

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 7439/2020

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

10 July 2024



ERIKA COETZER

Applicant

and

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

Respondent

In re:

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

Plaintiff

and

INVESTMENT AUTO GROUP (PTY) LIMITED

1st Defendant

GAVIN ANTHONY SMITH

2nd Defendant

ERIKA COETZER

3rd Defendant

JUDGMENT

Mdalana-Mayisela J

Introduction

- [1] The applicant (as third defendant in the action) has brought the application in terms of Rule 35(7) of the Uniform Rules of Court compelling the respondent (as plaintiff in the action) to discover and make available the documents listed in the applicant's Rule 35(3) notice served on 11 October 2022, in accordance with Rule 35(2); and the application in terms of Rule 21 compelling the respondent to provide further and better particulars. The applications are opposed by the respondent. The Deputy Judge President has directed that the two applications be heard together with the issue of costs in the previous two similar applications.

Factual background

- [2] In March 2020, the respondent instituted the action for damages against the first defendant, second defendant and applicant. The applicant is sued as a surety for the debt of the first defendant. The basis for the respondent's claim is a Master Sale Agreement ("MSA") concluded between the respondent and the first defendant on 13 July 2017. The first and second defendants have not entered an appearance to defend. The action is defended by the applicant.
- [3] In June 2020, the respondent applied for a default judgment against the first and second defendants. On 10 December 2020 the default judgment was granted against the defendants, including the applicant. The respondent abandoned the whole default judgment in terms of Rule 41(2) on 21 April 2021. The

default judgment was rescinded on 23 August 2022 on the basis that it was erroneously granted against the applicant.

[4] The applicant served a notice in terms of Rule 35(3) of the Uniform Rules of Court on the respondent on 11 October 2022. The respondent replied to the aforementioned notice on 25 October 2022. On 10 November 2022, the applicant brought the application in terms of Rule 35(7) to compel further and better discovery. The respondent filed an answering affidavit in the Rule 35(7) application on 7 December 2022. The applicant filed a replying affidavit in the Rule 35(7) application on 15 December 2022.

[5] On 11 October 2022, the applicant served a request for trial particulars. On 25 October 2022, the respondent replied to the request for trial particulars. The applicant brought the application in terms of Rule 21 to compel further and better particulars on 15 November 2022. The respondent filed the answering affidavit on 7 December 2022. The applicant's replying affidavit was filed on 15 December 2022.

Application for further and better discovery

[6] The pleadings in the action are closed. The issues in dispute between the parties in the action include the following:

[6.1] Whether there was a breach of warranty as provided for in clause 6.1.2 (i.e. a warranty that the dealer will in each instance be able to give free and unencumbered title to the goods concerned to the bank);

[6.2] The cause of the respondent's alleged damages; and

[6.3] Whether it prejudiced the applicant as a surety in a manner which serves to release her as a surety.

[7] On 11 October 2022, a notice in terms of Rule 35(3) was served upon the respondent's attorney of record. The applicant believes that, in addition to the documents disclosed in the respondent's discovery affidavit, there are additional documents which may be relevant to any matter in issue, in the possession of the respondent or under its control or custody. Briefly, the additional documents sought by the applicant are related to the following:

[7.1] The signed finance application submitted by Papa Mbodji to the respondent, preceding the instalment sale agreement concluded on 11 April 2019;

[7.2] The credit assessment conducted by the respondent, in respect of Papa Mbodji, as prescribed by the National Credit Act, prior to the respondent entering into the instalment sale agreement with Mbodji;

[7.3] The debit order signed by Mbodji;

[7.4] The payment history in respect of the instalment sale agreement concluded between the respondent and Mbodji;

[7.5] The confirmation by the respondent, as envisaged in clause 3 of the MSA relied on, that the first defendant should sell the vehicle described in paragraph 10 of the particulars of claim to it;

[7.6] Documents evidencing payment by the respondent of the purchase price of the vehicle, as alleged in paragraph 13 of the particulars of claim;

[7.7] The respondent's documentation requirements, applicable as at April 2019, as envisaged in clause 5.1.1 of the MSA;

[7.8] The respondent's approval conditions, applicable as at April 2019, as envisaged in clause 5.1.1 of the MSA; and

[7.9] The registration certificate as envisaged in clause 5.3 of the MSA.

