

SOUTH AFRICA / JUDGMENT

Dotcom Trading 118 (Pty) Ltd v Hobbs Sinclair Trading (Pty) Ltd (8503/2016) [2016] ZAWCHC 155 (6 September 2016) [2016] ZAWCHC 155

COURT

Western Cape High Court, Cape Town

BEFORE

Davis

CASE / FILE NUMBER

8503/2016

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

CASE NUMBER:	8503/2016
DATE:	6 SEPTEMBER 2016 Reportable
In the matter between:	DOTCOM TRADING 118 (PTY) LTD Applicant and HOBBS SINCLAIR TRADING (PTY) LTD Respondent

JUDGMENT

DAVIS, J:

On 11 April 2014 plaintiff instituted an action against the defendant claiming repayment of R1 601 780.46 for services rendered in relation to restructuring of operational activities of a company known as Wilenri Appliance Services (Pty) Ltd t/a Mastercare (Wilenri) together with interest and costs. On 15 May 2014, prior to the filing of its plea, defendant filed a notice in terms of Rule 35(12) and (14) of the Uniform Rules of the High Court requesting inter alia:

Copies of the contracts of employment.

Copies of the tax invoices.

Copies of the time records.

Copies of the schedule of expenses and;

Copies of further invoices and bank statements.

On 25 June 2014 plaintiff filed its response to the defendants' Rule 35(12) and

(14) notice providing certain documentation in its possession. On 31 July 2014 defendant filed its plea to the plaintiffs' particulars of claim. On 11 September 2014 the plaintiff delivered a replication to the defendants' plea. The defendant called upon the plaintiff to make discovery under Rule 35(1). Plaintiff complied with the demand and delivered a discovery affidavit on 22 January 2015. On 3 July 2015 defendant filed a request for trial particulars in terms of Rule 21 together with a request for further and better discovery in terms of Rule 35.

On 1 February 2016 the plaintiff replied to the request. The present application concerns the delivery of trial particulars arising out of this action. Defendant has now applied for an order compelling the discovery of trial particulars arising out of its action. In short, the plaintiff has sued for services rendered (*locatio conductio operis*). As Mr Tredoux on behalf of the defendant correctly submits, plaintiff must prove the contract and the performance of the services, before being entitled to payment. See *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 808-809. Mr Tredoux submits further that the particulars of claim simply allege that an agreement to render certain services were rendered, that part payment had been made and that there was a balance owing, which is set out in a document referred to in these proceedings as POC1.

In his view, defendants' plea is designed to put plaintiff to the proof of all the services allegedly rendered. According to the defendant, although plaintiff discovered, it did not discover any documents recording actual time spent. Therefore what defendant contends is that it has filed a request for trial particulars in which the plaintiff must be required to provide full particulars of the services allegedly rendered and produce the relevant source documentation such as the time sheets.

The nature of the documentation which had been provided has, according to Mr Tredoux, compelled the defendant to repeat many of the questions asked earlier. In his view, defendant requires the plaintiff to provide information relating to the following:

The meeting at which the contract between the parties had allegedly been concluded.

How each of the consultancy fees was made up?

When the invoice relating to each claim was printed for the first time?

Which computer was used to prepare the invoice?

What services were rendered by each of the employees whose name appeared on each of the invoices?

Where and when each service was rendered, the nature of the service, what was actually done, documentation evidencing what was allegedly done, the time spent and all reports prepared.

Whether the plaintiff have been requested to provide supporting documentation in order to substantiate this claim and if so, who had made the request and whether the documentation had been provided.

