

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 13158/2022

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

In the matter between:

MICHAEL HOWE

Plaintiff

(IDENTITY NUMBER 7[...])

and

PLATFORM 45 (PTY) LTD

Defendant

(Registration Number: 2008/000035/07)

JUDGMENT

MINNAAR AJ:

Introduction:

[1] On 23 September 2022, the plaintiff delivered a notice in terms of Rule 35(3) to the defendant (the parties are referred to as they are cited in the combined summons). This notice followed the defendant's discovery affidavit, which was delivered on 15 August 2022.

[2] In the Rule 35(3) notice, the plaintiff sought the following documents, in addition to the documents already discovered by the defendant:

- a. Item 1: Engagement letter, contract(s), and related documents and correspondence confirming the appointment of the auditors and their scope of work.
- b. Item 2: Engagement letter, contract and related documents and correspondence confirming the appointment of the valuer and its scope of work.
- c. Item 3: All correspondence between the defendant and/or the auditors with the valuer.
- d. Item 4: Written instructions from the defendant and/or the auditors to the valuer.
- e. Item 5: All documents provided by the defendant and/or the auditors to the valuer for purposes of preparing a valuation of the defendant's business.
- f. Item 6: The defendant's audited, alternatively reviewed, monthly financial statement for the 2019/20, 2020/21 and 2021/2022 financial years.
- g. Item 7: The defendant's audited, alternatively reviewed, annual financial statement for the period 1 November 2019 to present.
- h. Item 8: The defendant's management accounts for the period from 1 November 2019 to present.
- i. Item 9: The defendant's performance reports for each month from 1 February 2022 to present.
- j. Item 10: The defendant's budget for the 2022/23 and 2023/24 financial years.
- k. Item 11: The defendant's 5-year financial forecast from the 2021/22 financial year onwards.
- l. Item 12: Valuation(s) of the defendant's business as conducted by the valuer, including supporting documents/spreadsheets that show

inputs/assumptions and their sources, as well as a breakdown of relevant components of the valuation (e.g. each legal entity and each equity investment).

m. Item 13: Shareholders' resolution(s) and all other correspondence regarding any dividends paid by the defendant from 1 November 2019 to 30 November 2021.

n. Item 14: Payslips and proof of payment for Shannon Richards (the CEO's spouse) from 1 November 2019 to 30 November 2021 on the basis that indirect CEO compensation is akin to dividend compensation for favourable company performance (and therefore linked to the Defendant's valuation).

o. Item 15: Shareholders' resolution(s), documentation and correspondence regarding any equity investments (including but not limited to '201 deals') conducted by the defendant from 1 November 2019 to 30 November 2021.

p. Item 16: Shareholders' agreements for each equity investment (including but not limited to '201 deals') made by the defendant from 1 November 2019 to 30 November 2021.

q. Item 17: Pre- and post-money valuations for the defendant's capital raises for all equity investments (including but not limited to '201 deals') between 1 November 2019 and 30 November 2021, as well as capitalisation tables showing the defendant's equity stakes.

r. Item 18: Contracts and purchase orders from 1 November 2019 to the present for all of the defendant's clients spending more than R500 000.00 per year on the defendant's fees (e.g., Standard Bank, Investec, Anglo American, Healthforce, Netstar, Low&Behold, WTax etc.)

s. Item 19: Receipt for iPhone and accessories purchase made by the defendant at the iStore in Q1 2021 (i.e., the iPhone and accessories provided to the Plaintiff).

t. Item 20: Invoices issued by independent contractors like Pierré Smith and Barry Tandy (prior to Barry Tandy becoming a permanent employee of the defendant) and proofs of payment showing the defendant paying for these services.

u. Item 21: Invoices issued to the defendant by international suppliers (such as Litslink) and proof of payment showing the defendant paying for these services into bank accounts outside of South Africa.

[3] According to the plaintiff, the documents are relevant and necessary to determine the agreed market value as provided for in clause 3.2.6 of the agreement between the parties.

[4] On 9 October 2022, in response to the plaintiff's Rule 35(3) notice, the defendant caused a letter to be delivered to the plaintiff. In this letter, the defendant sought clarity on the relevance of the documents requested by the plaintiff. The plaintiff's attorney responded to this letter, and further correspondence was exchanged between the parties.

