



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7606/2021

In the matter between:-

DISCOVERY LIFE LIMITED

APPLICANT/PLAINTIFF

and

SUNIL PRANPATH

RESPONDENT/DEFENDANT

JUDGMENT

ANNANDALE, AJ

[1] This is a judgment in respect of two interlocutory applications which, somewhat ironically given the identity of the plaintiff, both relate to the issue of discovery. The plaintiff seeks an order in terms of rule 35(7) compelling further and better discovery, whilst the defendant seeks to have that application set aside as an irregular step, whilst simultaneously resisting the compelling application on its merits.

[2] The plaintiff, Discovery Life Limited, instituted action seeking to recover some R16 million it paid to the defendant pursuant to claims made under two insurance policies which afforded disability and income protection cover in the event the defendant became totally and permanently unable to perform his nominated occupation as an accountant.

so throughout. The plaintiff contends that the defendant conducts business through various entities and the income earned by those entities was probably generated through the defendant's work activities. The defendant, who describes himself as "a professional accountant presently working in a limited capacity", disputes this.

[4] The central issue in the action is therefore whether the defendant did indeed become totally and permanently unable to follow his nominated occupation as a result of suffering from depression from 2016 onwards.

[5] The plaintiff has issued and the defendant has replied to two notices in terms of rule 35(3). The plaintiff contends that the responses are non-compliant in various respects. It consequently seeks production of various categories of documentation which it contends contain financial information which will provide evidence of the defendant's earnings. Although the defendant has raised a number of issues, in the main, he resists production mainly on grounds of relevance and that certain of the requested documents do not exist.

[6] In relation to the defendant's main grounds of opposition then, the real issues are therefore whether the documents are relevant and, where they are said not to exist, whether I am entitled to go behind that statement in the affidavits filed in response to the rule 35(3) notices.

[7] The applicable principles are well established and need be stated only briefly. Relevance is a matter for the court having regard to the pleadings and does not depend on the parties' views of the matter.¹ It is not necessary that the documents requested must be relevant, only that they may either directly or indirectly enable the party requiring discovery either to advance their own case or to damage the case of their adversary. Documents fall within that category if they may fairly lead a litigant to a train of inquiry which may have either of these consequences.² Issues of relevance must be approached with common sense.³

¹ *Swissborough Diamond Mines (Pty) Ltd v The Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 316J to 317 A.

² *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N) (*Rellams*) at 564 A .

³ *R v Matthews and others* 1960 (1) SA 752 (A) at 758 A-B.

[8] Discovery affidavits are *prima facie* conclusive, save where it can be shown that there are reasonable grounds for believing that the other party has or had the relevant documents in their possession or is false in their assertions. Such reasons may derive from (i) the discovery affidavit itself, (ii) the documents referred to therein, (iii) the pleadings, (iv) admissions made by the deponent to the affidavit, and (v) the nature of the case or the documents in issue.⁴

[9] As disputes regarding discovery must perforce be decided with reference to the issues as they emerge from the pleadings, it is as well to begin with the consideration of the pleaded allegations and defences. What follows is a synopsis of the undisputed facts and the issues relevant to the applications before me as they emerge from the pleadings.

The pleaded allegations

[10] The defendant lodged claims under both policies in June 2013 as a result of orthopaedic injuries he suffered when he was knocked over by a motor vehicle whilst walking. The plaintiff accepted and paid these claims.

[11] In February 2015, the defendant lodged a mental and behavioural disability claim under both policies, alleging that he suffered from major depression and chronic pain which prevented him from working. The plaintiff accepted the truth and correctness of the statements and approved payment of the benefits in December 2016.

[12] It is a contractual requirement for a valid claim that the insured must in fact have suffered and continue to suffer a loss of the majority of his income. Such claims are therefore constantly under review because it is possible that an insured might recover and regain the ability to work, in which event the insured is no longer entitled to receive disability and income protection benefits. The plaintiff conducts those reviews by requiring insured persons to complete claim review forms and questionnaires periodically.

[13] Subsequent to the initial benefits being paid, the defendant completed three continuous claim forms in 5 June 2018, 27 August 2019 and 25 August 2020. In all of

⁴ *Relams* fn 2 *supra* at 560G.

the reviews, the defendant represented that he was totally unable to work as an accountant, was not working as an accountant and did not foresee that he would return to work at any specified date or time. A quality of life questionnaire completed by the defendant on 28 September 2019 was to the same effect.