[8] On 24 October 2022, the respondent replied to Rule 35(3) notice. It made available to the applicant the final financial approval of Mbodji, affordability assessment for Mbodji, identity document of Mbodji, debit order authorization, statement of account, instalment sale agreement, proof of payment, and NATIS document.

[9] It also stated that *'save for the documents that are made available herein, the remainder of the documents sought are irrelevant to the disputes that arise for determination, are confidential and privileged, and further protected in terms of the Protection of Personal Information Act 4 of 2013 ("POPI Act").'*

[10] The respondent also filed an affidavit in reply to Rule 35(3) notice wherein it repeated the contents stated in paragraph [9] above.

[11] The object of mutual discovery is to give each party before trial all documentary material of the other party so that each can consider its effect on his own case and his opponent's case and decide how to carry on his proceedings or whether to carry them on at all. Another object is to enable each party to put before the court, all relevant documentary evidence.¹

[12] Rule 35(3) provides that *'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.'*

[13] Rule 35(7) provides that:

"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."

¹ Crown Cork & Seal Co Inc and Another v Rheem SA (Pty) Ltd and Others 1980 (3) SA 1093 (W) at 1095.

[14] The applicant in her Rule 35(7) application seeks *first*, that the respondent discovers the documents listed in the Rule 35(3) notice dated 11 October 2022, in the manner prescribed by Rule 35(2). Rule 35(2) provides that:

“The party required to make discovery shall within 20 days or within the time stated in any order of a judge make discovery of such documents on affidavit in accordance with Form 11 of the First Schedule, specifying separately-

- (a) such documents and tape recordings in the possession of a party or such party’s agent other than the documents and tape recordings mentioned in paragraph (b);*
- (b) such documents and tape recordings in respect of which such party has a valid objection to produce;*
- (c) such documents and tape recordings which a party or such party’s agent had, but no longer has possession of the date of the affidavit.*

A document shall be deemed to be sufficiently specified if it is described as one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

[15] In reply to Rule 35(3) notice the respondent did not deny possession of documents sought in Rule 35(3) notice. In terms of Rule 35(1) the respondent is required to specify on oath the documents and tape recordings in its possession or under its

control '*relating to any matter in question in such action*'. In terms of Rule 35(2)(b) it is obliged to specify separately such documents and tape recordings in respect of which it has a valid objection to produce. In its reply to Rule 35(3) notice it has failed to specify which documents are irrelevant or confidential or protected in terms of POPI Act. Although a privileged document need not be discovered, it must nevertheless be described in a separate schedule and the respondent has failed to do so. It was necessary for the respondent to also state the nature of the privilege it is relying on, and it has failed to do so. I find that its reply to Rule 35(3) notice is not in accordance with Rule 35(2) read with Form 11 of the First Schedule.

- [16] The respondent has a burden to adduce evidence that the documents referred to in paragraph [9] above are irrelevant or privileged or protected in terms of POPI Act.² The applicant is required to satisfy the Court on a balance of probabilities that the aforementioned documents are relevant or not privileged.³ The non-compliance by the respondent with the requirements of Rule 35(2) causes prejudice to the applicant by making it difficult for her to discharge onus, and unable to enforce her right in terms of Rule 35(10). It also makes it difficult for the Court to determine whether the defences raised by the respondent in this application

²Centre for Child Law v The Governing Body of Hoerskool Fochville (156/2015) [2015] ZASCA 155; [2015] 4 ALL SA 571 (SCA); 2016 (2) SA 121 (SCA) (8 October 2015) para [18].

³Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd 1971 (4) SA 589 (W) at 595.

are sustainable. Accordingly, the application to compel further and better discovery should succeed.

[17] *Second*, the applicant in her Rule 35(7) application seeks the order compelling the respondent to make the documents referred to in paragraph 1 thereof, but for a final financial approval of Mbodji document; paragraph 2 thereof, save for affordability assessment for Mbodji document; paragraphs 5, 7 and 8 thereof available for inspection. The said documents are mentioned in sub-paragraphs [7.1], [7.2], [7.5], [7.7] and [7.8] above.

