

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 44776/2021

1.	REPORTABLE: YES/ NO
2.	OF INTEREST TO OTHER JUDGES: YES/NO
3.	REVISED: YES / NO
DATE: 16 JULY 2024	
SIGNATURE OF JUDGE: [REDACTED]	

In the matter between:

BUFFELSDRIFT WILD AND NATURE RESERVE (PTY) LTD

APPLICANT

and

MAGALIES WATER BOARD

RESPONDENT

JUDGMENT

MEADEN A J

On 10 JUNE 2024 upon hearing counsel for the parties and considering the papers, I handed down the following Order:

[1] *"The Respondent / Plaintiff's application for condonation for the late service and filing of the opposing / answering affidavit, be condoned;*

[2] *the Respondent / Plaintiff be ordered to properly comply with the Applicant / Defendant's Notice in terms of Rule 35(3) and within 10 (ten) days of this Order; by delivering the documents called for, to the Applicant / Defendant in respect of the following paragraphs of the Rule 35(3) Notice:*

2.1 *Paragraph 1;*

2.2 *Paragraph 3;*

2.3 *Paragraph 4;*

2.4 *Paragraph 6;*

2.5 *Paragraph 7;*

2.6 *Paragraph 10;*

2.7 *Paragraph 11;*

2.8 *Paragraph 12;*

2.9 *Paragraph 13.*

[3] *That should the Respondent / Plaintiff fail to comply with paragraph 2 above, the Applicant/ Defendant be entitled to approach the above Honourable Court on the duly supplemented papers for further relief.*

[4] *That the Respondent / Plaintiff pay the costs of this Application, such costs to include, but not be limited to the costs of Counsel on Scale B in terms of Rule 69 of the Uniform Rules of Court."*

The above Order was handed down, taking consideration of the undermentioned:

- [1] Magalies Water Board (Respondent/Plaintiff - hereinafter to be referred to as the Plaintiff), is the primary supplier of water to the Buffelsdrift Wild and Nature Reserve (Pty) Limited (Applicant/Defendant - hereinafter referred to as the Defendant).
- [2] In instituting action proceedings under the above Case Number back on 06 September 2021, the Plaintiff sought to restrict or suspend its water supply to the Defendant, pending payment of a claim in the amount of R724 022.11 together with interest accruing thereon at 7% per annum and a contribution on legal costs on the scale as between attorney and client.
- [3] In so doing, the Plaintiff annexed as "Annexure A" to its Particulars of Claim, the "*Magalies Water Aansoek Vorm om Drinkbare Water*" duly concluded by / on behalf of the Defendant and dated 30 April 1997 and which the Plaintiff referenced as being the written agreement entered into between the above litigants in re the supply of drinkable water by the Plaintiff to the Defendant.
- [4] Premised on the aforesaid, the Plaintiff in its Particulars of Claim alleged that the Defendant breached the aforesaid contract in failing to make payment on account timeously and also failed to comply with the provisions of The National Water Act.
- [5] The Defendant admitted the above contract, but denied failing making payment on account and since February 2021. The Defendant pleaded that following on the conclusion of the aforesaid agreement, the Plaintiff failed to install a water meter at the point of supply located at the boundary of the Defendant's property and in breach of the Plaintiff's contractual and statutory obligations instead relied on a water meter located approximately 1.2 kilometres distant from the above point of supply and in measuring consumption.
- [6] The Defendant in its Plea further alleged that on 12 June 1997, it reached agreement with the Plaintiff regarding the Plaintiff being responsible for the maintenance of the water supply pipeline and related equipment up to the supply connection point at the boundary of the Defendant's property. This water connection was construed as being a temporary water supply connection, pending the installation of a final permanent connection point which the Plaintiff would locate adjacent to Wallmansthal Road at the border of the Defendant's property and upon the main waterline being completed. Reference is also had in the Defendant's Plea to the Plaintiff in February 2000 requesting that the final permanent connection point of water supply to the Defendant's property be

moved away from the Wallmansthal Road with such permanent connection then to be located on the Downbern side of the Defendant's property and upon the Downbern locality being connected with a water supply. The Defendant pleaded that on 28 September 2000 it reached agreement with the Plaintiff regarding the temporary installation being discontinued and water supply on a permanent basis then to be received by the Defendant from the Downbern side and which the Plaintiff had failed in the interim to attend on.