[14] The plaintiff pleads that in truth however, the defendant was able to work and continued to work throughout the period 7 August 2019 to 25 August 2020 and so the responses to the review forms and questionnaire were misrepresentations. This is refuted by the defendant.

[15] The defendant also denies the facts and inferences on which plaintiff's allegation that the claims were fraudulent is based, which are, in summary, as follows. Surveillance undertaken during the period 7 October 2019 to 18 October 2019 by the plaintiff's employees revealed that the defendant was earning an income and pursuing the practice of an accountant from his place of work at 143 King Shaka Road, KwaDukuza during normal working hours. In addition, in September 2020, the defendant refused to provide the plaintiff with his income tax assessments and bank statements for the period 2012 to 2017 despite contractual obligations on him to do so. The plaintiff pleads that as the requested information would show the defendant's earnings or the lack thereof, it can be inferred from his refusal to supply the documentation, that he was in fact able to work and did so continuously since at least December 2016 when the claims arising from major depressive disorder were first approved.

[16] The battlelines thus drawn, trial preparation got underway and skirmishes regarding discovery ensued. By virtue of the issues in the rule 30 application and certain of the defences raised in the application to compel further and better discovery, applications, it is necessary to detail the procedural chronology of the parties' engagements on the subject of discovery.

The discovery notices, responses and applications

[17] The plaintiff regarded the defendant's initial discovery affidavit as inadequate. Rule 35(3) entitles any party which believes that there are, in addition to documents disclosed in the counter party's discovery affidavit, other documents which may be relevant to any matter in question in the position of any party thereto, to give notice

requiring the counterparty to make these available for inspection or state on oath that such documents are not in his possession, in which event the counterparty is required to state their whereabouts if known.

[18] The plaintiff consequently issued a notice in terms of rule 35(3) dated 14 February 2023 (the first rule 35 (3) notice). The defendant did not respond to the first rule 35 (3) notice timeously. On 22 March 2023, the plaintiff instituted an application in terms of rule 35 (7), in which it sought an order compelling the defendant to respond to the first rule 35(3) notice (the application to compel).

[19] After the institution of the application to compel, and on 4 May 2023, the defendant filed an affidavit in response to the first rule 35(3) notice but did not make a tender in respect of the costs of the application to compel. Some three weeks later, on 22 May 2023, the defendant also filed an affidavit opposing the application to compel, despite the fact that its purpose had been fulfilled the moment the defendant's response to the first rule 35(3) was filed.

[20] This rather unusual course of action was prompted by the plaintiff's attorney having indicated that they wanted the costs of the application to compel. The defendant's answering affidavit was not confined to costs but raised various grounds on which it was contended that the application to compel ought to be dismissed with punitive costs, thus prompting the plaintiff's attorney to file a replying affidavit.

[21] The first rule 35(3) notice contained certain typographical and descriptive errors. The plaintiff issued a second rule 35 (3) notice on 15 August 2023 (the second rule 35(3) notice) in which these errors were corrected and other documentation not listed in the first notice was requested. On 22 August 2022, the defendant responded to the second notice on affidavit.

[22] Thereafter, on 2 February 2024, the plaintiff instituted an application to compel the production of certain of the documents referred to in the rule 35(3) notices, or for him to state on oath that he does not possess them (the application for further and better discovery).

[23] The defendant issued a rule 30 notice in respect of the application to compel further and better discovery on 12 February 2024, but then filed an affidavit opposing

that application on 10 April 2024, before instituting a separate application under rule 30 to set it aside on 15 April 2024 (the rule 30 application).

The rule 30 application

[24] It is logical to begin with the rule 30 application, as it will bring an end to the application to compel further and better discovery if it is upheld.

[25] The gist of the complaint in the rule 30 application is that the application to compel further and better discovery is irregular (not to mention an abuse of process) because it is a duplication of the application to compel which is opposed, still pending and has not yet been set down despite the fact that the papers are complete.

[26] There are two insurmountable obstacles in the way of the rule 30 application.