[5] Absent a proper response to the Rule 35(3) notice, the plaintiff proceeded with a Rule 35(7) application to compel the defendant to comply. The defendant did not file an opposition to the Rule 35(7) application. Instead, the defendant filed an answering affidavit to respond to the plaintiff's Rule 35(3) notice. In this answering affidavit, the defendant questioned the relevancy of the documents requested. The plaintiff delivered a replying affidavit. In the replying affidavit, the relevancy of the requested documents was addressed. This prompted the defendant to prepare a supplementary answering affidavit. By way of application, leave was sought to introduce this supplementary answering affidavit into the record. The plaintiff did not object hereto, and the defendant's supplementary answering affidavit was allowed into the record. This affidavit dealt with the defendant's responses to the aspect of relevance as raised in the replying affidavit.

[6] The Rule 35(7) application was set down on the Trial Interlocutory Roll, where it came before me. Strictly speaking, the Rule 35(7) application was unopposed as the answering affidavit was delivered in response to the Rule 35(3) notice. After debating the matter with counsel and having considered the approach by counsel for the defendant that the court should not adopt an overly formalistic approach, the court allowed the parties to argue on the Rule 35(3) notice and the documents specified therein. In essence, the court had before it the version of the plaintiff and

the defendant concerning the requested documents. In addition, both sides presented extensive heads of argument and were ready to argue the application.

Rule 35(3) and Rule 35(7):

[7] In terms of the provisions of Rule 35(3), if any party believes that there are, in addition to documents or tape recordings disclosed in Rule 35(1) and (2), other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in 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.

[8] 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.

[9] Rule 35(3) is not intended to be a fishing expedition. The subrule intends to provide for a procedure to supplement discovery which had already taken place but which is alleged to be inadequate.¹

[10] The documents requested in the subrule must be relevant. Relevance is determined from the pleadings and not extraneously therefrom.² The test for relevance, as laid down by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1982) 11 QBD 55 has often been applied. In *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A, the full court accepted the following *dicta* with approval:

¹ *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515D

² *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 200 (3) SA 181 (W) at 194A

*"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."*³

- [11] An affidavit of discovery is conclusive, save where it can be shown either:
- a. From the discovery affidavit itself;
 - b. From the documents referred to in the discovery affidavit;
 - c. From the pleadings in the action;
 - d. From any admission made by the party making the discovery affidavit;
- or
- e. The nature of the case or the documents in issue;
- that there are reasonable grounds for supposing that the party has or has had other relevant documents in its possession or power.⁴

- [12] The onus to demonstrate relevance rests on the party seeking discovery or inspection.⁵

The pleadings:

- [13] It is common cause that on 1 June 2020, the plaintiff and the defendant concluded a written engagement agreement ("the agreement").

- [14] It is the plaintiff's pleaded case that the relevant terms of the agreement were:

³ See also *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others* 1999 (2) SA 279 (T) at 316D-H

⁴ *Federal Wine & Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749H.

⁵ *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 597 and 598

- a. The defendant appointed the plaintiff as a service provider to provide general advisory services on an ongoing basis, and as the defendant may request from time to time [clause 1].
- b. The agreement was to endure for 18 months from 1 June 2020 (“the commencement date”) to 30 November 2021 (“the termination date”) [clause 3.5.1].
- c. In return for services rendered by the plaintiff, the defendant would remunerate the plaintiff in terms of the agreed base fee for the periods 1 June 2020 to 31 December 2020, 1 January 2021 to 30 June 2021 and from 1 July 2021 [clause 3.2.1].
- d. Any portion of the agreed base fee not paid by the defendant in cash would accrue as convertible note, bearing 10.25% interest per annum up to 1 June 2021, and interest at the rate of 8.5% per annum thereafter (“the convertible note”) [clause 3.2.3].
- e. The convertible note would be convertible into ordinary shares of the defendant, in whole but not exceeding 15% of the defendant’s total ordinary shares, at the defendant’s election, with input and agreement from the plaintiff, at or around the termination date [clause 3.2.4].
- f. Any uncovered portion of the convertible note, plus accrued interest, shall be payable by the defendant to the plaintiff in cash (“unconverted balance”) [clause 3.2.5].
- g. If conversion of the convertible note into ordinary shares does not occur at the defendant’s election, then the unconverted balance shall be the greater of:
 - i. The converted note, including accrued interest; or
 - ii. The discounted market value of the shares due to the plaintiff if the convertible note had been converted into the defendant’s ordinary shares in terms of clause 3.2.4 of the agreement (“the agreed market value”) [clause 3.2.6].
 - iii. The agreed market value (to be calculated in accordance with the formula set out in clause 3.2.6) would be determined by an independent and qualified valuer appointed by the auditors and would be equal to the fair market value per ordinary share of the defendant at that time less:

1. 31 %, being equal to the entry-price discount offered to the plaintiff in Tranche-1 and Tranche-2 of the convertible note as per clause 3.2.4 of the agreement; and
 2. 50% of the accrued interest on the convertible note at that time [clause 3.2.6].
- iv. The defendant shall pay the plaintiff the unconverted balance on the termination date.

