

REPUBLIC OF SOUTH AFRICA



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

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

09/05/2024

SIGNATURE

DATE

CASE NO: 48/2019

In the matter between:

WOZANI BERG GASOLINE (PTY) LTD

Applicant

and

MKHONDO OIL AND DIESEL (PTY) LTD

Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 09 May 2024 at 10:00.

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This Court is to adjudicate on two interlocutory applications. In each instance, the one application has been launched by the one against the other. In the first application, the Applicant ("Wozani") is, in terms of Rule 21(4) of the Uniform Rules of this Court, compelling the Respondent ("Mkhondo Oil") to furnish further particulars for trial. In the second application Mkhondo Oil, as the Applicant, is compelling Wozani (the Respondent in this instance) in terms of Rule 35(7) of the Rules, to make further and better discovery as intended in Rule 35(3). I have elected to refer to the parties in their actual names to avoid confusion.

FACTUAL MATRIX OF THE FIRST APPLICATION

[2] Turning first to the application in terms of Rule 21(4). The factual background to this application emanates from an action instituted by Wozani against Mkhondo Oil for payment due and owing by the latter in respect of fuel supplied for and on its behalf. The facts are largely common cause. For a better appreciation of the dispute and to put the matter in its proper perspective, it is important to lay out the circumstances that led the parties to both these applications. Wozani issued and served summons against Mkhondo Oil in early 2019. Mkhondo Oil responded by excepting to the particulars of claim, which prompted Wozani to amend its particulars of claim during the same year.

[3] When Mkhondo Oil delayed to promptly plead to the amended particulars of claim, Wozani placed it under bar. Mkhondo Oil persisted with its exception but it was nonetheless ultimately dismissed following opposition by Wozani. On 3 September 2020,

Mkhondo Oil delivered a plea and counterclaim to the action. On 30 September 2022, Wozani delivered a request for further particulars for purposes of the impending trial. The further particulars for trial were directed at the averments made in the plea and counterclaim of Mkhondo Oil.

[4] Mkhondo Oil furnished the further particulars as requested on 25 October 2022 but Wozani alleges that the response of Mkhondo Oil was insufficient insofar as it failed to provide a substantive and meaningful reply to paragraphs 2.2.2, 2.4.2, 2.6.2 and 2.8.2. The response of Mkhondo Oil to each of the aforesaid paragraphs was that it intended to amend its pleadings. On 2 December 2022, Wozani wrote to Mkhondo Oil advising that it was entitled to a proper response in respect of those paragraphs. Wozani further reminded Mkhondo Oil that it has failed to observe its commitment that it would amend its pleadings.

[5] In responding to Wozani on 7 December 2022, Mkhondo Oil recommitted to its intention to amend its pleadings. On 18 April 2023, Wozani once more reminded Mkhondo Oil by letter that its pleadings remained unamended. In view of that failure, Wozani persisted on answers to those specific paragraphs failing which it threatened to launch an application to compel for further particulars. Wozani alleges further that even on 17 May 2023, the date on which it launched the application for the request for further particulars for trial, Mkhondo Oil had neither delivered its intention to amend its pleadings nor had it provided substantive answers to paragraphs 2.2.2, 2.4.2, 2.6.2 and 2.8.2.

[6] Wozani alleges that it persisted in Mkhondo Oil responding to the questions raised in respect of those paragraphs of the request for further particulars or amending its pleadings because Mkhondo Oil had raised five defences to the claim for payment. These defences also formed the basis of five counterclaims instituted against Wozani by Mkhondo Oil. The defences were that Wozani overcharged Mkhondo Oil:

- 6.1 In the amount of **R 4 057 637.02** by raising invoices for diesel which was never delivered to the defendant;

- 6.2 For fuel to the value of **R8 382.50** in respect of excessive litres which were never delivered and at an incorrect price;
- 6.3 For fuel to the value of **R1 543 423.34** by raising invoices for diesel at a tariff that does not equate to the agreed tariff;
- 6.4 For consignment stock at a tariff that did not equate to the agreed tariff, to the value of **R1 339 717.03**; and
- 6.5 In the amount of **R 754 631.23** in respect of fuel delivered to Mkhondo Oil but subsequently collected by Wozani.