[18] The respondent in reply to rule 35(3) notice tendered to make available for inspection the documents mentioned in paragraph [8] above, save for documents which are irrelevant, confidential or privileged or protected in terms of POPI Act. It has not adduced any evidence on the contention that the documents it objected to make available for inspection are irrelevant or confidential or privileged or protected in terms of POPI Act.

[19] A Court will not make an order against the party to produce a document that cannot be produced or is privileged or irrelevant.⁴ The respondent has not specified which documents are irrelevant or privileged or protected by POPI Act. In the circumstances, I am unable to determine whether the documents required for inspection are irrelevant or protected in terms of POPI Act or privileged. In my view the respondent should first make a

⁴ Centre for Child Law *supra*.

discovery in the manner prescribed by Rule 35(2) read with Form 11 before the applicant can give a notice for aforementioned documents to be produced for inspection. In the premises, I am not granting the order compelling the production of the aforementioned documents for inspection.

Application to compel further and better particulars

[20] On 11 October 2022 a request for further particulars for purposes of trial was served on the respondent's attorney of record. On 25 October 2022 an answer to the request for further particulars was received.

[21] According to the applicant the aforementioned answer is inadequate. She alleged that she is prejudiced in her preparation for trial. She seeks the order compelling the respondent to provide the further particulars sought in paragraphs 1.1; 1.2; 12.1 to 12.4; 15.4; and 18.1 to 18.4.1 of the applicant's request for further particulars served on the respondent on 11 October 2022. The further particulars sought are as follows:

“1.1 Precisely what was the Plaintiff's “documentation requirements” at the time of entering into the agreement with Mbodji? If such requirements were in writing, a copy is required.

1.2 Precisely what was the Plaintiff's “approved conditions”, or “approval conditions”, at the time of entering into the agreement with Mbodji? If such conditions were reduced to writing, a copy thereof is required.

12.1 *The Third Defendant pleaded that the MSA provides that:*

12.1.1 *the Plaintiff would confirm to the First Defendant that it wanted to enter into an agreement with a stated customer;*

12.1.2 *the Plaintiff would nominate the person to whom the vehicle would be delivered;*

12.1.3 *the vehicle would only be delivered against fulfillment of the Plaintiff's documentation requirements and approval conditions;*

12.1.4 *the First Defendant would procure the registration of the vehicle in the name of the Plaintiff as the registered title holder thereof, prior the Plaintiff effecting payment of the purchase price to the First Defendant.*

12.2 *The Plaintiff has denied the aforesaid allegations.*

12.3 *Is it the plaintiff's case that the MSA does not contain the aforesaid terms? If so, precisely which of the terms contended for do not form part of the MSA?*

12.4 *Is it the plaintiff's case that:*

12.4.1 *It did not confirm to the First Defendant that it wanted to enter into an agreement with Mbodji, prior to doing so?*

12.4.2 *It did not nominate Mbodji as the person to whom the vehicle had to be delivered;*

12.4.3 It did not have documentation requirements and approval conditions at the time of entering into an agreement with Mbodji?

12.4.4 The vehicle was delivered to Mbodji without its documentation requirements and approval conditions being fulfilled?

12.4.5 The First Defendant did not procure the registration of the vehicle in the name of Mbodji, prior to the plaintiff effecting payment of purchase price to the First Defendant?

.....

15.4 Precisely what were the Plaintiff's documentation requirements and approval conditions at the time of delivery of the vehicle to Mbodji? If in writing, a copy thereof is required.

.....

18.1 The Third Defendant pleaded that the MSA provides that:

18.1.1 The vehicle would be delivered to the customer against fulfilment of the bank's documentation requirements and approval conditions:

18.1.2 The First Defendant would procure that the Plaintiff was registered as the title holder of the vehicle prior to the Plaintiff effecting payment of the purchase price.

18.2 The Plaintiff has denied these allegations.

18.3 Is it the Plaintiff's case that the MSA does not contain the aforesaid terms?

18.4 *the plaintiff admits that the MSA does contain such terms, the Third Defendant requires particulars of the following:*

18.4.1 the Plaintiff's documentation requirements and approval conditions at the time of it concluding an agreement with Mbodji. If such requirements were in writing, a copy thereof is required;"

[22] Rule 21 provides that:

"(1) Subject to the provisions of subrules (2) and (4) further particulars shall not be requested.