[15] It is further common cause that the agreement terminated by effluxion of time on 30 November 2021.

[16] The plaintiff pleads that on the termination date, the defendant elected not to convert the convertible note into ordinary shares and, as such, clause 3.2.6 of the agreement applied and the plaintiff was entitled to be paid the unconverted balance, which shall be the greater of R5 527 546.27, together with interest calculated at the rate of 8.5% per annum calculated from 30 November 2021; or the agreed market value of its shares, together with interest at the rate of 7.25% per annum calculated from 13 January 2022.

[17] It is then the plaintiff's pleaded case that the defendant breached the terms of the agreement by failing to take the necessary steps as contemplated by clause 3.2.6 of the agreement to determine the agreed market value of the ordinary shares and failing to pay the plaintiff the unconverted balance on the termination date.

[18] The plaintiff seeks the following relief in his particulars of claim:

- a. An order rectifying the agreement by substituting "3.3.2" with "3.2.4" wherever it appears in clause 3.2.6 of the agreement.
- b. An order compelling the defendant to act in accordance with clause 3.2. and cause the auditor to appoint an independent and qualified valuer to determine the agreed market value of the ordinary shares in terms of clause 3.2.6 of the agreement within 10 days of the date of the order.
- c. Upon completion with prayer (b) above, an order that the defendant pays the plaintiff in South African Rands to a nominated appointee and bank

account specified by the plaintiff, the unconverted balance, being the greater of:

- i. The sum of R5 527 546.27, together with interest calculated at the rate of 8.5% per annum calculated from 30 November 2021; or
 - ii. The agreed market value of the shares, together with interest calculated at the rate of 7.25% per annum, calculated from 13 January 2022.
- d. Costs of suit.

[19] In paragraph 6.2 of the amended plea, the defendant pleaded:

“In relation to the requirement of the determination of the Fair Market Value of the shares in question referred to in clause 3.2.6 of the agreement, and in paragraphs 13.7, 17 and 18.2.2 of the particulars of claim and the relief sought by the plaintiff in its prayer (b), an initial estimate determination of the Fair Market Value of the shares was performed by the auditor of the defendant in January 2022, according to which the market value thereof was in the range between R25 million and R30 million. Subsequent thereto, an independent and qualified valuer appointed by the auditor finalised its determination of the Fair Market Value of the shares, which was an amount of R31.25 million.”

[20] Paragraph 6.2 of the amended plea is repeated in the responses pleaded to the defendant’s alleged breach (paragraphs 7, 8, 10 and 11 of the amended plea).

[21] The plaintiff did not replicate to the defendant’s plea. On this aspect, counsel for the defendant argued that the plaintiff chose not to challenge the allegation in paragraph 6.2 of the amended plea, by for instance, asserting that the value determination referred to therein had been improperly or incorrectly prepared and issued, or that it suffered from some or other defect, all of which had to be pleaded in detail. As such, it was submitted, the plaintiff has thus not raised any factual or legal issue concerning the validity of that valuation, nor concerning its accuracy, other than to leave the allegations in paragraph 6.2 of the plea in dispute. It was submitted that there is thus no factual challenge on the pleadings as to the validity, accuracy or basis of that determination. The consequence, so was it submitted, is that the plaintiff is not entitled to obtain production of documents under Rule 35(3) to enable

it to go in search of a basis to amend its particulars of claim later, or to prepare a replication, dealing with the quality or validity of the value determination alleged by the defendant in its plea.

[22] In support of its submissions, counsel for the defendant relied on the judgment in *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* 2023 (5) SA 439 (WCC). *Ingenuity* deals with Rule 32 and whether it is proper to deliver a replication where summary judgment is pursued. In *Ingenuity*, the defendant raised a special plea calling for the delivery of a replication. The facts of *Ingenuity* are discernible from what is before me.