[7] To avoid Mkhondo Oil catching it by surprise at the trial by ultimately relying on instances of alleged incorrect charging not specifically pleaded, Wozani alleges that it sought to establish from Mkhondo Oil if it relied on any such instances other than those that it has specifically pleaded in the counterclaim. These requests were made firstly, in relation to the first defence and counterclaim. Secondly, in relation to the second defence and counterclaim. Thirdly, in relation to the third defence and counterclaim. Fourthly, in relation to the fourth defence and counterclaim. Mkhondo Oil's answers to all these was that it would amend its pleadings in due course, which it has since 25 October 2022 not done.

ASSERTIONS ADVANCED BY THE PARTIES

[8] Wozani contends that having regard to the length of period that Mkhondo Oil has had since 25 October 2022 to either supply the details of the unpleaded instances of incorrect charging or initiate a process that would lead to the amendment of its pleadings, it would by now have done so. Mkhondo Oil's failure in that regard to date is reminiscent or has a flavour of a party bereft of bona fides. It is unavoidable, maintains Wozani, to conclude that Mkhondo Oil does not have any claims against it other than those pleaded,

is not eager to get to grips with the issues and wishes to protract matters as much as possible.

[9] Wozani further asserts that in respect of amounts claimed by it, Mkhondo Oil has referred to specific transactions such that it is able to identify the transactions and investigate the merits of the allegations. Conversely, Mkhondo Oil has not done so in respect of amounts not claimed by it. It has not referred to specific order numbers or invoices. As such, Wozani is incapable of identifying the transactions and investigate the claims.

[10] Wozani further argues that Mkhondo Oil's reliance on a strict interpretation of Rule 21 that on the pleadings as they stand, Wozani is not entitled to the particulars that it seeks could be correct but disingenuous and misguided in these circumstances. Wozani is steadfast that Mkhondo Oil has known that whether or not, strictly speaking the allegations which it relies on, are part of the pleadings, it was certainly going to rely on them at some stage. Wozani suspected that Mkhondo Oil would do so at the trial but instead, it did so by a belated request of discovery of every document that relates to all business transactions between the parties from inception.

[11] Wozani maintains that Mkhondo Oil's failure to single out any specific transactions during the parties' business relationship fortifies the contention that it does not know of any other transactions on which it can rely but instead hopes to find something in the mountain of documents that it is demanding. Wozani concludes that Mkhondo Oil is simply on a fishing expedition with the hope of protracting the matter. This is manifest, asserts Wozani, because by failing to reply to its answering affidavit in the request for further discovery, Mkhondo Oil has not only failed to show the relevance of the documents that it is demanding but has also not succeeded to demonstrate that its claims against Mkhondo have not prescribed.

[12] Mkhondo Oil, on the other hand, asserts that Wozani had requested from it to answer, in the case of amounts not claimed, by referring to invoice number, date and time

of purchase, which deliveries were not made. In response, Mkhondo Oil indicated that it would attend to the amendment of its plea and counter claim. Having answered as aforesaid, Mkhondo Oil proceeded to make a counter request in terms of Rule 35(3) of all of the invoices mentioned by Wozani in its request for further particulars for trial. Mkhondo Oil claims that it cannot furnish the further particulars without information from Wozani. In other words, Wozani must first discover in terms of the Rule 35(3) Application to enable it to make the discovery.

[13] Mkhondo Oil argues that it finds Wozani's refusal to answer to its request for discovery in terms of Rule 35(3) and its complaint that it (Mkhondo Oil) has failed to respond to its request for further particulars not only illogical but mala fide. Mkhondo Oil further argues that a party is only entitled to call for such further particulars as are 'strictly necessary' to enable him to prepare for trial. The purpose of permitting a party to call for further particulars for trial is:

13.1 To prevent surprise;

13.2 A party 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; and

13.3 Having regard to the foregoing nevertheless not to tie the other party down and limit his case unfairly at the trial.

ISSUES

[14] Central in this application is whether or not Wozani has made a case for the granting of an order compelling Mkhondo Oil to furnish further particulars as envisaged in Rule 21(4).

LEGAL FRAMEWORK

[15] The pertinent Rule of Court concerned with request for further particulars for purposes of trial and failure to respond thereto is 21. Sub-rules (1) and (4) respectively provide that:

“(1) *After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him or her to prepare for trial. Such request shall be complied with within 10 days after receipt thereof.*”

(2) ...