[27] First, while rule 30(1) entitles a party to a cause in which an irregular step has been taken to apply to court to set it aside, rule 30(2)(a) provides that such an application may be made only if the applicant has not taken a further step in the cause with knowledge of the irregularity. Having taken the further step of filing an answering affidavit in the proceedings said to be irregular, the defendant was precluded from relying on the claimed irregularity. The defendant's contention that the prohibition created by rule 30(2) relates only to additional steps taken before the issue of the notice in terms of rule not thereafter, is incompatible with the text of the rule, which speaks in terms to steps taken before the application, and is also contrary to authority.⁵

[28] Second, the defendant's case loses sight of the fact that rule 35 (7) which deals with enforcement of the obligation to make discovery, including responding to a notice in terms of rule 35(3), finds application in at least two distinct scenarios. The first is where the person to whom the notice has been issued fails to respond to it; the second is where the recipient of the notice replies, but the response is not compliant with rule 35. The application to compel was of the first type, the application for further and better discovery is of the second.

[29] The relief sought in the application to compel was an order directing the defendant to file a response to the first rule 35(3) notice, not the production of

⁵ *Graham v Law Society Northern Provinces* 2016 (1) SA 279 (GP) at 287 E-F.

documents specified in the notice. That application became moot, save for the issue of the costs, once the defendant filed his response to the first rule 35(3) notice. It does not amount to a duplication of the present application to compel the production of specified documents listed in both 35(3) notices.

[30] This also means that there was no point in setting down the application to compel, unless either party wanted to pursue a costs order. It was open to the defendant to set down the application if he so chose, but neither party set the matter down. That is unsurprising, as the costs of an opposed motion would likely exceed any costs which might notionally be recoverable

[31] It follows that the rule 30 application is misconceived and falls to be dismissed. I will deal with the costs implication of that result at the end of this judgment.

[32] Turning to the application to compel further and better discovery, the defendant raised what amounted to a special plea which, if upheld, would bring an end to the application without needing to consider the specific grounds upon which it was resisted.

Objection to attorney as deponent

[33] The defendant seeks the dismissal of the application on the basis that the plaintiff's attorney deposed to the founding affidavit. The defendant asserts that this is improper unless exceptional and compelling circumstances exist, because rule 35 (7) entitles "the party desiring discovery" to apply to court.

[34] It has long been established that it is the litigant and not their legal representative which ought to depose to the discovery affidavit, or an answer to a notice under rule 35(3) unless special circumstances exist.⁶ The reason for this principle is that it is ordinarily it is the litigant, and not their attorney, who has knowledge of the existence and extent of the documentation. The rule upon which the defendant relies is therefore not a blanket one which applies to affidavits in all applications. It stems from and is grounded in the foundational principle is that an affidavit must be deposed to by a competent witness, which is someone with the necessary knowledge of the matters to which they speak, and, where they speak to

⁶ *Rellams* fn 2 *supra* at 558 B- 559 D.

those matters on behalf of someone other than themselves, the necessary authority to do so.

[35] A founding affidavit in an application to compel a response to a discovery notice, or to compel further and better discovery, stands on a different footing to a discovery affidavit. A deponent to the founding affidavit in such proceedings needs knowledge only of what has happened in the litigation. The plaintiff's attorney who has represented the plaintiff throughout and been personally involved in the conduct of all the proceedings, plainly has the relevant knowledge here.

[36] There is nothing in the text of rule 35(7) which precludes an attorney acting for a party to bring the application on its behalf as happened here. The deponent was not himself seeking discovery, but was acting on behalf of his client. There is nothing improper in that.⁷ The point in *limine* therefore fails and I turn to the substance of the application.

The documents requested and the defendant's stance

[37] The plaintiff seeks production of various categories of financial information from 2012 to date in respect of the defendant, the firm or sole proprietorship through which he trades or traded under the name of Sunil Pranpath Inc, and three corporate entities of which the defendant is the sole member and or director. The corporate entities are a property owning close corporation 24-28 Fenton Road CC (registration number B1992/025727/23), Pranpan Investments CC or (Pty) Limited (registration number B2003/068508/23), a consultancy business, and a personal liability company with the same name as the sole proprietorship, Sunil Pranpath Inc (registration number K2018/617674/21). In an effort to minimise confusion, I will refer to the corporate entity as the personal liability company and to the sole proprietorship as such.

