



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 14564/2014

In the matter between:

SUPERCARE SERVICES GROUP (PTY) LTD

Applicant

And

INTEBE LANDSCAPING CC

Respondent

In re

MAUREEN VAN DER MERWE

Plaintiff

And

EDEN ON THE BAY (PTY) LTD

First Defendant

SUPERCARE SERVICES GROUP (PTY) LTD

Second Defendant

INTEBE LANDSCAPING CC

Third Defendant

**RENNIE PROPERTY MANAGEMENT
CAPE (PTY) LTD
EDEN ON THE BAY BODY CORPORATE**

**Fourth Defendant
Fifth Defendant**

Coram: BARENDSE AJ

Heard: 13 May 2026

Delivered: 25 May 2026

ORDER

- (a) The Respondent is ordered to provide the Applicant with a proper Rule 35(3) Reply;
- (b) The application to compel the furnishing of further and better particulars is dismissed;
- (c) Applicant shall pay the Respondent's costs relating to the application to compel the furnishing of further and better particulars, with counsel's fees taxable at scale B;
- (d) No order as to costs is made in respect of the application to compel compliance with Rule 35(3).

JUDGMENT

BARENDSE AJ

Introduction

[1] This is an interlocutory application in which Applicant brought an application against the Respondent for:

2.1 an order compelling the Respondent to comply with Applicant's notice in terms of Rule 35(3);

2.2 an order compelling Respondent to sufficiently comply with Applicant's Request for Trial Particulars.

Background

[2] It is necessary to briefly set out the background against which this application was brought.

[3] The Plaintiff in the main action instituted action against the defendants following an incident which occurred on 2 January 2014 at or near the entrance between shop 53a and 55 at Eden On The Bay Shopping Centre in Bloubergstrand, Cape Town, Western Cape (“*the premises*”).

[4] The Plaintiff claims that she was seriously injured when she stepped onto water that was present on the floor of the premises which caused her to slip and fall (“*the incident*”).

[5] The Applicant is the Second Defendant in the main action, and the Respondent is the Third Defendant in that action.

[6] The Plaintiff claims that the Applicant at all material times was contracted to provide cleaning services at the premises..

[7] By virtue of the aforesaid, the Plaintiff claims that the Applicant had a legal duty towards the public and in general and to the Plaintiff:

7.1 to ensure the safety of any person entering the premises;

7.2 to ensure the safety of any person walking in or at the premises;

7.3 to take all reasonable steps to avoid incidents such as the one that gave rise to the incident;

7.4 to ensure that any person or entity employed, alternatively contracted to carry out any of the duties referred to above would do so speedily, properly and effectively.

[8] The Plaintiff claims that the Respondent (as Third Defendant) at all times material to the incident, was contracted to attend to landscaping, horticulture and maintenance services of the premises.

[9] By virtue of the aforesaid, the Plaintiff claims that the Respondent had a legal duty towards the public in general and the plaintiff in particular to:

9.1 the safety of any person entering the premises;

- 9.2 the safety of any person walking in or at the premises;
- 9.3 take all reasonable steps to avoid incidents such as the one that gave rise to the accident.
- 9.4 ensure that any person or entity employed, alternatively contracted to carry out any of the duties referred to above would do so speedily, properly and effectively.

[10] The Plaintiff pleads that both Applicant and Respondent breached their respective legal duties by:

- 10.1 failing to ensure the safety of any person, in particular the plaintiff entering the premises.
- 10.2 failing to ensure the safety of any person, in particular the plaintiff walking in or at the premises.
- 10.3 failing to ensure that the floor of the premises was dry.
- 10.4 failing to ensure that notice was drawn to the presence of water on the floor of the premises.
- 10.5 failing to ensure that the water on the floor of the premises was cordoned off.
- 10.6 failing to take all reasonable steps to avoid incidents such as the one that gave rise to the action.

10.7 failing to ensure that any person or entity employed, alternatively contracted to carry out any of the duties mentioned, would do so speedily, properly and effectively.

Defences raised by the Applicant and Respondent in the main action

[11] The Applicant pleads a general denial of negligence and wrongfulness. In the alternative, Applicant relied upon an indemnity provided for in the Master Service Agreement concluded between Applicant and Eden On The Bay Body Corporate, the Fifth Defendant in the main action. To place reliance on the indemnification, Applicant served a Rule 13 Notice on Eden On The Bay in the main action.

[12] Applicant further denies negligence on the parts of the Defendants (including the Respondent as Third Defendant) and puts Plaintiff to the proof thereof.

[13] In the further alternative, Applicant pleads that the incident and injuries were caused by Plaintiff's sole negligence, alternatively, Plaintiff's contributory negligence.

[14] The Respondent in turn admits that it was at the time of the incident contracted to attend to the landscaping, horticulture and maintenance services at the premises.

[15] In amplification, the Respondent pleads that to the extent that it was contracted to provide and maintain the landscaping and horticulture services of the premises, it is admitted that it had the duty to do so and that such obligations having at all material times been attended to.