(2) 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.

.....

(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."

[23] The Court retains a discretion to grant or refuse an order for the delivery of further particulars. The applicant is not entitled to an order compelling a reply as of right, but she must set out sufficient information in the application to enable the Court to consider whether or not to exercise its discretion in her favour.⁵ She bears

⁵ Van der Walt v Van der Walt 2000 (4) SA 147 (E) at 150E-F.

the onus of satisfying the Court that the particulars are strictly necessary and that she is entitled to them.⁶

[24] In reply to sub-paragraphs 1.1 and 1.2 of the request for further particulars the respondent contended that the applicant is not entitled to such particulars or documents, *inter alia* on account of the fact that:

[24.1] Such information does not form part of the disputes that arise for determination in the action. The applicant impermissibly conflates the relationship between the bank and the dealer, and the bank and its customer;

24.2] The documents cannot be obtained through Rule 21; and

[24.3] Beyond such response, the particulars requested are not strictly necessary for the applicant to prepare for the trial, alternatively are irrelevant for determination of matter, further alternatively constitutes impermissible interrogatories to which the plaintiff is not obliged to submit.

[25] The applicant in her replying affidavit stated that she has received the further particulars (documentation requirements and approval conditions) she sought in paragraphs 1.1 and 1.2 of her request for further particulars from the respondent's answering affidavit filed in the application for further and better discovery.

⁶ Jansen v Jansen 1979 (4) SA 809 (W) at 811.

Therefore, it is not necessary for this Court to determine whether she is entitled to the aforementioned further particulars.

[26] In Paragraphs 12.1 to 12.1.4 the applicant repeated the terms of the MSA pleaded in the particulars of claim relating to delivery of the vehicle to a nominated person and the payment of the purchase price to the first defendant. Paragraph 12.2 refers to the bare denial of the same by the respondent. In paragraph 12.3 the applicant enquired whether *'is it the Plaintiff's case that the MSA does not contain the aforesaid terms? If so, precisely which of the terms contended for do not form part of the MSA?'* In paragraph 12.4 the applicant sought further particulars relating to MSA terms denied by the respondent.

[27] Further particulars may only be sought for purposes of preparation for trial as are strictly necessary. A party cannot, however, be required to give particulars in relation to a mere denial, i.e. 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.⁷

[28] The pleadings must be phrased in such a manner and have such particularity that they enable the other side to know what the case of his or her opponent is. It does not mean that the pleading must give such particularity which tend to be evidence or prove the case of the pleader. The pleading should state every fact which it would

⁷ Swart v De Beer 1989 (3) SA 622 (E) at 625.

be necessary for the pleader to prove in order to support his or her right to obtain judgment of the Court.⁸ The purpose of particulars for trial is not to elicit evidence or information which will emerge on cross-examination.⁹

[29] The further particulars sought by the applicant in the paragraphs mentioned in paragraph [26] above are not strictly necessary for the preparation for trial. The applicant is in possession of the MSA. The MSA document speaks for itself. The interpretation thereof will be done by the trial Court. Further, the particulars sought are in relation to the MSA terms placed in issue by the respondent's bare denial, and the applicant is not entitled to them.

[30] In paragraph 15.4 of the request for further particulars, the applicant asked what were the respondent's documentation requirements and approval conditions at the time of the delivery of the vehicle to Mbodji? The applicant in her replying affidavit stated, *'it needs to be stated that the respondent has filed an answer to an application to compel discovery of documentation reflecting its documentation requirements and approval conditions.'* The applicant has received the information she alleged is necessary for preparation for trial.

[31] In paragraphs 18.1 to 18.1.2 the applicant repeated the terms of the MSA pleaded by her. In paragraph 18.2 she referred to the

⁸ Oraclem Health (Proprietary) Limited v The Hollard Life Assurance Company Limited & Another (31338/2013) [2023] ZAGPJHC 469 (7 May 2023).

⁹ Von Gordon v Von Gordon 1961 (4) SA 211 (T) at 213.

denial by the respondent of the aforesaid terms. In paragraph 18.3 she enquired whether it is the respondent's case that the MSA does not contain the aforesaid terms. In paragraph 18.4 to 18.4.1 she required the respondent to furnish her with the documentation requirements and approval conditions at the time it concluded an agreement with Mbodji.