[38] The defendant's response to the rule 35(3) notices and his opposition to the application to compel further and better discovery covered a broad range which included: that it would be too costly for him to obtain the documents, some of the requested documents had already been obtained under subpoena, there were duplications in the two rule 35(3) notices, that certain of the documents did not exist,

⁷ *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705 H-J, and 706 E-G.

and almost all the documents were not relevant for various reasons. In relation to those items where relevance was contested, the defendant in his response to the rule 35(3) notices did not state whether he was in possession of the documents or had at any time been in possession, and, if he was no longer in possession, disclose the current whereabouts of those documents. It is necessary to deal with each of these defences, although some can be disposed of briefly.

Expense

[39] The plaintiff does not require the defendant to produce documents which are not in his possession, merely that he disclose their present whereabouts if known. The defendant's complaints regarding costs are therefore unfounded.

Documents obtained under subpoena

[40] Rule 35 imposes an obligations on litigants to make proper discovery. The issue of a subpoena by one of the parties does not do away with this duty. In addition, where a party has obtained some documents under a subpoena, it is not possible for that party to know whether the information it has obtained from third parties is all the information which is relevant in the absence of proper compliance with rule 35 by their counterparty. The defendant's blanket objection to making discovery of documents which may have been obtained under subpoena is therefore unsound in principle.

[41] It is also problematic on the facts as the defendant mounts the argument primarily in respect of bank statements on the predicate that all the relevant bank accounts have been subpoenaed. Apart from the bald statement in the defendant's answering affidavit to the effect that his personal First National Bank account had been subpoenaed, there is no evidence before me as to which accounts of which entities have been subpoenaed.

[42] The defendant knows the identity of all bank accounts and the whereabouts of all bank statements of which the plaintiff seeks production or disclosure on oath. Where the defendant is unable to produce the actual bank statements, rule 35(3) requires him to state on oath the bank and account number details of each account operated by the various entities identified in the notice.

[43] Only once the defendant has complied with this obligation, will it be apparent whether the plaintiff has received complete bank account information pursuant to the subpoena as it has already issued.

[44] I find that the plaintiff is correct when it contends that in relation to bank statements, the completeness of disclosure is important and one cannot establish an accurate picture of total earnings without knowing that the source documentation is complete

Duplications

[45] The defendant contends that there were duplications in the documents requested between the two rule 35(3) notices and this renders the application to compel discovery an abuse of process. The alleged duplications are said to relate to documents requested from the corporate entities and the sole proprietorship.

[46] The first notice misdescribed the corporate entities in various respects, or gave their incorrect incorporation numbers. Pranpran Investments was described as Pranpath Investments while the registration number specified for 24-26 Fenton Road CC indicated that it ought to have been incorporated in the 11th Century. The defendant responded in each case that to the best of his knowledge these entities did not exist.

[47] The first notice also called simply for documents relating to "Sunil Pranpath Inc". It did not refer to the registration number of the personal liability company. The defendant responded that Sunil Pranpath Inc was the trading name he used for his sole proprietorship, but did not produce any documents for the sole proprietorship as he treated the request as one relating to the personal liability company, despite his response that he concern mentioned in the notice was a firm.

[48] The second notice gave the full correct names and registration numbers of the corporate entities, including the personal liability company. There was thus no duplication.

[49] Even if there had been duplications in the rule 35(3) notices, this could only constitute an abuse of process insofar as this would require the defendant to respond

twice to the same request, the present proceedings relate to the production of documents in respect of which there is no duplication. The plaintiff will only be entitled to an order of production if I find that the defendant's response to the notices was insufficient. If that is found, there can be no question of the application to compel production of those documents being an abuse of process.

Documents said not to exist

[50] While the bulk of the defendant's objections to disclosure are on the grounds of relevance, there are certain limited categories of documents which the defendant contends do not exist. It is convenient to consider these more limited contentions first.

[51] In the affidavits filed in response to the rule 35(3) notices and to the application to compel further and better discovery, the defendant stated that the following categories of documents listed in the notices "do not exist":

- a. payslips issued by any of the entities to the defendant
- b. all the documents requested in respect of the personal liability company;
- c. annual financial statements whether final or in draft and audited or unaudited exist for any of the entities or the proprietorship; and
- d. management accounts of the sole proprietorship

[52] The plaintiff submits that it is appropriate for the court to go behind these statements for two reasons. First, the defendant's terse statements to this effect are not in compliance with rule 35. This, the plaintiff argues, is because the defendant does not state in that documents have never existed, it is confined to the present tense. To comply with what the rule requires the defendant should therefore have stated that he was once in possession of the documents but is no longer so possessed and have disclosed their current whereabouts to the extent that they are known to him. Second, the nature of the documents mean they must have existed at some point.