[23] In terms of the provisions of Rule 25 of the Uniform Rules of Court, no replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleadings shall be necessary, and issues shall be deemed to be joined and pleadings closed in terms of Rule 29(b).

[24] It is trite that it is only necessary to deliver a replication when the plaintiff intends:

- i. Admitting allegations in the plea;
- ii. Admitting (confessing) but at the same time avoiding allegations in the plea; or
- iii. Responding to a special defence such as one based on prescription.

[25] It is further trite that a replication is not necessary when the plaintiff intends to dispute the allegations in the plea. The absence of a replication amounts to a denial of all the allegations in the plea.

[26] Applying the above principle to the facts of the case before me, and absent a replication, the defendant's plea that there was due compliance with clause 3.2.6 of the agreement is denied, and it remains in dispute. The contrary to the defendant's approach is clear: the plaintiff did not accept the valuation done and is seeking better discovery to enable himself to substantiate his claim and to prepare for trial.

Documents requested in terms of the Rule 35(3) notice:

[27] Before I deal with each of the items in the Rule 35(3) notice, it is imperative to note that the defendant only provided a detailed response to the items listed under Items 1, 2, 3, 4, 5 and 12 thereof. For the remainder of the items, the defendant, in its supplementary answering affidavit, states that some of the items may have become relevant had the plaintiff decided to plead issues in relation to the quality, reasonableness or accuracy of the valuation that was performed, which is not the case.

[28] I have already dealt with the defendant's attack on the plaintiff's failure to replicate to the plea. There is no replication, and as such, all of the allegations in the plea are deemed to be denied.

Item 1: Engagement letter, contract(s) and related documents and correspondence confirming the appointment of the auditors and their scope of work:

[29] In the replying affidavit (paragraph 33 thereof), the plaintiff states that this documentation is required to verify the nature of the relationship between the respondent and the auditor. It is the plaintiff's case that the nature of the relationship between the defendant and the auditor is central to the matter, as the valuer was appointed by the auditor

[30] Initially, in the answering affidavit (paragraph 7 thereof), the defendant stated that none of the documents listed in the plaintiff's Rule 35(3) are relevant to the pleaded issues. In the supplementary answering affidavit (paragraph 4.1 thereof), the defendant, with reference to the first four items on the Rule 35(3) notice, states that, at first glance, these four items appear to potentially have some relevance to the appointment of the valuer and that the fact that he performed the valuations referred to in paragraph 6.2 of the defendant's plea. It is further stated by the defendant that, justified by an analysis, these documents are clearly not relevant to the pleaded issues, and none of the further documents sought in the plaintiff's Rule 35(3) notice has any relevance to the issues set out in paragraph 6.2 of the defendant's plea.

[31] In the supplementary answering affidavit (paragraph 4.2 thereof), the defendant states that it did not issue an engagement letter to the auditor concerning the implementation of clause 3.2.6 of the agreement. Reliance is placed on Item 51 of the defendant's schedule of discovered documents. Item 51 is a letter issued on 25 April 2022 by Key Account Connection (Pty) Ltd with the subject being: Appointment of independent & qualified enterprise valuer.

[32] I find it difficult, for the plaintiff's case, to understand the relevance of the manner and process of appointing the auditor and how it came about. What would be relevant is the mandate given and not the process of appointing the valuer and the auditor.

[33] In light of the above, the plaintiff is not entitled to discovery of the documents listed under Item 1.

Item 2: Engagement letter, contract and related documents and correspondence confirming the appointment of the valuer and its scope of work:

[34] The parties adopted the same approach with the documents requested under Item 2 as they adopted for the documents requested under Item 1. No repetition in this regard is needed.

[35] In the supplementary answering affidavit (paragraph 4.3 thereof), it is stated that the valuer was appointed by way of a telephone call, apparently conducted between the auditor and the valuer.

[36] As with Item 1, the manner and process of appointing the valuer is irrelevant, and the plaintiff is not entitled to the discovery of the documents requested under Item 2.

Item 3: All correspondence between the defendant and/or the auditors with the valuer:

[37] In the replying affidavit (paragraph 34 thereof), the plaintiff states that this is required to determine whether the valuer remained independent.

[38] In the supplementary answering affidavit (paragraph 4.4 thereof), the defendant stated that the wording of Item 3 is impermissibly vague and unspecific. No range of dates is referred to, nor any subject matter of correspondence. It is further stated that the plaintiff failed to state the relevance of such a wide category of documents.