- [7] The Defendant also avers that the Plaintiff failed and/or refused to effect the necessary repairs to and maintenance of the aforesaid temporary water supply pipeline and related equipment. In failing so to do, the pipeline developed substantial leaks downstream from the metering point and which resulted in substantial water loss along the pipeline and prior to it reaching the point of supply at the boundary of the Defendant's property.
- [8] In consequence of the Plaintiff failing to sustain and maintain the pipeline, the Defendant pleaded that it overpaid the Plaintiff on water consumption in the amount of R1 504 452.95 and further at its cost, facilitated and also undertook repairs and maintenance on the pipeline in the amount of R146 492.42. The aggregate of the Defendant's counterclaims is in the sum of R1 650 945.37 (R1 504 452.95 plus R146 492.42).
- [9] The Plaintiff also denied the above locality of its meter, averring that it is situated at the point of supply within the Defendant's premises and further that the Defendant is obligated to maintain the above pipeline and accessories. According to the Plaintiff, it is responsible for the pipeline and accessories up to the supply point and within the Plaintiff's property. Further, the Plaintiff denied being accountable on any damages and expenses sought to be claimed by the Defendant in its above Counterclaim.
- [10] *Ex facie* the aforesaid, the scope of the above action extends well beyond that of the Plaintiff's claim for non-payment on account; with the parameters, scope and extent of the written and tacit contractual terms and agreements entered into between the Plaintiff and the Defendant being placed in issue. To this is to be added; the disposition and standing of temporary and permanent water supply, including the locality thereof, the maintenance of the temporary water supply pipeline and the installation of a permanent water supply line (initially to be located adjacent the Wallmansthal Road and thereafter on the Downbern side of the Defendant's property).

- [11] Aside from the Plaintiff's commitment and obligation to supply the Defendant with drinkable water, the remaining issues arising and attributed in so doing on a temporary and permanent basis and further on payment due for such water supplied and consumed, have been placed in issue.
- [12] *Ex facie* the above pleadings, the battle lines have been drawn between the Plaintiff and the Defendant. Pleadings have closed and the above litigants are pursuing pre-trial preparation and have requested and are in the midst of discovery.
- [13] The object of discovery has been enunciated in ***Durbach vs Fairway Hotel Ltd 1949 3SA 1081 (SR) at 1083*** to relate in ensuring that before trial, both parties are made aware of all the documentary evidence that is available. Further, the underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries the duty to put those documents in proper order for both the benefit of his / her adversary and the court and in anticipation of a trial action (***Copalcor Manufacturing (Proprietary) Limited vs GDC Hauliers (Pty) Limited 2000) (3SA 181 (W) at 1941***). Discovery assists the parties in court in discovering the truth and by doing so, helps towards a just determination of the case. (***Air Canada vs Secretary of State for Trade (1983) TWO AC 394 at 445 – 446.***)
- [14] **Rule 35 (1)** of the Uniform High Court Rules requires a party to make discovery of all documents relating to any matter in question in such action. This extends then to the discovery of documents which may either directly or indirectly enable the party requesting the Affidavit of Discovery either to advance his or her own case or in damaging the case of his / her adversary.
- [15] Relevance of documentation forming the subject of Discovery is a matter for the court to decide, having regard to the issues arising between the parties in the matter before it. The ambit of discovery flows from the pleadings in which the parties delineated the matters in question as between them (***Copalcor Manufacturing (Pty) Ltd vs GDC Hauliers (Pty) Ltd at SA 181 (W) at 194 A***).
- [16] Upon consideration of the Plaintiff's Discovery delivered on 10 February 2023, the Defendant concluded such Discovery Affidavit was incomplete and aside from notifying the Plaintiff's attorneys of record in writing hereof on 20 February 2023, the Defendant's attorney also caused a comprehensive Rule 35(3) Request for Further and Better Discovery to be served on the Plaintiff and on the above date.