[53] As to the first submission, it does not hold true across the board. Certain of the defendant's responses to the notices when read holistically convey that the documents

have never existed whilst others are open to the criticism levelled by the plaintiff. It is therefore necessary to consider each category on its own facts.

Personal payslips

[54] The defendant's statement that personal payslips do not exist is in my view intended to convey that the documents have never existed. It cannot be said that such documents must have existed at some point in time, particularly given the manner in which the defendant practiced as a sole proprietorship. I therefore find that there is no basis to go behind the defendant's discovery affidavits on this score. My view in this regard is strengthened by the fact that the plaintiff requested production of all contracts of employment between each of the entities and the defendant in the second rule 35 (3) notice and does not seek to compel production of those contracts, contenting itself with accepting the defendant's response to that no such documents exist.

All requested records of the personal liability company

[55] The plaintiff seeks production of the memorandum of incorporation, the annual financial statements, whether audited or unaudited, income tax returns and assessments, VAT returns, EMP 501 submissions and PAYE forms of this entity.

[56] The defendant's denial that any of these documents exist must similarly be taken to be a denial that they ever existed, both because he states that this corporate "was never transacted on or traded from" and due to his unequivocal statement that the only document which exists for the personal liability company is the CIPC document annexed to his second 35(3) response. In the case of these documents however, there is reason to go behind his categorical statements as the nature of the documents is such that there is reason to believe that the documents, or at least several categories of them, must either exist or have existed at some point in time.

[57] The personal liability company was incorporated in 2018. The CIPC document reveals that it was in business as at February 2023. Even if the entity was not trading, it still had a statutory obligation to submit annual returns. Those must have been based on some form of management accounting. Financial documents for the entity almost certainly must or did exist. Whether those documents would include all the categories listed in the rule 35(3) notice would depend on the nature of the financial documents

and the returns actually submitted, but the defendant can deal with that in a response on oath that complies with rule 35.

Annual financial statements, whether audited or unaudited

[58] The defendant's blanket denial that any annual financial statements exist for any of the entities or for the sole proprietorship is susceptible to both forms of criticism levelled by the plaintiff. It cannot be read as stating that annual financial statements have never existed and it cannot be that such documents have never existed as the sole proprietorship, 24-26 Fenton Road CC and Pranpran Investments are all business which have traded, and in the case of the latter entities are still doing business on the defendant's own showing and are therefore required to submit annual returns.

Management accounts of the sole proprietorship

[59] It will be recalled that in response to the first 35(3) notice which referred to Sunil Pranpath Inc without any details identifying this as a corporate entity, the defendant responded that this was the trading name for his sole proprietorship. His response to the request in that notice for the management accounts was that "the documents sought from Sunil Pranpath Inc do not exist".

[60] This response is likewise susceptible to both forms of criticism levelled by the plaintiff. It is the defendant's own case that the sole proprietorship traded or is still trading - his statements are capable of both interpretations. Consequently, the sole proprietorship was an enterprise that would have been liable for tax through income tax and value added tax and would have been accountable to the professional body regulating accountants. It is inconceivable that such a firm would not have maintained management accounting records, and have compiled financial statements for submission to the revenue service relating to its tax liabilities. In this regard, it is worth noting that the defendant's response to the request in the second rule 35(3) notice for the management accounts of all the corporate entities was to contest their relevance, not to deny their existence.

[61] I turn then to the issue of relevance.

[62] The defendant raised numerous objections on basis of relevance and it conduces to clarity to consider them by category, as the reach of some of the objections are general whilst others are specific.

Relevance of the entities

[63] The defendant disputes that the records of any of the entities are relevant. He does not deal directly with the plaintiff's request for the records of the sole proprietorship in his answering affidavit, preferring to deal with any reference to Sunil Pranpath Inc as a reference to the personal liability company. To the extent that this was intended to be a relevance objection to the records of the sole proprietorship under which he traded, that enterprise was, or is, one through which the defendant generated income and its records are plainly relevant.