[39] I agree with submissions by the defendant's counsel that the documents requested under this Item are impermissibly wide.

[40] In *Urgup*⁶ on page 513, Judge Thring stated: *'Discovery has been said to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for it can be, and often is, a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. It seems to me that, generally speaking, its employment should be confined to cases where parties are properly before the Court and are litigating at full stretch, so to speak. It is not intended to be used as a sniping weapon in preliminary skirmishes, such as the main application in this matter is, unless there are exceptional circumstances present.'* (My emphasis).

[41] As already stated, the process of discovery is not a fishing expedition, and a litigant cannot be allowed to cast its net as wide as possible in the hope of catching something useful. To allow that would be to permit an abuse of the process and purpose of Rule 35.

[42] The documents requested under Item 3 are unspecified as to their nature and range of dates, and it is therefore impossible to attach any relevance to them. The plaintiff is not entitled to the documents requested under Item 3.

⁶ See footnote 1

Item 4: Written instructions from the defendant and/or the auditors to the valuer:

[43] It is the case of the plaintiff in his replying affidavit (paragraph 36 thereof) that this is required to confirm what, from both the defendant's and the auditor's point of view, had to be done and considered to arrive at the valuation.

[44] In the supplementary answering affidavit (paragraph 4.5 thereof), the defendant states that, to the deponent's knowledge, the defendant did not provide any instructions to the valuer, nor did the auditor.

[45] I find this explanation most intriguing. The question arises: If neither the defendant nor the auditor gave any instructions to the valuer, then how did the valuer come to determine the fair market value as pleaded in paragraph 6.2 of the plea? And on what basis would the valuer have come to his conclusions?

[46] Logic dictates that a mandate had to be provided to the auditor and eventually to the valuer. Such a mandate would be intricately linked to proper instructions.

[47] The mandate provided to the auditors is relevant to the plaintiff's case, as such I am of the view that the plaintiff is entitled to the documents requested under Item 4, but only in as far as it relates to the appointment of the auditor and the valuer to comply with the provisions of clause 3.2.6 of the agreement.

Item 5: All documents provided by the defendant and/or the auditors to the valuer for purposes of preparing a valuation of the defendant's business:

[48] It is the plaintiff's case (paragraph 37 of the replying affidavit) that this is to confirm that the valuer received all necessary and relevant documentation to perform an accurate valuation and to enable the applicant and the Court to consider the basis for the valuer's determination of the agreed market value.

[49] The documents requested under Item 5 deal with the mandate provided to the valuer for the determination of the valuation of the defendant's business and, as with Item 4, I find it to be relevant.

Item 6: The defendant's audited, alternatively reviewed, annual financial statement for the period 1 November 2019 to present:

[50] In the replying affidavit (paragraph 38 thereof), the plaintiff states that documentation summarising the financial performance of the defendant, as verified by its auditors, is an essential input to the valuation. The plaintiff states that these historical financial statements need to be accurately reflected in the valuation for the valuation to capture the financial performance of the respondent, and therefore for the valuation to be correct.

[51] In my view, the documents requested under Item 6 are relevant to the pleaded issues and the plaintiff is entitled to discovery thereof.

Item 7: The defendant's audited, alternatively reviewed, monthly financial statements for the period 1 November 2019 to present:

Item 8: The defendant's management accounts for the period from 1 November 2019 to present:

Item 9: The defendant's management accounts for the period from 1 November 2019 to present:

Item 10: The defendant's performance reports for each month from 1 February 2022 to present:

Item 11: The defendant's 5-year financial forecast from 2021/22 financial year onwards:

[52] In the replying affidavit (paragraphs 39 to 43) thereof, it is the plaintiff's case that documentation summarising the financial performance of the defendant, as verified by its auditors, is an essential input to the valuation. The documents are required to assess the 5-year forecast mentioned in Item 51 of the defendant's discovered documents.

[53] As with Item 6, I find that the documents requested under Items 8, 9, 10 and 11 are relevant and the plaintiff is entitled to discovery thereof.

Item 12: Valuation(s) of the defendant's business as conducted by the valuer, including supporting documents/spreadsheets that show inputs/assumptions and their sources, as well as a breakdown of relevant components of the valuation (e.g. each legal entity and each equity investment):

[54] It is the plaintiff's case (paragraph 44 of the replying affidavit) that the calculations, assumptions and methodologies underlying the valuation, including a breakdown across legal entities and equity investments, and the 5-year forecast mentioned in Item 51 of the defendant's discovered documents, are required to assess and determine the correctness of the valuation of the respondent.