THE PLEADINGS:

Given the litany of detail in the papers, as well as the considerable list of information required by defendant pursuant to these proceedings, it is relevant to replicate the relevant portions of the pleadings. The particulars of claim therefore, to the extent necessary, read as follows:

3. On 7 May 2012 the directors of Wilenri Appliance Services ... resolved that Wilenri voluntarily commenced business rescue proceedings and be placed under supervision in accordance with section 129(1) of the Companies Act ...
4. On 21 May 2012 the director of the defendant, Mr Neill Hobbs, was appointed as a senior business rescue practitioner of Wilenri in accordance with section 138(1)(b) and 138(2) of the Act.
5. On 22 May 2012 Mr Hobbs assumed the management and control of Wilenri.
6. Shortly thereafter, the precise date of which the plaintiff is not sure, the defendant duly represented by Mr Hobbs approached the plaintiff, duly represented by Mr Mark Mans, with a view to employing the plaintiff to assist the defendant with the business rescue of Wilenri, more specifically to restructure the operational activities of Wilenri.

7. Towards the end of May 2012 and at the offices of the defendant, the plaintiff, duly represented by Mr Mark Mans and the defendant duly represented by Mr Neill Hobbs, entered into a verbal agreement ("the agreement").

8. The material and express, alternatively tacit, alternatively implied terms of the agreement were inter alia as follows:

8.1 The plaintiff was appointed by the defendant to render certain services, more particularly the restructuring of the operational activities of Wilenri.

8.2 The plaintiff would appoint appropriate personnel to effect the restructuring of the operational activities of Wilenri.

8.3 The plaintiff would at all times be subject to the management and control of the defendant.

8.4 The plaintiff would be remunerated on the basis of time spent and the plaintiffs' employees and / or consultants, certain of which were contracted on an ad hoc basis would be charged out by the plaintiff rates:

8.4.1 Mark Mans, R1 000.00 per hour.

8.4.2 Alister Penny, R250.00 per hour.

8.4.3 Rowan Jackson, R250.00 per hour.

8.4.4 Chris Williams, R250.00 per hour.

8.4.5 Des Blackhurst, R500.00 per hour.

8.4.6 Dietrich Gerber, R400.00 per hour.

8.4.7 Paul Johnson, R1 000.00 per day worked.

8.5 The plaintiff would be entitled to charge a 10% administration fee, calculated in the costs incurred or disbursed by the plaintiff on behalf of the plaintiff.

8.6 The plaintiff would submit its invoices to the defendant at the end of each month and the defendant would make payment in respect thereof at the end of the following month.

9. The plaintiff commenced carrying on with its obligations in June 2012 and duly rendered services to the defendant to the value of R3 936.228,03 for the period from June 2012 to August 2013.

10. The defendant has to date made payment to the plaintiff of the sum of R2 334 447.57.

11. The defendant has failed and / or refused to make payment to the plaintiff of the balance outstanding in the sum of R1 601 780.46 for the services that were duly rendered by the plaintiff. The aforesaid sum is calculated as follows:

11.1 Total amount of services rendered R3 936 228.03.

11.2 Less amount paid, R2 334 447.57.

11.3 Total due R1 601 780.46.

Attached to the particulars of claim, to which I have referred is a document POC1, which sets out the complete set of invoices generated in the amount of R3 936 228.03 of which R2 334 447.57 was paid; that is payment was made for all invoices generated until 30 April 2013, the significance of which I shall return to presently.

Mr Butler, who appears on behalf of the plaintiff together with Ms Foster, correctly in my view submitted that this application falls to be assessed on the case made out in the founding affidavit.

In this connection, it would appear that the critique of the reply to the request for trial particulars as generated by the defendant can be assessed in four sections:

Miscellaneous observations made at the outset of the founding affidavit regarding the conclusion of the agreement, who was present, the provision of documentation in respect of the claims, the author of POC1, whether the business rescue practitioner approved those who worked on the project.

How the amounts in the invoices were made up?

Precisely what services were rendered?

What expenses were incurred?

As Mr Butler submit, no attempt was made in the founding affidavit to justify any other relief and, in particular, there was no attack made on the adequacy of the discovery nor was there an attempt to explain why written authorisation or approvals were needed, whether there was any justification for questions, such when invoices were previously submitted nor was any effort made to justify the request for details of computers on which the invoices were prepared.