[64] I turn then to deal with the documents request as it relates to the corporate entities and firm.

[65] Regarding the relevance of the records of the various corporate entities, the defendant asserts that these documents are irrelevant as the issue in the trial relates to his personal ability to earn an income. That line of resistance is ill conceived as it is the plaintiff's case that the defendant generates income through these entities.

The personal liability company

[66] It is not in dispute that the defendant is the sole member of this entity which he caused to be incorporated in 2018. Both the nature of the company and its date of incorporation are significant in determining relevance.

[67] A personal liability company is a form of corporate enterprise of which only professional persons may be members. Such companies are created to enable professionals to practice as such with the advantages a corporate structure can offer, whilst offering protection to their clients by rendering members personally liable for the debts of the company.

[68] This personal liability was incorporated in 2018, two years after the payment of benefits was authorised and at a time when, on the defendant's case, he was completely incapable of conducting a profession through this form of company. It is

still in existence, and, according to CIPC, still in business. It is therefore plainly relevant.

[69] To the extent that the defendant's relevance objection is based on his assertion that the entity never traded, the plaintiff is not obliged to take the defendant's word for that, and is entitled to either production or a compliant rule 35 response.

24 – 26 Fenton Road CC

[70] The plaintiff asserts that this entity owns the premises which is the office of the sole proprietorship. The plaintiff therefore contends that the defendant would be able to return income from his accounting practice to himself via rental payments to this property owning entity which is therefore likely to contribute to the defendant's net earnings ultimately derived from his accounting practice. On that basis, the plaintiff submits, the requested documents may be relevant to the main issue in the action.

[71] The defendant's relevance-based objection to production is that he does not earn an income from this entity. The defendant explained that this entity only owns a building and has a bank account to which rentals are paid and from which bond instalments are paid.

[72] In my view, the plaintiff is not merely required to accept the defendant's say so on this score. The plaintiff's allegation that the premises are the address of the defendant's accounting practice was met with a bare denial. The defendant chose not to disclose the identity of the tenant but by his own showing, the entity is generating an income. This contradicts his affidavit filed in response to the second notice, in which the defendant stated that the corporation was a non-trading entity.

[73] In the circumstances, I find that the documents requested may be relevant to the defendant's ability to earn an income as an accountant.

Pranpran Investments (Pty) Ltd

[74] In response to the second rule 35(3) notice, the defendant stated that he is an "active director" of this company which he described as a consultancy based in Stanger but resisted disclosure of its records on the basis that documentation for this entity is not relevant to any pleaded issue in dispute.

[75] The defendant chose not to disclose the nature of the consultancy or how it derives revenue. His affidavit in response to the second rule 35(3) notice stated however that this business was "operated and managed by my staff complement." The entity is therefore on the defendant's own showing one whose financial records may be relevant to the issue of the defendant's earnings and ought to be disclosed.

[76] The defendant also contested the relevance of various categories of documents in the request.

Relevance of financial documents generally

[77] The documents requested are incorporation documents, bank statements, management accounts, financial statements (whether audited or unaudited), tax submissions, assessments and returns, records relating to payment of staff and PAYE and EMP 501 returns.

[78] Counsel for the defendant submitted that the documents requested were all irrelevant because they are financial in nature and the central issue in the action was whether the defendant was unable to work, which was a medical question. It is not possible to view the issues in the action through such a narrow lens. What will be decisive of the plaintiff's claim is not the defendant's diagnosis but whether, as a fact, he is and was able to work notwithstanding the diagnosis.

[79] The documents requested, bar the incorporation documents, all bear directly on the income the defendant may have received either directly or through the entities and are therefore relevant to the central issue in the action.

[80] Insofar as the incorporation documents are concerned, the memoranda of incorporation will outline the relevant entity's governance structure, internal rules and procedures and relationships with shareholders. The document may therefore be relevant to the issues as it may cast light on the extent and nature of the defendant's direct or indirect involvement in these structures and benefits he may derive from any shareholding. The CK documents, which will show members, and changes in membership, may be relevant to the issue of the benefit, if any, the defendant derives from the corporations. The documents also contains VAT and tax numbers which

would be relevant to consideration of the corporation's tax liability, which in turn bears on the net benefit the defendant may derive from the corporation.