[55] In the supplementary answering affidavit (paragraph 6 thereof), the defendant provided (as Annexure "CMS3"), a valuation prepared by R Davies CA(SA). It was submitted by the defendant's counsel that the valuation requested under Item 12 was provided, and the same was again tendered.

[56] I am of the view that the supporting documents, spreadsheets that show inputs, assumptions and their sources, as well as a breakdown of relevant components of the valuation, are also relevant and that the plaintiff is entitled to discovery of it.

Item 13: Shareholders' resolution(s) and all other correspondence regarding any dividends paid by the defendant from 1 November 2019 to 30 November 2021:

[57] It is the plaintiff's case (paragraph 45 of the replying affidavit) that this documentation is required to establish the quantum and frequency of any dividend payments. It is stated that dividends are a generally accepted indication that a company is performing well, and a high-performing company will have a high value, which can be used comparatively with the valuation to assess its correctness.

[58] In my view, the documents requested under Item 13 are relevant and the plaintiff is entitled to them.

Item 14: Payslips and proof of payment for Shannon Richards (the CEO's spouse) from 1 November 2019 to 30 November 2021 on the basis that indirect CEO compensation is akin to dividend compensation for favourable company performance (and therefore linked to the Defendant's valuation).

[59] According to the plaintiff (paragraph 46 of the replying affidavit), the CEO's spouse did not work for the defendant, but she was paid a salary. The plaintiff further contends that the fact that she was paid a salary whilst not working for the defendant demonstrates strong financial performance of the defendant, and, therefore, a high value.

[60] The plaintiff is now granted access to all the financial statements that he requested in his Rule 35(3) notice, and he will be able to properly conduct his investigation on those documents.

[61] To seek payslips and proof of payments for the CEO's spouse would amount to fishing for evidence.

[62] The documents requested under Item 14 are, in my view, irrelevant to the pleadings and the plaintiff is not entitled thereto.

Item 15: Shareholders' resolution(s), documentation and correspondence regarding any equity investments (including but not limited to '201 deals') conducted by the defendant from 1 November 2019 to 30 November 2021.

Item 16: Shareholders' agreements for each equity investment (including but not limited to '201 deals') made by the defendant from 1 November 2019 to 30 November 2021:

Item 17: Pre and post-money valuations for the defendant's capital raises for all equity investments (including but not limited to '201 deals') between 1 November 2019 and 30 November 2021, as well as capitalisation tables showing the defendant's equity stakes:

[63] The plaintiff states (paragraphs 47, 48 and 49 of the replying affidavit) that this documentation is required to understand the number, nature, timing and "market-to-

market valuations” (on or around 30 November 2021) of the defendant’s investments in other companies. It is the plaintiff’s case that these investments form part of the valuation of the respondent on a “sum-of-the-parts valuation.”

[64] I find these documents to be relevant, and the plaintiff is thus entitled to the documents under Items 15, 16 and 17.

Item 18: Contracts and purchase orders from 1 November 2019 to the present for all of the defendant’s clients spending more than R500 000.00 per year on the defendant’s fees (e.g., Standard Bank, Investec, Anglo American, Healthforce, Netstar, Low&Behold, WTax etc.):

[65] It is the case of the plaintiff (paragraph 50 of the pleading affidavit) that contracts and purchase orders can quantify the income received by the defendant from its clients, including future spending, because purchase orders often include budgeted spending over a predefined future period. The plaintiff further states that quantifying client income to be received in the future relates to the valuation because this can indicate the strength of future financial performance and can inform financial forecasts.

[66] These documents are deemed relevant, and the plaintiff is entitled to discovery of the documents listed under Item 18.

Item 19: Receipt for iPhone and accessories purchase made by the defendant at the iStore in Q1 2021 (i.e., the iPhone and accessories provided to the Plaintiff):

[67] In the draft order presented by the defendant, the defendant undertook to provide the documents under Item 19, with the qualification that these documents exist.

[68] In line with this undertaking, the plaintiff is entitled to the documents requested under Item 19.

Item 20: Invoices issued by independent contractors like Pierré Smith and Barry Tandy (prior to Barry Tandy becoming a permanent employee of the defendant) and proofs of payment showing the defendant paying for these services.