- [17] This then culminated in the Plaintiff serving a fresh Discovery Affidavit on 22 May 2023, containing *inter alia*; an identical “*First Schedule*” listing discovered documents contained in the Plaintiff’s initial discovery dated 20 February 2023 and which was then accompanied by an Affidavit deposed to by the Plaintiff’s legal Manager – Mr P J Morwane and wherein he dealt with the Defendant’s above Request for Further and Better Discovery drawn in terms of Rule 35(3).
- [18] In deposing to this Rule 35(3) Answering Affidavit, the Plaintiff dealt with each separate request for discovery as raised in the Defendant’s above Rule 35(3) Notice and in instances provided additional discovered documentation. On this basis, further documentation was discovered at the instance of the Plaintiff and in re the requests contained in paragraphs 2, 8, 9 and 14 of the Rule 35(3) request. Further, discovery of additional documentation referred to ad paragraphs 5 and 15 of the above request was confirmed as not being available by the Plaintiff.
- [19] In relation to the remainder of the Rule 35(3) request and specifically documentation requested ad paragraphs 1, 4, 6, 7, 10, 11, 12 and 13, it was averred on behalf of the Plaintiff that such documentation is “*irrelevant to any pleaded issue in dispute between the parties. Accordingly, the disclosure sought is refused*”.
- [20] Further, in respect of documentation sought ad paragraph 3 of the 35(3) Notice, the Plaintiff responded to the effect, “*The request contained in this paragraph is so broad that, in the circumstances; “Plaintiff (Respondent) cannot reasonably be expected to identify those documents which are relevant and those that are not; as the Defendant (Applicant) does not make mention of which local authority they refer to. Accordingly, such disclosure is refused*”.
- [21] No further substantive insight was provided on behalf of the Plaintiff in motivation of its above reply to the aforesaid comprehensive Rule 35(3) Request for Further and Better Discovery by the Defendant.
- [22] Having due regard to the scope and extent of the dispute at hand and as framed in the pleadings, the aforesaid advices recorded on behalf of the Plaintiff and in refusing further and better Discovery are best described as being bald, incomplete and unsustainable. This then also disregards the scope, application and intention of Rule 35(1) of the Uniform High Court Rules and as summarised above.

[23] *Ex facie* the pleadings, disputes have *inter alia* arisen regarding:

- 23.1 The scope and extent of the agreements reached between the Plaintiff and Defendant;
- 23.2 the location of temporary and permanent water supply and connection thereof to the Defendant's property;
- 23.3 the meter point in measuring the water consumption;
- 23.4 the maintenance of this water supply line;
- 23.5 the volume of water supplied together with available water pressure;
- 23.6 the extent of the water consumed and to be paid for by the Defendant;
- 23.7 the financial claim and counterclaim raised by the parties against each other.

What is recorded above is not to be construed as being exhaustive of the full extent of the disputes at hand and arising in this matter.

[24] This then stands to be reconciled with each of the requests raised by the Defendant in its aforesaid Rule 35(3) notice and which the Plaintiff has in turn, as above, refused to favourably respond on and in providing the requested further and better discovery.

24.1 With regard to item 1 of the above Rule 35(3) Request, the Defendant "sought":

"Any and all documents, including but not limited to maps, registered servitudes, written advice and/or opinions, plans and correspondence, relating to Plaintiff's planning of the Downbern area water network from the inception of the Defendant's development at Buffelsdrift Wild and Nature Reserve to date".

24.1.1 Reference is had in the exchanged pleadings to the Plaintiff envisaging supplying the Defendant with a permanent water supply from the Downbern area / side. The above requested information clearly falls within the scope and ambit of the issues and disputes arising in this matter and as raised in the pleadings exchanged. The production of discovered material in terms of this request for further and better discovery may prove or disprove the planning in re how and where the Plaintiff intended to locate the water connection points vis-à-vis its water network and specifically in providing the Defendant with water supply and then further in establishing whether the existing connection from which the Defendant is deriving its water supply is a temporary or permanent connection.

24.1.2 The documentation sought in this Request for Further and Better Particulars may very well advance the case of the Defendant, or damage the case of the Plaintiff and cannot be construed as not being relevant to any pleaded issues in dispute between the parties as averred by Mr P J Morwane in his Answering Affidavit to the Defendant's Rule 35(3) Notice. It is further premature for Mr Morwane to aver that such requested documentation is not relevant, this remaining to be determined by the Court in the course of trial of this matter in due course.

24.2 Regarding item 4 of the Rule 35 (3) request, the Defendant sought:

"Any and all documentation and correspondence between the Plaintiff and the Plaintiff's own appointed engineers relating to the water network in connection thereof, the Defendant's development at Buffelsdrift Wild and Nature Reserve, from the inception thereof to date."

24.2.1 In facilitating and thereupon coordinating the actual supply of water (and be that on a temporary or permanent basis) by the Plaintiff to the Defendant, this would be directly linked to the Plaintiff's water network. The Plaintiff's engineers would have identified, laid out and coordinated such connection of water supply.