All of this was done for the first time in reply. It is clear that in terms of our law that this is an impermissible cause of process. See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1992 (2) SA 279 (T) at 323-325. In proceedings of this nature, all the necessary allegations, upon which an applicant wishes to rely, must appear in the founding affidavit. It cannot make out its case in reply. As Mojapelo, DJP said in *Goldfields v Motley Rice LLC* 2015 (4) SA 299 (SG) at 325h-i:

“The rationale behind the striking out jurisdiction of the Court is sound. It promotes orderly ventilation of issues, promotes

focus on the real issues, prevents proliferation of issues, unnecessary prolix and irrelevancies that unduly burdened records in

application proceedings. The applicant is therefore obliged to make out its case in the founding affidavit and to stand or fall by it. The case in the founding affidavit is the one on which the applicant brings the respondent to court.”

In this case, the replying affidavit has raised new matter which was not addressed in the founding affidavit. There are numerous examples thereof; for example in paragraph 13.1 to 13.4 of the replying affidavit defendant refers to new facts in an attempt to explain the relevance of the requested trial particulars to persuade the Court that the particulars sought are necessary to enable the defendant to prepare for trial. The simple point is that this Court is obliged to examine the application through the prism of the founding affidavit. With this in mind, I turn to examine the law with regard to discovery.

DISCOVERY: THE LEGAL BASIS

Rule 35(1) and (2) require a party to any action, which has been requested thereto to make discovery of all documents and tape recordings relating to any matter in question in such action. In terms of Rule 35(3) the party which believes that there are other documents or tape recordings which may be relevant to any matter in question in the possession of any party:

“The former may give notice to the latter requiring him to make the same available for inspection in accordance with sub rule (6) or to state under oath within 10 days if such documents are not in his possession.”

The requirement of relevance is encapsulated in Rule 35(1) and Rule 35(3) which prescribe that in order to be discoverable a document or tape recording must relate to “any matter in question”. In *SA Neon Advertising (Pty) Ltd v Claude Neon Heights (SA) Ltd* 1968 (3) SA 381 (W) at 385 the Court cited with approval a dictum of Greenberg, J (as he then was) in *Schlesinger v Donaldson and Another* 1929 (WLD) 54;

“In order to decide the question of relevance, the issues raised in the pleadings must be considered.”

In *Swissborough Diamond Mines*, supra, Joffe, J at 317 said:

“In determining the issues raised by the pleadings regard would not be had to request for further particulars for purposes of trial when further particulars are furnished in response thereto. The purpose of particulars for purpose of trial are to prevent surprise, to inform the other party what is to be proved to enable the other party to prepare his case and having regard to the foregoing, nonetheless not to tie the other party down and limit his case unfairly at trial.”

Rule 21(2) provides for a request for particulars for trial to be made “after the close of pleadings”. The request for particulars would therefore relate to the pleaded issues and would not raise additional issues between the parties. In short, Courts are, for these reasons, reluctant to go behind discovery affidavit which is prima facie taken to be conclusive. See *Maraïs v Lombard* 1958 (4) SA 224 (E) at 227G and *Continental All v Highveld Steel Vanadium Ltd* 1971 (4) SA 589 (W) at 597e-h.

In *Swissborough Diamond Mines (Pty) Ltd*, supra the Court provided further guidance for the determination of an application of this nature when it said that when determining relevance, regard can only be had to the plaintiffs’ particulars of claim and, insofar as the request for trial particulars might seek to widen the issues, they cannot be taken into account. The onus is on the party seeking to go behind the discovery affidavit. In determining whether to go behind the discovery affidavit, a Court will only have regard to the following factors:

The discovery affidavit itself.

The documents referred to in the discovery affidavit.

The pleadings in the action.

Any admissions made by the parties making the discovery affidavit.

The nature of the case, or the documents in question.

