

*2. Correspondence relating to termination of the agreement between the Emalahleni local municipality to the defendant in respect of the water treatment works.*

*3. Documents illustrating payments made by the Emalahleni local municipality to the defendant in respect of the water treatment works”.*

[3] Conveniently and in uniformity with the terminology used by the parties, the documents sought per paragraph 1, 2 and 3 above will be referred to as “Document 1”, “Document 2” and “Document 3” respectively.

[4] On 19 October 2022, and in response to the applicant’s Rule 35(3) notice, the respondent delivered a formal reply. The respondent made document 1 and 2 available to the applicant for inspection. The respondent in this respect held out:

***“BE PLEASED TO TAKE NOTICE THAT*** *defendant makes requested documents 1-2 for (sic) available for plaintiff’s inspection on the following date and times:*

*Day: Tuesday to Friday*

*Time: 10h00 to 12h00*

*Arrangement: Reasonable notice of intention to inspect at least 24 hours’ notice.”*

- [5] In respect of document 3 the respondent claimed privilege. The notice stated that:

***“TAKE NOTICE FURTHER THAT** defendant claims privilege over the contents of document number 3 relating to payments between the Emalahleni local municipality and defendant.”*

- [6] The respondent thus formally expressed its position *in re* the documents sought in terms of the Rule 35(3) notice. Thus, this application is not one where the respondent did not respond, but it responded and gave expression to the position it held in respect of the documents. This response and the failure of the respondent to act in terms thereof gave rise to the present application, where in the applicant seeks 1) the respondent to be compelled to act in terms of its reply to the Rule 35(3) Notice and 2) the respondent to be compelled to provide document 3 as it is not of a privileged nature.
- [7] Its apposite to briefly consider the remaining background to this application, which is largely common cause.

### Background

- [8] The applicant is the plaintiff in the main action and issued summons in this court against the respondent as defendant. The respondent also counter-claimed against the applicant.
- [9] Subsequent to the close of pleadings, the respondent delivered its discovery affidavit on 24 November 2021. In terms thereof, and under Schedule A, the respondent discovered all process and notices filed under case number 236/2021, an undated letter by the respondent to the applicant sent on/or about 19 October 2020, as well as proof of payment by the respondent to the applicant, in the amount of R500 000.00 and R800 000.00.
- [10] In terms of the discovery affidavit, the respondent objects to the production of documents set out in Schedule B on the ground that same fall within the doctrine of legal professional privilege. This schedule contained the standard items and

did not contain any reference to document 3.

- [11] What followed was the applicant's Rule 35(3) notice and the respondents reply thereto, as already dealt with above. Pursuant to the respondent's reply and per correspondence dated 23 October 2022, the applicant enquired whether the respondent would provide copies of documents 1 and 2 to the applicant electronically. The applicant further recorded that it did not agree with the ostensible privilege claimed in respect of document 3, as said document merely would merely illustrate that payments had been made by the Emalahleni local municipality to the respondent in respect of the water treatment works. The applicant also recorded that the respondent's reply does not accord with Rule 35(3), in that did not confirm under oath why said document was not being made available.
  
- [12] In this respect the respondent was invited to confirm under oath the basis of the refusal to make document 3 available. This respondent was to respond by 28 October 2022. No response was forthcoming from the respondent.
  
- [13] On 7 November 2022, a telephonic and email enquiry was directed to the respondent's attorneys of record to arrange for inspection of documents 1 and 2, in line with the respondent's reply. Inspection was requested to take place on 8 November 2022. On attendance, the respondent's attorney was not available.
  
- [14] On 9 November 2022, the respondent's attorney of record was contacted by the applicant's correspondent attorney to arrange inspection. Mr Khoza on behalf of the respondent advised that a pre-trial had been scheduled for 11 November 2022, where all the issues between the parties would be dealt with.
  
- [15] On 11 November 2022 a pre-trial conference was held between the parties. The pre-trial conference was attended by counsel, Mrs Cilliers and Mr Roberts on behalf of the applicant, and Mr Meintjes on behalf of the respondent.
  