[32] The contents of paragraphs 18.4 and 18.4.1 are the repetition of the contents of paragraphs 1.1 and 1.2 of the request for further particulars. I have already dealt with the further particulars required in the aforesaid paragraphs in paragraph 25 above.

[33] The further particulars sought by the applicant in paragraph 18.3 are not strictly necessary for preparation for trial. The applicant is in possession of the MSA. The MSA document speaks for itself. Further, the applicant is not allowed to elicit details of evidence that would be canvassed at trial.

[34] I conclude that the applicant has failed to discharge onus of satisfying the Court that the further particulars are strictly necessary and that she is entitled to them. In the premises, the application to compel further and better particulars must fail.

Costs

[35] The applicant is successful in the application to compel further and better discovery and therefore, she is entitled to costs of the application.

- [36] The applicant has not succeeded in the application to compel further and better particulars and therefore, she must pay the costs of the application.

The costs of previous applications

- [37] The applicant brought the application to compel further and better discovery dated 19 March 2021; and the application to compel further particulars for trial dated 30 March 2021 (“previous applications”). The previous applications were set down for 20 May 2021. They were heard by Siwendu J and her judgment was delivered on 24 May 2021. Siwendu J removed the previous applications from the roll, and she ordered the respondent to pay the costs of the hearing.
- [38] It is common cause that the wasted costs incurred in pursuing the previous applications were not determined by Siwendu J. The applicant filed the affidavit and heads of argument on this issue. The respondent filed no papers on this issue. The applicant seeks the costs of the previous applications for the following reasons. The respondent obtained a default judgment against the applicant on 10 December 2020. It did not serve the default judgment on the applicant. The action has a duplicate file on CaseLines. The judgment was uploaded on the duplicate file. It was not uploaded on the main file. The applicant and her attorney were not aware of the existence of a duplicate file, and they were not invited on it. The respondent’s attorney filed an affidavit in terms of the

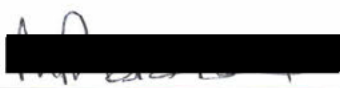
Practice Directive of this Division declaring that no duplicate file for the action exists on CaseLines.

- [39] The previous applications were brought after the default judgment was obtained. The applicant submitted that if the respondent disclosed the existence of the duplicate file, or the judgment, neither of the previous applications would have been issued.
- [40] After the applicant became aware of the default judgment, her attorney wrote to the respondent's attorney recording that the previous applications were abortive. The respondent persisted that the previous applications had to proceed and compelled the applicant to file replying affidavits. It also persisted that the action must proceed to trial. Siwendu J refused to entertain the previous applications because the Court had become *functus officio* and its authority over the subject-matter had ceased.
- [41] In conclusion on the issue of costs, I find that the respondent caused the applicant to incur wasted costs in pursuing the previous applications. The respondent had a duty to serve the default judgment on the applicant and to disclose the existence of a duplicate file, and it failed to do so. I accept the applicant's submission that if the respondent disclosed the existence of the duplicate file, or served the judgment, neither of the previous applications would have been issued.

ORDER

[42] Accordingly, the following order is made:

1. The respondent is ordered to discover all the documents listed in the applicant's notice in terms of Rule 35(3), in the manner prescribed by Rule 35(2) of the Uniform Rules of Court read with Form 11 within 10 days of service of this order upon its attorneys of record by the applicant's attorneys of record.
2. The respondent shall pay the costs of the application to compel further and better discovery.
3. The application to compel further and better particulars is dismissed with costs.
4. The respondent is ordered to pay the wasted costs (excluding hearing costs) of the application to compel further and better discovery dated 19 March 2021.
5. The respondent is ordered to pay the wasted costs (excluding hearing costs) of the application to compel further and better particulars dated 30 March 2021.



MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division,
Johannesburg

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be on 10 July 2024.

Appearances:

For the Applicant: Adv WHJ Van Reenen

Instructed by: Bezuidenhout Lak Attorneys

For the Respondent: Adv JC Viljoen

Instructed by: Rossouws, Lesley Inc