



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

Case No.: 1447/2022

Date Heard: 21 November 2024

Date Delivered: 18 February 2024

In the matter between:

SPECTRUM LOGISTICS (PTY)LTD

Plaintiff

and

KAROO TREATS CC t/a JFM LOGISTICS

Defendant

JUDGMENT

RONAASEN AJ

Introduction

[1] In May 2022 the plaintiff instituted action against the defendant for payment of the sum of R814 775.00 and interest on that sum in respect of transport services allegedly

rendered by the plaintiff to the defendant pursuant to a written agreement concluded between them in June 2019, entitled "Facility Agreement".

- [2] The defendant has defended the action and instituted a claim in reconvention.
- [3] In its plea, the defendant admits the conclusion of the "Facility Agreement" and that the plaintiff had rendered transport services to it over the period alleged by the plaintiff, namely December 2021 to March 2022.
- [4] In terms of its claim in reconvention the defendant seeks payment from the plaintiff of the sum of R3 646 748.48 for damages in the form of a loss of profits, against the following background:
 - 4.1. in May 2020, the plaintiff as subcontractor, and the defendant as principal contractor concluded a written subcontracting agreement;
 - 4.2. the subcontracting agreement was concluded subsequent to the conclusion of the "Facility Agreement" and thus, according to the defendant, superseded the "Facility Agreement";
 - 4.3. in terms of the subcontracting agreement, *inter alia*:
 - 4.3.1. the plaintiff undertook to maintain, at all times, the highest degree of good faith to the defendant and to avoid any conflict of interest arising between them;

- 4.3.2. the failure by the plaintiff to advise the defendant of any conflict of interest would amount to a material breach of the subcontracting agreement;
- 4.3.3. the plaintiff acknowledged that during the subsistence of the subcontracting agreement and in the course of its performance of its obligations in terms thereof it would gain access to and acquire knowledge of various aspects of the defendant's business, which were collectively referred to as its "confidential information"; and
- 4.3.4. the plaintiff undertook, for the duration of the subcontracting agreement as well as after its termination, not to utilise the defendant's confidential information for its benefit;
- 4.4. in March 2022 the plaintiff employed one Roland Barrath ("the employee") who, until 28 February 2022, had been employed by the defendant since October 2019;
- 4.5. the employee played a crucial management role in the operations of the defendant;
- 4.6. by virtue of his position in the defendant's structure the employee had access to very confidential information regarding the defendant's operations;

4.7. the plaintiff, by employing the employee, and utilising his knowledge of the defendant's confidential information resulted in the plaintiff gaining an unfair advantage against the defendant and thereby breached the terms of the subcontracting agreement by failing to maintain the highest degree of good faith towards the defendant, allowing a conflict of interest to materialise between the plaintiff and the defendant and failing to advise the defendant immediately of such conflict; and

4.8. thus, the plaintiff was in material breach of the subcontracting agreement by misusing the defendant's confidential information gained from employing the employee, resulting in a loss of profits and the defendant suffering damages in the sum claimed from the plaintiff.

[5] The plaintiff has pleaded to the claim in reconvention, denying any liability to the defendant for the payment of damages.

[6] The interlocutory dispute which I am required to determine, revolves entirely around the claim in reconvention.

Summary of the interlocutory dispute

[7] During May 2024 the plaintiff delivered a the following documents:

7.1. a notice in terms of Uniform Rule 35(3) ("the notice"); and

7.2. a request for particulars for trial ("the request").

[8] According to the plaintiff the present interlocutory application was prompted by the defendant's alleged failure to respond:

8.1. to the notice; and

8.2. sufficiently to the request.

[9] In terms of its notice of motion the plaintiff, in summary, seeks relief in the form of orders directing the defendant to:

9.1. "*comply with the provisions of*" certain paragraphs in the notice (to which I shall revert, below); and

9.2. "*provide proper responses to the enquiries*" contained in identified paragraphs in the request (to which I shall also revert, below).

Discussion of relevant legal principles and their application to this matter

The notice

[10] Rule 35(3) ("the rule") provides as follows:

If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant

to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days thereof 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.

[11] The clear intention of the rule is to ensure the availability to a party of documents which are relevant issue in dispute between the parties.

[12] A discovery affidavit delivered by a party to an action is ordinarily conclusive unless it can be shown from the discovery affidavit itself, from the documents listed in the discovery affidavit, from the pleadings in the action or from any admission made by the party who delivered the discovery affidavit that there are reasonable grounds to assume that there are additional documents in the position of that party. *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 732 (ECD) at 749H.

[13] In this case the plaintiff relies entirely on the claim in reconvention for the relief it seeks.

[14] In paragraph 1 of the notice the plaintiff seeks access to the defendant's rate schedule, referred to in paragraph 8.3 of the claim in reconvention. Paragraph 8 of the claim in reconvention sets out the employee's job description with the defendant. One of his tasks is described in paragraph 8.3 as being to complete the defendant's rate schedule of both its subcontractors and its customers, for invoicing purposes.

[15] Paragraph 2 of the notice is directed at the discovery of the contracts referred to in paragraph 10 of the claim in reconvention. Paragraph 10 of the claim in reconvention

refers to the defendant's contracts with third parties to which the employee would have had access by virtue of his employment with the defendant.

[16] No attempt is made by the defendant in its founding affidavit to motivate why the documents referred to in paragraphs 8.3 and 10 of the claim in reconvention are relevant to any matter in question in the action. The applicant contents itself with a statement, in the form of a conclusion, that the documents are "*material to an understanding by the Plaintiff of the Defendant's claim*". In any event I cannot see how documents referred to in the context of the employee's job description and the defendant's contracts with third parties are relevant to a claim for damages arising from the alleged breach of the subcontracting agreement. The principal issue is the extent to which the employee had access to confidential information of the defendant. In the subcontracting agreement neither the rate schedule of the defendant or its contracts with third parties are identified as forming part of the defendant's confidential information. In paragraph 10 of the claim in reconvention the defendant distinguishes between its confidential information, on the one hand and its contracts, on the other hand.