- [16] The issue in respect of the Rule 35(3) notice and subsequent responses were

discussed. Mr Meintjes on behalf of the respondent undertook to scan and e-mail document 1 and 2 to the applicant's attorneys by no later than 16 November 2022. At that point in time no stance was communicated contrary to the reply by the respondent in terms of Rule 35(3). The respondent's position remained in line with that expressed, being the applicant was entitled to document 1 and 2. In respect of document 3 and undertaking was made to take instruction and to provide the documentation requested or communicate the basis of the continued refusal by no later than 18 November 2022.

[17] Although the pre-trial was held on 11 November 2022, the pre-trial minute was only prepared in January 2023 and signed by the respondent's attorneys on 1 February 2023. The respondent's position remained unchanged between the period November 2022 to February 2023.

[18] Notwithstanding the reply by the respondent tendering inspection in October 2022, the undertaking in the pre-trial during November 2022, the recordal of the failure to adhere to the undertaking in the minutes as signed in February 2023, document 1 and 2 were not made available either for inspection or by making electronic copies available. Nor did the respondent communicate any further or comply with Rule 35(3) by stating its refusal in re document 3 under oath.

[19] On 2 August 2023, further correspondence was addressed to the respondent's attorney requesting compliance with the undertakings per the pre-trial minute to deliver the copies of document 1 and 2, again drawing the respondent's attention to the fact that its response in respect of document 3 was not compliant with Rule 35(3). No response was received.

[20] The present application was prepared as a result of the respondent's conduct, issued and served on 4 September 2023.

#### Judicial case management hearings

[21] On 4 September 2023 the matter was enrolled for the first judicial case

management, during which these issues were raised. In the case management the applicant sought the court to order the respondent to provide document 1 and 2 in terms of Rule 37A(5)(c). Mr Mhlanga appearing for the respondent confirmed that the documents will be provided and agreed that the court could make an order to that effect.

[22] The case management was stood down until 5 September 2023, and thereafter until 7 September 2023, Mr Meintjes appeared and alleged that Mr Mhlanga who appeared on the 4<sup>th</sup> of September 2023 was not prepared to “deal in detail with the matter” and even less to make any admissions.

[23] The applicant was not granted relief as sought in terms of document 1 and 2 but an order was granted in terms of Rule 37A(12)(e) enrolled for hearing on 23 October 2023 in order to properly ventilated the issues in respect of documents 1, 2 and 3.

[24] The party’s respective positions and contentions during said case management hearing are no longer relevant in respect of this determination, as the parties have now exchanged affidavits formally setting out their respective contentions and evidence relied on.

#### *The parties respective contentions*

[25] The respondent in its answering affidavit has done an about-turn compared to its reply to the Rule 35(3) notice and undertaking in the pre-trial hearing and minute.

[26] In the answering affidavit the respondent states that it has instructed its legal representative to withdraw any undertaking regarding the production of these documents. This confirming that there was an earlier instruction to produce document 1 and 2.

[27] Although not in the clearest of terms the respondent shifts focus from privilege *in re* document 3 to that of relevance. This is coupled with the further

contention that document 1 may contain confidential information and that if document 3 equated to bank statements it is similarly confidential and privileged.

[28] As a further all-encompassing contention, it is alleged that all the documents are irrelevant and on that basis notwithstanding its formal reply to the Ruel 35(3) notice, the documents have not provided.

[29] The respondent contend, that documents should be relevant to the issues between the parties and the relevance or basis for reliance should have been pleaded. In substantiation the respondent contends that as the applicant has not placed reliance on an agreement between the respondent and the Emalahleni Local Municipality, no basis has been laid for the discovery of such agreement. According to the respondent the agreement between the it and the Emalahleni Local Municipality is over 200 pages long and comprises of tender documents, which include competitive pricing strategies and scope of work, and would disclose competitive industrial advantages, such as expert research, laboratory tests and highly sensitive information. The respondent alleges that on the strength of the applicant's own correspondence, it was not a sub-contractor of the respondent, nor did it ever conclude an agreement with the Emalahleni Local Municipality

[30] In respect of document 3, the respondent alleges that it did not made payments to the municipality, nor were such payments alleged or pleaded by the respondent, therefore same is irrelevant. The respondent contends that it never repaid any monies to the Emalahleni Local Municipality upon lapsing of the 3-year agreement, but effected accounting entries in its accounting records to reflect credits, off-setting amounts received from the Emalahleni Local Municipality.