24.2.2 Again the above requested additional discovery clearly falls within the scope and ambit of the disputes arising as between the Plaintiff and Defendant and as framed in pleadings exchanged. To aver that documents sought in terms of this request are irrelevant to any pleaded issue in dispute between the parties in the prevailing circumstances, is clearly unsustainable on the part of the Plaintiff and the relevance of the above requested additional discovery would be considered at court on trial.

24.3 Ad Paragraph 6 of the Rule 35(3) Notice, the following is requested:

“Any and all documentation, correspondence and written instructions directed from the Plaintiff to their own engineers, relating to the water network and the connection thereafter; the Defendant’s development at Buffelsdrift Wild and Nature Reserve from the inception thereof to date.”

24.3.1 *Ex facie* the pleadings, a dispute has arisen regarding the actual water connection/ point (temporary and permanent) and who is accountable in maintaining the waterline and equipment up to this connection.

24.3.2 The discovery of documentation as requested is indeed relevant *vis-à-vis* that summarized in the pleadings at hand and the refusal on the part of the Plaintiff to provide the requested discovery here is unreasonable and disregards the requirements of Rule 35(1) of the Uniform High Court Rules.

24.4 Ad paragraph 7 of the Rule 35(3) request, the Defendant sought:

“Any and all reports commissioned, prepared and or received by or on behalf of the Plaintiff, relating to the availability of water within the supply area of the Defendant’s development at the Buffelsdrift Wild and Nature Reserve, from the initial Application by the Defendant for water rights to date”.

- 24.4.1 The Plaintiff is the Defendant's primary supplier of drinkable water. The Plaintiff has per the pleadings provided a temporary water connection and further engaged in re the provision of a permanent water connection running adjacent to the Wallmanthal Road alternatively in the locality of Downbern. Again the above request for discovery of documentation clearly falls within the scope and ambit of the action. The availability of water and the related water pressure within the Plaintiff's water supply network influences the determination of water connection points and including that provided by the Plaintiff to the Defendant.
- 24.4.2 Again, the Plaintiff's conclusion that such requested documents are irrelevant in the dispute arising between the parties is unsustainable and runs contrary to the application of Rule 35 (1) of the Uniform High Court's summarised above.
- 24.5 Ad Paragraphs 10, 11, 12 and 13 of the Rule 35(3) Notice, the Defendant identifies various categories of documents that it is seeking further and better discovery from the Plaintiff.

"10. Any and all correspondence between the Plaintiff and the Department of Roads, and/or Local Municipality relating to any water networks servitudes, and/or work to be done in respect of the water network which affects roads bordering the Defendant's development at the Buffelsdrift Wild and Nature Reserve."

- 24.5.1 In the pleadings, specific reference is had to the proposed introduction of a permanent pipeline connecting the Plaintiff's water supply to the Defendant and along the Wallmansthal Road. It is anticipated that such water pipeline would be located within a servitude registered for this purpose. The allegation on the part of the Plaintiff that such requested documentation sought is irrelevant to any pleaded issue and dispute between the parties is in the prevailing circumstances contradicted by that contained in the pleadings and misplaced. Such an answer on the part of the Plaintiff also runs contrary to the criteria and application of Rule 35 (1) of the Uniform High Court Rules.

24.6 Ad paragraph 11 – 13 of the Defendant's Request for Further and Better Discovery, the following is recorded:

"11. All and any correspondence between the Plaintiff and Applicant who originally applied for the sub-division of the property at the Buffelsdrift Wild and Nature Reserve".

"12. Any and all documentation, including but not limited to reports and written comments, prepared by or behalf of the Plaintiff, relating to the original application for the sub-division of the property at the Buffelsdrift Wild and Nature Reserve."

"13. "Any and all correspondence between the Plaintiff and the Town Planners, in respect of the property, water network and water availability in respect of Buffelsdrift Wild and Nature Reserve."

24.6.1 As a primary supplier of water to the Defendant, in the course and scope of town planning and subdivision attendances; the Plaintiff would have been engaged and in establishing whether a necessary water supply to the Defendant's property was available and with that, how this was to be connected going forward on a temporary and a permanent basis. Issues relating to temporary and permanent water connections are referenced in the pleadings exchanged as between the Plaintiff and Defendant. The underlying circumstances and contractual terms attributed to the Plaintiff's supply of water to the Defendant have been placed in issue in this ongoing action and the provision of documentation as framed in the Defendant's above requests, contrary to the Plaintiff's conclusions here may very well be relevant and in establishing the availability and conditions of water supply as well as the locality thereof.