Bank statements not the only relevant financial documents

[81] In the alternative to the argument that financial documents were irrelevant, the defendant argued that the requested documents were irrelevant as they could tell the plaintiff no more than could already be ascertained from the bank statements which they had subpoenaed.

[82] There are two fundamental difficulties with this argument which have implications for certain other contentions raised by the defendant.

[83] The first is that there is no evidence that all the relevant bank accounts have been subpoenaed as I have already found. Second, the argument assumes both that bank statements can be comprehensively and coherently interpreted in the absence of source documents and that the statements are a full reflection of all the relevant transactions. Neither of these assumptions is sound. The nature of transactions reflected on a bank statement can frequently only be properly appreciated when viewed together with the underlying source documents, and cash transactions may not be reflected on bank statements.

Tax returns and income tax assessments (ITA 34s)

[84] The defendant resists disclosure of his personal provisional tax returns on the basis that they are not relevant to any pleaded issue. That is manifestly incorrect given that the central issue is the defendant's historical and current earning capacity. The income tax assessments are said to be a duplication of an earlier request but that request was likewise refused on the basis of relevance.

Documents for the period prior to December 2016

[85] Another general relevance objection relates to any documentation prior to December 2016 when the payment of benefits was approved. Before considering the objection at a level of principle, it is necessary to deal with a matter of detail.

[86] In its notice of motion, the plaintiff seeks production of documentation covering the period 1 January 2012 to the present. The first rule 35(3) notice requested documentation for that period but the second requested documents from 1 January 2014 to date. The first notice encompasses the request for the records of the sole proprietorship but it was the second notice which correctly described the corporate entities in respect of which production of documents is now requested.

[87] Neither of the parties raised this inconsistency in their affidavits or heads of argument, and the nature of his objection to producing prior period documents applies with equal force to the period 2012 to 2014 as it does to the period to 2012 to 2016. However, as the present application is to compel responses to documents previously requested as envisaged in rule 35(7), I propose to deal with the matter on the basis that it is not competent to order production of records of the corporate entities or documentation for the period prior to that stipulated in the second notice.

[88] It is nonetheless instructive to consider the prior period document request with reference to a 2012 starting date as this is a date which features in the pleadings and until I raised the discrepancy in argument, all parties had treated the requested as if it related to 2012 and addressed their relevance arguments on that basis.

[89] The plaintiff contends that prior period documents are relevant to establish a baseline of earnings against which subsequent earnings can be compared. It submits that the need to go back as far as 2012 arises from the fact the defendant's undisputed orthopaedic injuries, which are referenced in the pleadings, would have interfered with his earnings from 2014 onwards. The plaintiff submits that the defendant's earnings in 2014 and 2015 consequently do not reflect his full earning capacity but information from 2012 to 2014 would be expected to show the full extent of the defendant's unimpaired earnings.

[90] Any change, or an absence of change, in earnings before and after the defendant's alleged depression is therefore probative in relation to the question whether the defendant has in fact become totally and permanently unable to work as a result of depression.

[91] On the issues as defined in the pleadings that justification of relevance is compelling. I consequently find that the defendant's resistance to an order requiring

him to produce documents solely on the basis that they relate to a period before December 2016 is not justified.

[92] The date of incorporation of the personal liability company was 2018 and the defendant acquired the member's interest in the property owning close corporation in 2018. It therefore stands to reason that relevant documents prior to 2018 may not exist. The defendant did not oppose the requests for prior period documents on this basis and he can deal with these matters in a response on oath if necessary.

Rental agreement for 143 King Shaka Road

[93] The notice of motion referred to these premises being in Durban, whereas it is common cause that they are in KwaDukuza. The plaintiff consequently moved for an amendment to the notice of motion to correctly describe the location of the premises, which was not opposed by the defendant. It could in any event have occasioned no prejudice and that amendment was consequently granted.

[94] The defendant resists production of the lease agreement on the basis that it is not relevant to any pleaded issue. Given the express allegation in the particulars of claim that the defendant was observed by the plaintiff's investigators conducting the business of an accountant from that address whilst he was receiving benefits, the document is plainly relevant and must be disclosed.

[95] It follows that the plaintiff is largely entitled to the orders it seeks.

[96] That leaves only the question of costs in both applications.