[17] Thus, on the ground that the plaintiff has not demonstrated the relevance of the rate schedule or the contracts and on the ground that their relevance does not appear from the pleadings, the plaintiff is not entitled to these documents. To this I must add that it is significant that the plaintiff was able to plead to the relevant paragraphs of the claim in reconvention by way of motivated denials without access to these documents.

[18] Pursuant to paragraph 4 of the notice the plaintiff requires access to the credit applications referred to in paragraph 13 of the claim in reconvention. Paragraph 13 reads like this:

"Barrath having resigned his employment on 28 February 2022 and having commenced his employment with the plaintiff, the defendant became aware that the plaintiff started sending through credit applications to customers and subcontractors of the defendant."

[19] In reply the plaintiff concedes that defendant is not in possession of the documents referred to in paragraph 4 of the notice and this paragraph accordingly requires no further attention.

[20] Paragraph 5 of the notice calls on the defendant to discover its "*financial records would [sic] demonstrate the manner in which the profit margin of 20% referred to by the Defendant in its Counterclaim is arrived at*". The defendant states that it has made discovery of its detailed ledgers. One would have expected the plaintiff to be more precise in identifying the documentation to which it seeks access. As it correctly states in its replying affidavit, a profit is determined with reference to expenses incurred. Proof of those expenses may be embodied in any number of documents, which have not been identified by the plaintiff. It is uncertain whether the plaintiff's request refers to annual financial statements or all the source documents which were used to compile the annual financial statements. In my view the request in paragraph 5 of the notice is vague and overbroad. As has been stated the rule is not intended to "*afford a litigant a licence to fish in the hope of catching something useful*." *Erasmus* - Superior Court Practice, D1 Rule 35-20 (Issue 22, 2023) and the authorities collected there.

[21] Under paragraph 6 of the notice the Plaintiff seeks access to the Defendant's "*financial records in respect of the six month period up to the 28th of February 2022 and in respect of the six month period after the 28th of February 2022 from which the total sales of the Defendant to those of its customers and suppliers not referred to in paragraphs 21.5 and 21.11 of its counterclaim to those customers are apparent*". This paragraph is also vaguely formulated, referring only in broad terms to "*financial records*". The plaintiff has also not stated why the documents referred to are relevant to any matter in question in the action. The plaintiff has not alleged in its founding affidavit that the relevance of these documents appear from the defendant's discovery affidavit, or documents referred to in the discovery affidavit. There is no admission by the defendant which refers to the documents alluded to in paragraph 6 of the notice. In respect of the entirety of the averments in paragraph 21 of the claim in reconvention the plaintiff has proffered a bare denial. The plaintiff has not made any averment that the defendant's alleged loss of profits is not confined to the entities referred to in paragraphs 21.5 and 21.11 of the claim in reconvention. Therefore, there is no basis on which the plaintiff could be entitled to access to the documents referred to in paragraph 6 of the notice.

The request

[22] In terms of Uniform Rule 21(2) a party to an action is entitled to seek from an opposing party "*only such further particulars as are strictly necessary to enable him or her to prepare for trial*".

[23] The relief the plaintiff seeks in respect of the request is for a "*proper*" response to certain enquiries contained therein. If the word "*proper*" in this context is given its

ordinary grammatical meaning it refers to the form of the defendant's response rather than its content. I shall however assume in favour of the plaintiff that the use of the word refers to the alleged insufficiency of the defendant's response to the notice.

[24] Rule 21(4) provides that if "*the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action of the striking out of the defence, whereupon the court may make such order as to it seems meet*".

[25] Rule 21(4) was interpreted by this Court in *Warner v Warner and two other matters* 2000 (4) SA147 (E) at 150A-C, as follows:

"It is clear from the final words of this subrule, emphasising that the wrecks above, that the Court retains the discretion to grant or refuse an order for the delivery of further particulars. An applicant is accordingly not entitled to an order compelling a reply as of right should the opposing party failed to deliver further particulars timeously all sufficiently, that must sit out sufficient information to enable the Court to consider whether or not to exercise its discretion in his favour."

[26] In its founding affidavit the plaintiff has not set out any information to enable me to consider whether or not to exercise my discretion, to order the furnishing of further particularity, in its favour. It simply states that the particularity is sought to enable it to prepare for trial. This statement does not satisfy the requirement of sufficient information in the absence of an explanation why the particularity is required for trial

preparation. Moreover, the requests were all responded to in some detail. Nothing in the founding affidavit says why, and to what extent, these responses are insufficient.

[27] I have had regard to a letter dated 11 September 2024, annexed to the founding affidavit, which was addressed by the plaintiff's attorney to the defendant's attorney, demanding a more detailed response to the request. This letter is merely argumentative but does not contain sufficient information to satisfy me as to why the particularity sought is required for preparation for trial.

Conclusion and order

[28] For these reasons the plaintiff is not entitled to the relief sought in the notice of motion dated 2 October 2024. In respect of costs there is no reason for me to deviate from the ordinary rule that costs follow the result. Thus, I make the following order:

The application is dismissed with costs.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

The parties were represented as follows:

The applicant: Adv. KM Morris
Instructed by BLC Attorneys, 4 Cape Road, Gqeberha.

The respondent: Adv. L Ellis
Instructed by Steyn Inc (PE), 29 Bird Street, Central, Gqeberha