[31] The applicant contends that the respondent's reply to the Rule 35(3) notice wherein the respondent agreed to make document 1 and 2 available and relied on privilege confirmed the respondents position in respect of the documents. This being the position the applicant is entitled to act upon for the purpose of

seeking an application to compel.

- [32] Further that, the respondent subsequent undertaking in the agreed pre-trial minute amounts to an admission that the applicant is entitled to documents 1 and 2 and are binding. Therefore, absent special circumstances being advanced by the respondent why same ought not to be regarded as binding, and the respondent on that basis be allowed to unilaterally withdraw from such agreements and/or undertakings, it remained bound thereto. The applicant contends that the respondent is not entitled in law to unilaterally withdraw and agreement reached and the applicant is entitled to documents 1 and 2. For this reason it is contended by the applicant that the relevance of these documents is not before this court for assessment, notwithstanding the respondent's attempt in its answering affidavit to unilaterally resile from the agreement that it would provide these documents and argue the relevance.
- [33] In respect of document 3, the applicant contends that the respondent in its reply refused to provide same, claiming that it is privileged. The respondent did so in circumstances where it did not in terms of Schedule B to the discovery affidavit claim, from the outset, that any documents illustrating payments made by the municipality to the respondent in respect of the water treatment works were privileged. And it placed reliance on privilege without doing so under oath, as required in terms of Rule 35(3).
- [34] According to the applicant and considering the respondent disavowing reliance on privileged in re document 3, has now changed tact, which illustrates the contrived attitude with which the respondent has approached the Rule 35(3) notice, this application and the litigation as a whole.
- [35] The applicant further contends that notwithstanding the about-turn, and in circumstances where the respondent is allowed to raise a different ground for refusal than that which was set out in its reply in terms of Rule 35(3), said document 3 is relevant.
- [36] It proceeds to contend that in paragraphs 17 and 18 of the respondent's

counterclaim its cause of action is pleaded to be that it gave notice to the applicant, requesting a refund in the amount of R1.3 million. In annexure “F”, being the letter of repudiation relied on by the respondent, it states that at the time of termination of the contract the respondent had already paid the applicant an amount of R1.3 million. As a consciousness of the decision, all payments by the municipality to the respondents were reconciled, and the amount which the respondent would have received from the municipality for this project was credited back to the municipality – *“We hereby request that you debit the invoice 6023846296 for the amount of R2,386 951.28 and refund the R1,3 million which we had paid on the account”*.

- [37] In paragraph 1.2 of the applicant’s replication, it is expressly pleaded that the applicant was engaged by the respondent to procure goods from the applicant during 2016 in respect of the agreement that the respondent had concluded with the municipality known as ‘*Emalahleni Water Treatment Works*’. Therefore, documents illustrating payments made by the Emalahleni Local Municipality to the respondent in respect of the water treatment works are relevant.
- [38] The applicant contends that considering the response by the respondent that no physical repayments have been made to the municipality, but rather that credits have been passed in its accounting books, the word ‘documents’ as described under item 3 does not mean bank statements, but documents illustrating payments. Thus, on the respondent’s version documents should be accepted to mean the accounting records of the respondent illustrating same.
- [39] The respondent takes issue with the wording of the prayers in the notice of motion, which call for delivery. According to the respondent, Rule 35(3) read with 35(7) merely makes provision for inspection and not delivery. The respondent further argues that none of the documents are relevant to the pleaded case of either party, and that a court’s power to investigate the relevance can never be ousted by an agreement to produce the documents in terms of a pre-trial or a reply to a Rule 35(3) notice.