Item 21: Invoices issued by independent contractors like Pierré Smith and Barry Tandy (prior to Barry Tandy becoming a permanent employee of the defendant) and proofs of payment showing the defendant paying for these services:

[69] In support of the request under Item 20, it is the plaintiff's case (paragraph 52 of the replying affidavit) that the documentation will demonstrate that the respondent routinely paid independent contractors without withholding PAYE.

[70] Concerning Item 21, it is the case of the plaintiff (paragraph 53 of the replying affidavit) that this relates to the payment of amounts owing to the plaintiff into a non-South African bank account. The documentation will demonstrate that the defendant routinely pays suppliers into non-South African accounts.

[71] As with Item 3, the plaintiff is vague in his failure to specify a date range of the requested documents, and as such, I am in no position to determine the relevance of these items.

[72] In light of the plaintiff's failure to be specific on the date range, the plaintiff is not entitled to the documents listed under Items 20 and 21.

Costs:

[73] The awarding of costs is in the discretion of the court. The plaintiff employed the services of two counsel and seeks costs on the scale as between attorney and client. In my view, costs should follow the result.

[74] I can see no justification for punitive costs, but I agree with the plaintiff that there was a need to employ the services of two counsels. As such, the plaintiff is entitled to such costs, and the costs are to be taxed in terms of scale C.

[75] The defendant is also liable for the costs of the application to introduce the supplementary affidavit into the record. Such costs are to be on an unopposed basis and to be taxed on Scale A.

ORDER:

The following order is made:

1. Within 10 (ten) days of the date of service of this order on the defendant's attorney of record, the defendant is to provide the plaintiff with the following documents:
 - a. Item 4: Written instructions from the defendant and/or the auditors to the valuer in complying with the calculation as provided for in clause 3.2.6 of the agreement.
 - b. Item 5: All documents provided by the defendant and/or the auditors to the valuer for purposes of preparing a valuation of the defendant's business.
 - c. Item 6: The defendant's audited, alternatively reviewed, annual financial statements for the 2019/20, 2020/21 and 2021/2022 financial years.
 - d. Item 7: The defendant's audited, alternatively reviewed, monthly financial statements for the period 1 November 2019 to present.
 - e. Item 8: The defendant's management accounts for the period from 1 November 2019 to 30 November 2021.
 - f. Item 9: The defendant's performance reports for each month from 1 February 2022 to present.
 - g. Item 10: The defendant's budget for the 2022/23 financial year.
 - h. Item 11: The defendant's 5-year financial forecast from 2021/22 financial year onwards.
 - i. Item 12: Supporting documents/spreadsheets that show inputs/assumptions and their sources, as well as a breakdown of relevant components of the valuation (e.g. each legal entity and each equity investment) utilised by the valuer to compile the valuation of the defendant's business.
 - j. Item 13: Shareholders' resolution(s) and all other correspondence regarding any dividends paid by the defendant from 1 November 2019 to 30 November 2021.

k. Item 15: Shareholders' resolution(s), documentation and correspondence regarding any equity investments (including but not limited to '201 deals') conducted by the defendant from 1 June 2020 to 30 November 2021.

l. Item 16: Shareholders' agreements for each equity investment (including but not limited to '201 deals') made by the defendant from 1 June 2020 to 30 November 2021.

m. Item 17: Pre- and post-money valuations for the defendant's capital raises for all equity investments (including but not limited to '201 deals') between 1 November 2019 and 30 November 2021, as well as capitalisation tables showing the defendant's equity stakes.

n. Item 18: Contracts and purchase orders from 1 June 2020 to 30 November 2021 for all of the defendant's clients spending more than R500 000.00 per year on the defendant's fees (e.g., Standard Bank, Investec, Anglo American, Healthforce, Netstar, Low&Behold, WTax etc.)

o. Item 19: Receipt for iPhone and accessories purchase made by the defendant at the iStore in Q1 2021 (i.e., the iPhone and accessories provided to the Plaintiff).

2. The defendant to pay the costs of this application on scale C, such costs to include the costs occasioned by the employment of two counsel.

3. The defendant to pay the costs of the application to introduce the supplementary affidavit into the record. Such costs are to be on an unopposed basis and to be taxed on Scale A.

MINNAAR AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff:

Adv J de Beer SC with Adv J Delport instructed by Barnard Inc.

For the Defendant:

Adv L Hollander instructed by Brett Inc

Date of Hearing : 29 January 2025

Date of Judgment: 29 April 2025