[16] Further to the above and without derogating from the generality of the aforesaid, the Respondent pleads that should a court find that it was subject to a legal duty towards members of the public, which duty entails the taking of any steps, which ought to be taken, then it is pleaded that such duty had at all material times been complied with.

[17] In the further alternative, the Respondent pleads that the incident and *sequelae* were caused wholly by the negligence of the plaintiff, alternatively by her contributory negligence.

The Rule 35(3) Issue

[18] The Applicant served a Rule 35(3) Notice, dated 23 January 2024, on the Respondent, requiring it to produce documents falling within four categories:

- **Category 1:** All correspondence between the Respondent and the Plaintiff and/or the Fourth and/or Fifth Defendants before, during and after the provision of landscaping services at Eden on the Bay;
- **Category 2:** Any written or partly written agreement or correspondence constituting an agreement between the Respondent and the entity, it contracted with to render landscaping services;
- **Category 3:** All quotations, invoices, letters of acceptance, payment remittances, bank statements, proof of payments, inventory lists, employment agreements and any other communication relating to any aspect of the landscaping services; and

- **Category 4:** All communications, reports, notes or other correspondence by the Respondent with any party, including its insurers, relating to the incident of 2 January 2014.

[19] The Respondent's Reply to the Rule 35(3) Notice, dated 20 May 2024, was in the form of a letter by Respondent's attorney. The Reply states that *"the Third Defendant does not have in its possession any of the documents/information requested and as far as the Third Defendant is concerned, it does not exist."*

[20] The Applicant contends that the Respondent's Rule 35(3) Reply was non-compliant with the requirements of Rule 35(3). The said Rule provides that: *"If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known."*

[21] The Applicant also complains about the fact that Respondent's discovery affidavit was signed by an employee of Respondent's insurer. This prompted the filing of the Rule 35(3) Notice.¹ That being said, the relief sought by the Applicant does not relate to the discovery affidavit itself.

[22] Applicant's main gripe is that in response to the Rule 35(3) Notice, the Respondent failed to state under oath that the requested documents were not in its possession and to state the whereabouts thereof, this being a peremptory requirement.

[23] The Respondent contends that the documents requested are not relevant to the matters in question. It also contends that Applicant was requested to indicate whether Applicant required an affidavit which would confirm what is stated in the Rule 35(3) Reply.

[24] The Applicant further requests the Court to go behind the Respondent's discovery. In doing so, reliance is placed on *Minister of Police and Others v Midnight Star Trading 437 cc t/a Braamfischer Spar*², where it was held that: "*The Court will go behind the affidavit only if it is satisfied-(i) from the discovery affidavit itself' or (ii) from the documents referred to in the discovery affidavit; or (iii) from the pleadings in the action; or (iv) from*

¹ Founding Affidavit paragraphs 9 to 14.

² (2021/48998) [2025] ZAGPJHC 1128 (7 November 2025) at paragraph 8.

the admissions made by the party making the discovery; or (v) from the nature of the case or the documents in issue.'

[25] During arguments, the Court *mero motu* raised the fact that in its Plea, the Applicant does not enter into a *lis* with the Respondent, yet through the Rule 35(3) Notice and the Request for Further Particulars, it was seeking to establish grounds for liability on the part of Respondent. Applicant did not, not even in the alternative, plead that the Respondent was liable to the Plaintiff in the main action for her damages. The documents requested to be discovered should be relevant to the issues in dispute as they appear from the pleadings.³

[26] Pursuant to the above, and after argument, both parties provided the Court with a further note.

The Trial Particulars issue

[27] At the outset is recorded that the court file relating to the main action does not contain the Request for Trial Particulars and the Replies thereto. The current Index and paginated papers end at page 169 with Fifth

³ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 311A.

Defendant's Plea. The Court was however able to glean the nature and details of the particulars requested from the papers filed in this interlocutory application. That said, it was incumbent on Applicant to ensure that the pleadings in the main action were properly before the Court, to the extent that it intended to rely thereon.

[28] The Applicant is seeking an order under Rule 21(4), compelling the Respondent to reply sufficiently to the requests listed from paragraph 2.1 to 2.10 of the Notice of Motion.

The Rule 30A issue

[29] There is also a dispute between the parties as to whether Applicant ought to have availed itself of the mechanism in Rule 30A, instead of bringing this application under R35(7) for further and better discovery.

[30] At the heart of this dispute was whether the Applicant should have allowed the Respondent an opportunity to purge its default of compliance before an application under Rule 35(7) was brought.

[31] During argument, this point was not pursued with any level of enthusiasm by Respondent's counsel. This Court accepts that Rules 30A and

35(7) are not in conflict and that the Court has a discretion to allow a party to follow either of them. Nothing more needs to be said about this issue.

Reasoning

[32] I first turn to deal with the discovery dispute. Rule 35(1) reads as follows:

"Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party."