## Discussion

- [40] When a party responds to a notice such as a Notice in terms of Rule 35(3) and proverbially draws the battle line the other party is entitled to approach an application to compel from said basis. The applicant was entitled to approach its application to compel from the premise that document 1 and 2 would be provided and document 3 was refused on the basis of privilege. To hold otherwise would amount to nothing less than allowing an abuse of process if not litigation by ambush.
- [41] The respondent did not object to the production of documents 1 and 2. It by contrast confirmed that it gave an instruction to its legal representatives to make same available and in line therewith the reply to the Rule 35(3) notice was prepared and inspection tendered. This the respondent did in October 2022. This position of the respondent remained in place pursuant to the pre-trial conference wherein again the respondent, through its attorney of record, undertook to make documents 1 and 2 available during November 2022.
- [42] It is only during the last case management hearing and its opposition to the present application in September 2023 when the respondent attempted to unilaterally withdraw such an undertaking to provide or make available for inspection documents 1 and 2. As justification it relies on the following:
- “Respondent’s legal representative having learned of the nature, scope and contents of the requested documents and upon instruction has withdrawn any undertaking regarding the production of document 1 and 3 ... Document 2 is an inherent component of document 1, which shall be explained in more detail below.”*
- [43] The respondent contends that it is not bound by its reply to the Rule 35(3) notice and may resile from the agreement reached in the pre-trial, as a competing instruction had been provided to its attorney of record. Save for that quoted herein above, there is no explanation before court, if it is to be accepted that it was for a lack of understanding of the scope, nature and content of the requested documents, what informed the earlier instruction and what has

changed since. Or when and how the legal representative came to better understand the scope, nature and content of the required document. The nature, scope and content of the requested document have been within the knowledge of the respondent from inception. It provided the earlier instruction to tender inspection and make same available.

- [44] In ***Filta-Matix (Pty) Ltd v Freudenberg and Others***<sup>1</sup> the Supreme Court of Appeal was faced with circumstances wherein the appellant in that matter was requested at a pre-trial conference to provide clarity, in response to which the appellant indicated that its attack was limited to a certain document. This was again echoed in a written response to the pre-trial questions, confirming its position. The appellant later sought to resile from such an agreement, alleging that the limitation of the issue was as a result of confusion caused by the nature of the question posed. The court held that said excuse cannot, in light of the facts, be accepted, and held that:

*“To allow a party without special circumstance, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of litigation (cf Price NO v Allied-JBS Building Society 1980 (3) SA 874 (A) at 882D-H). If a party elects to limit the ambit of his case, the election is usually binding (AJ Shepherd (Edms) Bpk v Santam Versekeringmaatskappy BPK 1985 (1) SA 399 (A) at 415B-D; Chemfos Ltd v Plaasfosfaat (Pty) Ltd 1985 (3) SA 106 (A) at 114I-115B). No reason exists why the principle should not apply in this case.”* (own emphasis)

- [45] Parties are bound to that which they agree to in a pre-trial conference, unless special circumstances dictate otherwise. In the Supreme Court of Appeal matter of ***MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another***<sup>2</sup> the Court *a quo* was faced with a rescission application founded on an agreement reached in terms of a Rule 37 pre-trial conference, where the Appellant contended it was not bound by the settlement

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<sup>1</sup> 1998 (1) SA 606 (SCA)

<sup>2</sup> 2010 (4) SA 122 (SCA)

agreement, because its legal representative was not expressly authorised to settle the matter on its behalf. The court held that the party was not entitled, in the absence of special circumstances, to resile from an agreement deliberately reached at a Rule 37 conference.<sup>3</sup>

[46] Considering above, there can be little room to conclude that respondent having given an instruction to provide documents 1 and 2, can merely replace such an earlier instruction with the later one to refuse same, without more. The facts before this court does not demonstrate that the legal representative acted without instruction in tendering document 1 and 2 and thereafter fortifying the tender by agreement and undertaking in the pre-trial. And even had that been the case it would make little different having regard to that set out in the authorities dealt with above, absent special circumstances being shown.

[47] In the present matter there is no allegation that the agreement, as reached during the pre-trial to make available for inspection and to e-mail documents 1 and 2, was not deliberately reached. The respondent entitlement to distance itself from its reply to the Rule 35(3) notice and to resile from the agreement in the pre-trial hinges solely on the allegation that after its legal representative learned of the nature, scope and contents of the requested documents, it upon the instruction of the respondent withdrew any undertaking regarding the production. This allegation is contrived and nonsensical. It does not demonstrate any special circumstances.

[48] The applicant is entitled to inspection and copies of document 1 and 2 being, the written agreement between the respondent and the Emalahleni Local Municipality in respect of the water treatment works and correspondence regarding the termination of the agreement between the Emalahleni Local Municipality and the respondent in respect of the water treatment works.