Costs

[97] Counsel for the defendant submitted that the costs of the rule 30 application ought to be reserved for decision by the trial court. I can see no basis for such an

order. The application was fatally flawed for the reasons already articulated and entailed issues discrete from those with which the trial court will be concerned.

[98] The same submission was made in respect of the costs of the application to compel further and better discovery, this time on the basis that the trial court may ultimately determine that certain of the documents the plaintiff seeks were not in fact relevant, and so the defendant had been correct in resisting production. This determination, so the submission ran, could only be made by the trial court taking into account the fullness of the evidence as it ultimately unfolds.

[99] In my view it is not appropriate to add to the trial court's burden, which, judging by the proceedings thus far, is likely to be considerable. The application to compel further and better discovery was brought on the basis of every litigating party's procedural entitlement to proper disclosure as of right. The stance that the defendant has adopted until now has deprived the plaintiff of that entitlement. The costs implications of its stance need not therefore detain the trial court.

[100] In addition, the threshold for ordering production is that the documents *may* be relevant to an issue. Where the threshold has been met the plaintiff is entitled to disclosure. It follows that even if certain of the documents ultimately turn out not to be relevant, that does not necessarily mean that the application was bad or that the plaintiff ought to be deprived of the costs it was compelled to incur so as to enable it to exercise its right of to consider the documents and satisfy itself as to relevance.

[101] I consequently find that in respect of both applications, the costs ought to follow the result.

[102] Both parties were represented by experienced counsel, and the issues surrounding document production are plainly of importance in an action where the quantum for both parties is considerable. Costs on a scale C are therefore appropriate, and both parties asked for costs on that scale in the event that they were successful.

Order

[103] In the result I make the following order:

1. The defendant's application in terms of rule 30 under notice of motion dated 15 April 2024 is dismissed with costs on Scale C.
2. The defendant is ordered within ten (10) days either to produce or state on oath that he does not possess the following documents relating to the period 1 January 2014 to the present of each of the following corporate entities: 24-26 Fenton Road, CC (registration number B1992/025727/23); Sunil Pranpath Inc (registration number K2018/617674/21); Pranpan Investments CC or (Pty) Limited (registration number B2003/068508/23):-
 - 2.1 Their memoranda of incorporation or CK1 and CK2 documents.
 - 2.2 Their annual financial statements whether audited or unaudited.
 - 2.3 Their income tax returns and assessments.
 - 2.4 IRP 5 forms submitted by them to SARS reflecting income earned by the respondent.
 - 2.5 Their EMP 501 submissions.
 - 2.6 Their PAYE forms.
 - 2.7 Their VAT returns.
3. The defendant is ordered within ten (10) days either to produce or state on oath that he does not possess the following documents relating to the period 1 January 2014 to the present of each of the following corporate entities: Sunil Pranpath Inc (registration number K2018/617674/21); Pranpan Investments CC or (Pty) Limited (registration number B2003/068508/23).
 - 3.1 Their management accounts.
 - 3.2 Their bank account statements.

4. The defendant is ordered within ten (10) days either to produce or state on oath that he does not possess the rental agreement or rental agreements applicable to 143 King Shaka Road, KwaDukuza from 1 January 2014 to the present.
5. The defendant is ordered within ten (10) days either to produce or state on oath that he does not possess the following documents relating to the period 1 January 2012 to the present pertaining to the accounting firm business that he conducted under the trading name Sunil Pranpath Inc.
 - 5.1 Management accounts.
 - 5.2 Annual financial statements whether audited or unaudited.
 - 5.3 Bank account statements used in the conduct of the said accounting firm business.
6. The defendant is ordered within ten (10) days to produce the following documents.
 - 6.1 His personal provisional tax returns from 2012 to the present.
 - 6.2 His personal ITA 34 forms from 2012 to the present.
7. If the defendant states under oath that any of the documents itemised in paragraphs 2 to 6 of this order are not in his possession, then in his affidavit he must also state their whereabouts if known in compliance with rule 35(3).
8. The defendant is ordered to pay the costs of the plaintiff's application for further and better discovery under the notice of motion dated 2 February 2024 on Scale C.

A handwritten signature in black ink, appearing to be 'Annandale', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

ANNANDALE, AJ

JUDGMENT RESERVED:

25 October 2024

JUDGMENT HANDED DOWN:

1 November 2024

Appearances

For plaintiff :

A Lamplough SC

Instructed by:

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