24.6.2 On being able to frame and pursue the above cause of action, as well as defend the counter claim raised; the Plaintiff ought to be in possession of records dating back to the inception of its contracted relations with the Defendant and with that; documentation contending with its water supply and the availability thereof to service the Defendant's needs. Further, the relevance of such documentation on discovery will be determined by the court hearing the trial of this matter.

24.7 Ad paragraph 15 of the Plaintiff's Request for Further and Better Discovery the following is recorded:

"15. Any and all internal reports, by or on behalf of the Plaintiff relating to water distribution via the present connection to the development at the Buffelsdrift Wild and Nature Reserve".

24.7.1 The Plaintiff, in reply hereto; avers that such reports are not available. This begs the question how and following on the initial "MAGALIES WATER AANSOEK VORM OM DRINKBARE WATER" which the Plaintiff refers to as the underlying contract for its supply of drinkable water to the Defendant, the Plaintiff then went about processing such Application and ensuing contract and which is now the subject of dispute. In facilitating and providing such water connection (be that temporary or otherwise), there would have been internal interaction on the approval of this application and further on the related roll-out of a connection and which may have been recorded in internal communications / correspondence - "**Internal Reports**" of the Plaintiff. In answering on the above Request for Further and Better Discovery, the Plaintiff does not confirm that such document is not in the possession of the Plaintiff. In the absence of so doing and upon being requested to provide such documentation in terms of a Request for Further and Better Discovery, the Plaintiff has accordingly been ordered so to do.

24.8 Ad Paragraph 3 of the Defendant's Rule 35(3) Notice, the following is requested:

"Any and all correspondence between the Plaintiff and the Local Authority relating to the Defendant's development at the Buffelsdrift Wild and Nature Reserve, from the inception thereof to date."

24.8.1 This documentation relates to issues raised in the pleadings and may either directly or indirectly enable the Defendant to advance its own case or damage the case of the Plaintiff. The documentation sought is clearly identifiable and the allegation by the Plaintiff to the effect that "*The request contained in this paragraph is so broad, that, in the circumstances the Plaintiff cannot*

reasonably be expected to identify those documents which are relevant and those that are not"; as the Defendant does not make mention of which Local Authority they refer to is best described as being disingenuous. The Plaintiff knows full well in which Municipal locality the Defendant's property is located, alternatively can locate and establish this.

- [25] The above answers tendered by the Plaintiff in re the Defendant's Request for Further and Better Discovery in terms of Rule 35(3) on paragraphs 1,3,4,6,7,10,11 and 13 disregard and fall short of the requirements and application of Rule 35(1) of the Uniform High Court Rules and as summarised above. Accordingly the above order was handed down by my person.

ORDER

Accordingly. I make the following order:

- [1] The Respondent / Plaintiff's application for condonation for the late service and filing of the opposing / answering affidavit, be condoned;
- [2] the Respondent / Plaintiff be ordered to properly comply with the Applicant / Defendant's Notice in terms of Rule 35(3) and within 10 (ten) days of this Order; by delivering the documents called for, to the Applicant / Defendant in respect of the following paragraphs of the Rule 35(3) Notice:
- 2.1 Paragraph 1;
 - 2.2 Paragraph 3;
 - 2.3 Paragraph 4;
 - 2.4 Paragraph 6;
 - 2.5 Paragraph 7;
 - 2.6 Paragraph 10;
 - 2.7 Paragraph 11;
 - 2.8 Paragraph 12;
 - 2.9 Paragraph 13.

[3] That should the Respondent / Plaintiff fail to comply with paragraph 2 above, the Applicant/ Defendant be entitled to approach the above Honourable Court on the duly supplemented papers for further relief.

[4] That the Respondent / Plaintiff pay the costs of this Application, such costs to include, but not be limited to the costs of Counsel on Scale B in terms of Rule 69 of the Uniform Rules of Court.



MEADEN J R

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 16th day of July 2024

Appearances

For Applicant / Defendant:	Adv C.M Dredge
Instructed by:	Hendrik Malan Attorneys
For Responded / Plaintiff:	Adv N Kekana
Instructed by:	Leepile Attorneys Inc.
Date of Hearing:	10 June 2024
Date of Judgment:	16 July 2024