[49] In respect of document 3, and although the respondent's response to the Rule 35(3) notice was not compliant with Rule 35(3), the basis of refusal was clearly

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<sup>3</sup> At par [6]

set out to be that of privilege, no basis to found privilege demonstrated in the opposing affidavit or arguments advanced. The applicant is thus entitled to inspection of document 3.

[50] This basis of refusal has shifted to document 3 not being material and relevant to any aspect before the trial court. Briefly considering same, Rule 35(3) provides that: “*if any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents ... which may be relevant to any matter in question in the possession of any party thereto, ...*” (own emphasis).

[51] The subrule does not envisage documents that are relevant, but clearly stipulates documents that may be relevant not only to the pleadings, but to any matter in question.<sup>4</sup>

[52] In respect of what is relevant, the judgment of ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of South Africa and Others***<sup>5</sup> remains applicable. After remarking that it was desirable to give a wide interpretation to the words ‘a document relating to any matter in question in the action’, it was held that “*it seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contain information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put it in the words ‘either directly or indirectly’ because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have of these two consequences.*”

[53] No privilege has been established in respect of document 3, therefor the applicant is entitled to inspection and or copies of same. In so far as the

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<sup>4</sup> ***Rellams (Pty) Ltd v James Brown and Hamer Ltd*** 1983 (1) SA 556 (N) at 565B  
<sup>5</sup> 1999 (2) SA 279 (T) at 316

respondent now relied on relevance, I find that the document sought, be it bank statements or accounting entries, on the basis of the pleadings before court and may be relevant to any matter in question.

### Manner of delivery

- [54] As set out above the respondent contend that the applicant is not entitled to an order for delivery of the documents but merely inspection. Rule 35(3) expressly state “....*to make same available for inspection in accordance with subrule (6)....*”. Subrule (6) provides that “...*to inspect such documents or tape recordings and to take copies or transcriptions thereof.*” The applicant is thus entitled to inspect and to make copies, be it hard copies or electronic copies.

### Costs

- [55] The applicant seeks attorney client costs against the respondent. in this respect the applicant contends that the respondent has failed to set out any facts to dispute the attack on its conduct and merely alleged there is no prejudice to the applicant. It was submitted that the respondent therefor accepts its conduct has been defiant to the advancement of the case and that it had failed to comply with the undertakings made and position expressed in its Rule 35(3) reply.
- [56] The respondent contends that cost should follow the event and, on a party and party scale.
- [57] In **Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging**<sup>6</sup> the court gave expression to awarding of costs on an attorney and client scale as follows: “*The true explanation for awarding of attorney and client costs...seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just,...*”

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<sup>6</sup> 1946 AD 597 at 607

[58] Such circumstances and conduct is present in this matter. The necessity of this application was wholly caused by the respondent's conduct. There is thus no reason why the applicant should be out of pocket in circumstances were it acted upon the respondents reply in terms of Rule 35(3) and subsequent agreement reached and undertakings in the pre-trial.

[59] By reason of aforementioned, the following order is made: -

1. The Respondent is ordered to make the documents referred to in paragraphs 1, 2 and 3 of the applicant's notice in terms of Rule 35(3) dated 29 September 2022, being:

1.1 The written agreement between the respondent and Emalahleni Local Municipality in respect of the Water Treatment Works;

1.2 Correspondence regarding the termination of the agreement between Emhlahleni Local Municipality to the Respondent in respect of the Water Treatment Works;

1.3 Documents (duly redacted bank statements or accounting records of the respondent) illustrating payments made by the Emhlahleni Local Municipality to the Respondent in respect of the Water Treatment Works.

available for inspection and to provide or allow the applicant to make copies thereof, within 10 days from the date of this judgment.

2. Should the respondent fail to comply with the orders set out in paragraph 1 above, the applicant is granted leave to apply, on the same papers duly supplemented, for an order striking out the respondent's defence in the action and dismissing its counterclaim.
3. The respondent is ordered to pay the cost of this application on an attorney and client scale.



**GREYLING-COETZER AJ**

HEARD ON: 23 October 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 11h00 on 23 January 2024.

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