“(4) *If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to 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 to it seems meet.*”

[16] The purpose of particulars for trial is not to elicit evidence or information that will emerge on cross-examination. See in this regard, the matter of *Von Gordon v Von Gordon*¹. In determining what particulars fall within the scope of the Rule, one would look primarily at the pleadings. The matter of *Hardy v Hardy*² is relevant. Where a party pleads a bare denial of allegations made by his opponent, such a party cannot be required to furnish particulars of any aspect placed in issue by such denial.

[17] In applying this principle, it must be borne in mind that a statement in a plea which is in form a denial may embody by necessary implication a positive averment of some fact. In such a case it may be proper to require that particulars be furnished of the implied averment. Since the pleadings alone do not necessarily contain sufficient information to determine whether or not a party may be taken by surprise and what the other party

¹ 1961 (4) SA 211 (T) at 213

² 1961 (1) SA 643 (W) at 646

intends to prove, it is permissible to go beyond the pleadings and to look at matter forming part of the record, such as expert witnesses' summaries and even (in an appropriate case) evidence given at an earlier hearing which forms part of the record. See in this regard, the matter of *Schmidt Plant Hire (Pty) Ltd v Pedrelli*³.

ANALYSIS

[18] The situation confronted by this Court is rather peculiar in that the essence of Mkhondo Oil is, without conceding that it is under any obligation to make further discovery, willing to provide the further particulars but it cannot comply with the request because the information sought is in the possession of Wozani. This matter is also peculiar in the sense that the assertion of Wozani that Mkhondo Oil has answered all the other questions but four, which happen to be linked to its counterclaim, presents difficulties insofar as it leaves Wozani understandably anxious of Mkhondo Oil's actual intention.

[19] Wozani's apprehension of Mkhondo Oil's true intention while understandable is in fact unfounded. This has to be the case in circumstances where Mkhondo Oil has gone to great lengths explaining why delayed to advance the matter a step further since 25 October 2022. The point is that it had to instruct an accountant to attempt to make sense of the figures claimed by Wozani. It is common cause that the exercise involved trawling through a mountain of pages of papers. Besides, Mkhondo Oil also explains that there was a personal difficulty why Mkhondo Oil delayed. Against that background, it will be premature for this Court to draw a negative inference from Mkhondo Oil's inability to address the situation earlier than it did.

[20] It is trite that Wozani must confine its case within the four corners of the provisions of Rule 21. It is unmistakable that the further particulars that are sought by Wozani fall outside the precinct of Rule 21. In these circumstances, Wozani should confine itself to what is before it and not venture to cross the border. If Mkhondo Oil has stated that it would amend its papers and then stay idle, Wozani should accept that the papers of

³ 1990 (1) SA 398 (D) at 402–3

Mkhondo Oil are what they purport to be and proceed with the case. The fear that Mkhondo Oil would surprise it at the trial has been allayed as the request for further discovery has come early than the date of hearing.

[21] Considering the above the application for request for further particulars for purposes of the forthcoming trial is refused. I note that Mkhondo Oil has asked for attorney client costs, which are by nature punitive. I do not think that this is warranted on the facts of what truly caused the delay that raised suspicions on the side of Wozani. The following order is made:

The application for request for further particulars in terms of Rule 21(4) is dismissed with costs.

THE RULE 35(7) APPLICATION

[22] The facts upon which the previous application was decided are similar and remain applicable to this application. As such, I will not repeat them here.

ISSUES

[23] The issue in this instance is to determine whether Mkhondo Oil has made a case for Wozani to make further discovery.

LEGAL FRAMEWORK

[24] As in the previous application, the starting point should be a citation of the relevant parts of Rule 35 being the Rule on which Mkhondo Oil has founded this application to compel further discovery. Of specific interest in this regard are sub-rules (3) and (7) which respectively provide that:

“(3) *If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party’s possession, in which event the party making the disclosure shall state their whereabouts, if known.*”

(4) ...

(5) ...

(6) ...

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

[25] Mkhondo Oil states that it is trite that the test for discovery of documents is relevance having regard to the issues as defined in the pleadings. That said, relevance is a matter for the Court, having regard to the pleadings and does not depend upon the Applicant’s own views on the matter. In this regard, this Court was referred to the matter of *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd*⁴. Furthermore, relevance is to be determined from the pleadings without regard to extraneous evidence. This Court was asked to consider the matter of *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*⁵.