[33] A plaintiff may require discovery from a co-plaintiff and a defendant may require discovery from a co-defendant.⁴

[34] Rule 35(3) is by extension a tool through which discovery to which a party is under Rule 35(1) entitled can be procured.

[35] The discovery must relate to *"any matter in question"*. Given the wide literal meaning of this phrase, it may convey the impression that a party may

⁴ Erasmus D1-460.

request discovery of any document conceivable. This is however not the legal position. Relevance is the test for what is discoverable. Relevance in turn is a matter for the court to decide, having regard to the issues between the parties.⁵

[36] The following is further stated in Erasmus :"*The ambit of discovery flows from the pleadings in which the parties have **delineated the matters in question between them***"⁶ (own emphasis).

[37] When having regard to the pleadings, in particular the Applicant's own Plea as mentioned in paragraphs [11], [12] and [13] above, this Court holds the view that the Applicant had to enter into a *lis* or had to otherwise raise matters between it and Respondent on the pleadings for the documents sought in the Rule 35(3) Notice to be relevant. Absent this, the request for the documents in question is nothing more than a fishing expedition.

[38] In *STT Sales v Fourie and Others*, the Court held as follows:

“The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position

⁵ Erasmus, Superior Court Practice D1-461.

⁶ Erasmus, Superior Court Practice D1-461 footnote 2 and the authorities cited there.

*to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established.*⁷

[39] There is a further conundrum. The Applicant contends, and rightly so, that there was no valid Rule 35(3) Reply. The Reply ought to have been in the form of a statement under oath. It was however not in dispute that the Respondent offered to provide this to Applicant. Applicant failed to respond to that offer and instead launched this application.

[40] Applicant asked the Court to go behind Respondent's discovery. In doing so, it asked the Court to go behind a Rule 35(3) Reply that Applicant itself contends is invalid. This notwithstanding, in view of the finding that Applicant failed to establish relevance, the requirements for going behind discovery were not satisfied.⁸

[41] While the Respondent did not strictly speaking comply with Rule 35(3), this application could have been avoided. Respondent tendered proper compliance, but this was ignored. Litigants must litigate responsibly and avoid a waste of client's and court's resources.

⁷ 2010 (6) SA 272 (GSJ) at para [16].

⁸ See paragraph [24] *supra*.

[42] In enforcing compliance with the Uniform Rules of Court, this Court will direct the Respondent to file a proper Rule 35(3) Reply but for the reasons stated earlier, it will not grant a cost order in favour of Applicant.

[43] I now turn to deal with the Trial Particulars issue. In terms of Rule 21(2) of the Uniform Rules, a party is only entitled to the further particulars strictly necessary to prepare for trial. The purpose of Further Particulars is:

43.1 to prevent surprise;

43.2 that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations.

43.3 having regard to the foregoing, nevertheless not to tie the other party down and limit his case unfairly at the trial.⁹

[44] In determining what particulars fall within the scope of the rule, one would look primarily at the pleadings.¹⁰ The pleadings define the issues in dispute between the parties on which the court will be called upon to

⁹ See Erasmus, *Superior Court Practice*, Second Edition at D1-252 and the authorities cited under footnote 2 there.

¹⁰ *Minister of Public Works & Infrastructure v Tuiniqua* (supra) at [60].

adjudicate. The purpose of particulars for trial is not to elicit evidence of information, which will emerge in cross-examination.¹¹

[45] A litigant may only request such further particulars as are strictly necessary to adequately prepare for trial by knowing enough about the other party's case to decide what evidence is required to meet it. When having regard to the pleadings and the further particulars sought in this matter, it cannot be held that such particulars are strictly necessary for Applicant to prepare for trial in the sense envisaged in *Kliptown*. On the pleadings, the Applicant does not have to meet a case by or prove one against Respondent. Requests of this nature go against the spirit and purpose of Rule 21(2).

[46] The Court agrees with the Respondent that the remaining particulars sought are not strictly necessary to prepare for trial, constitute interrogatories and concern matters of evidence. The order being sought by Applicant is therefore refused. The parties requested the Court to rule that the costs relating to the application to compel the furnishing of further particulars should stand over for determination at the trial. While this was appropriate in

¹¹ Von Gordon v Von Gordon 1961 (4) SA 211 (T) at 213.

Tuiniqwa, there is on the present facts no reason to burden the trial court with these costs.

Order

- (a) The Respondent is ordered to provide the Applicant with a proper Rule 35(3) Reply;
- (b) The application to compel the furnishing of further and better particulars is dismissed;
- (c) Applicant shall pay the Respondent's costs relating to the application to compel the furnishing of further and better particulars, with counsel's fees taxable at scale B;
- (d) No order as to costs is made in respect of the application to compel compliance with Rule 35(3).

R.D. BARENDSE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For applicant: Adv A Engelbrecht

Instructed by: MacGregor Erasmus Attorneys

For respondent: Adv E Benade

Instructed by: Visagie Vos Inc