[26] It was noted in *Rellams (Pty) Ltd v James Brown & Hamer Ltd*⁶ that it is not without significance that Rule 35(3) refers to documents that may be relevant and not those that

⁴ 2005 1 SA 398 (C) 404

⁵ 1999 (2) SA 279 (T)

⁶ 1983 (1) SA 556 (N) at 565 B)

are to the action. This is determined, having regard to the issues, taken at face value, as defined in the pleadings.

[27] The importance of discovery of documents is accentuated in by The Civil Practice of the Supreme Court of South Africa 4th Edition (1997) by the authors, *Herbstein & van Winsen* where the following is stated:

"The scope of discovery ... is wide. It extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence but which may fairly lead to an enquiry relevant to the issues."

ANALYSIS

[28] Wozani asserts that all the documents dated prior to 13 July 2028 are irrelevant. As such, Mkhondo Oil is not entitled to them. All the other transactions recorded on what is referred to as Annexure "A", so continues the argument, and falling outside of the 12 invoices on which Wozani's claims are based, have merely been included for convenience alone. In the particulars of claim, Wozani alleges that as on 4 October 2018, there was a balance outstanding of **R2 564 382.41** due to Wozani. Once again, Wozani refers to the entire Annexure "A" for proof even though it refers specifically to Annexures "B" to "V" for the period of 13 July 2017 to August 2018.

[29] The above said, Mkhondo Oil has demonstrated that between 13 July 2018 and 4 October 2018 it had paid to Wozani an amount of **R2 800 449.31**. On the other hand, Wozani states in the particulars of claim that the amount that was outstanding for the period 13 July 2018 to 7 August 2018 was **R2 564 382.41**. It is evident that the amount paid by Mkhondo Oil for the period exceeds that claimed by Wozani suggesting that there might be an overpayment. Because the amounts due are different, it becomes necessary to consider all the transactions on Annexure "A" to determine the source of the discrepancy.

[30] Acknowledging that Wozani will have to provide a whole mountain of papers, which may well be in excess of two thousand pages, it attracted upon itself the duty to make discovery by annexing the whole of annexure “A” even though it knew that it was relying on twelve of the invoices. Given the attitude of previous Courts and authors, as set out above, this Court is bound to direct that Wozani is under obligation to discover the documents as requested in Rule 35(3). See the case of *In Universal Studios v Movie Time*⁷ where the Court said that many references to documents in annexures to pleadings are probably irrelevant to the proceedings and would for that reason not have to be produced but it does not follow that the Rule does not apply to documents to which reference is made in annexures.

[31] Wozani cannot, as it has done, pick and choose which of those documents are relevant and which are not. Perhaps it will be appropriate to conclude on the subject by mentioning the matter of *Independent Newspapers (Pty) Ltd v Minister for Intelligence services and Another*; *In re: Billy Masetlha v President of the Republic of South Africa*⁸ where it was held as follows:

“Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because Court take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one’s case is a time-honoured part of a litigating party’s right to a fair trial”

[32] Wozani has argued that Mkhondo Oil is not entitled to the discovery of further documents because prescription has intervened. If for purposes of the counterclaim prescription has indeed occurred, so asserted Wozani, the corollary is that it would equally be ineffective for purposes of the application. I agree with Mkhondo Oil that a defence of

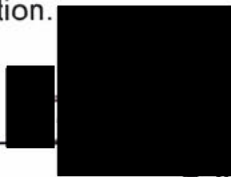
⁷ 1983 (4) 736 (D) at 750 D

⁸ (Case No: CCT/38/07 [2008] ZACC 6

non-delivery or incorrect charges cannot describe notwithstanding any contention to the contrary by Wozani.

[33] Everything above considered, the application for further discovery in terms of Rule 35(7) ought to succeed. Again, and insofar as costs are concerned, I do not think that the facts support a punitive cost order against Wozani. In the result I make the following order:

1. Wozani is directed to comply with the Notice in terms of Rule 35(3) within 10 days of date hereof;
2. Should Wozani fail to comply with paragraph 1 above, Mkhondo Oil will be entitled to approach this Court on the same papers, duly supplemented, for an order in terms of which the claim of Wozani is struck out, and further, in terms of which the defence of Wozani's to the counterclaim is struck out;
3. Wozani is liable for the payment of this application.


 B A MASHILE
 JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 MPUMALANGA DIVISION, MBOMBELA

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Date of Judgment:

09 May 2024