See Swissborough Diamond Mines (Pty) Ltd, supra at 320. Reading the applicants' affidavit as a whole, there is little if any clarity as to the precise inadequacy of that which was discovered. There is also considerable confusion with regard to the nature of the requirements to be fulfilled. In paragraph 1 and 2 of the notice of motion, the relief sought relates to the production of "documentation" despite the defendants' continued reference to "the production of trial particulars". In paragraph 57 applicants avers for the first time that, absent further information in respect of certain claims, defendant is unable to prepare for trial. Other than this paragraph, the tenor of the affidavit is captured in the following passage:

"To sum up, the Plaintiff has claimed the payment of substantial sums in respect of services allegedly rendered but will not – or cannot – say what service was rendered, by whom it was rendered and at what cost. It is inconceivable that the Plaintiff will proceed to trial on this and satisfactory basis (sic) and it must be accepted that the plaintiff intends to lead witnesses in order to substantiate its claims. The Defendant shall be caught by surprise at the trial which will no doubt have to be postponed to enable the defendant to procure evidence in rebuttal."

THE DETAILED REQUESTS:

Plaintiff has provided defendant with a series of invoices to substantiate its claim. Defendant contends that an invoice which simply gives the sum charged for a consultancy fee per person (at best the charge out rate is known to the defendant) is insufficient and inadequate as the invoice does not specify the work actually performed by each of the parties. In terms of POC1 it appears that until 30 April 2014 these invoices were never queried and defendant paid on the basis of these invoices. That itself is cause for considerable concern.

I turn to deal in greater detail with the averments in the founding affidavit. In paragraph 12 it is stated that:

"The plaintiff is required to provide full particulars of all persons who were present when the aforesaid agreement was concluded. The plaintiff responded with a pregnant positive – the names of two persons who were present was provided but the plaintiff leaves the door open for further participants which it may open in future."

The plaintiff has already informed the defendant that two persons were present at that meeting. The defendant then asks for a written notice on the agenda in respect of the meeting but plaintiff has already pleaded that there was an oral agreement and hence there was no written notice. It responded fully to the question of whether the contract was oral or in writing and as to whether there was any written agenda. The defendant then requested documentation in respect of a 10% administration fee but this request is not present in the notice of motion. The same holds true in respect of the question regarding POC1 which again is not contained in the notice of motion.

There is a further request in respect of any notice provided to the business practitioner of the persons who worked on the project but only a limited set of such documents appear in the notice of motion; that is if one examines the notice of motion, there are requests in terms of paragraph

18.4.4 and 18.4.4.1. In short, the notice of motion in this regard does not in fact appear to be congruent with that which appears in the founding affidavit. In respect of the specificity required by the defendant with regard to invoices, it is significant that in respect of invoices A1 to A19, as I have already indicated, they were paid by the defendant, seemingly without demur.

Further, in plaintiffs' response to the request for trial particulars plaintiff has set out which service each member of the plaintiff was required to render to the defendant.

CONCLUSION:

By the time the defendant produced its replying affidavit, it finally set out its case with some measure of clarity stating:

"The Defendant considered taking an exception but was advised that this course was likely to engender unnecessary costs and that it would be appropriate to plead and thereafter to obtain the necessary particulars for the purpose of preparing for trial by way of a request for trial particulars in terms of Rule 21 of the Uniform Rules of Court."

The Defendant was regrettably forced to file a substantial request for trial particulars / documentation. The Plaintiff complains about the length of the request and asserts that it is tantamount to an abuse of process. There is no merit in this carping. The Defendant is faced with a substantial claim which has been inadequately pleaded and the requests which were directed dealt with information which ought to have been provided in the particulars of claim and which is necessary to enable the Defendant to prepare for trial. If the trial particulars which have been requested are not provided the Defendant will not be able to prepare for trial and it will not be possible for the issues which are to be addressed in evidence to be limited."

It is trite that the purpose served by further particulars is:

"(a) To prevent surprise."

(b) 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 the counter allegations having regard to the above, nevertheless not to tie the other party down and limit his case unfairly at trial. See *Thompson v Barclays Bank DCO 1965*

(1) SA 365 at 369C-E."

Erasmus D1252, *Superior Court Practice* (2nd Edition) confirms this position: a party is only entitled to call for such further particulars as are "strictly necessary" to enable him to prepare for trial.

Even if the particulars requested may at times involve the disclosure of evidence, that fact does not entitle the other party from obtaining the particulars if, on the grounds of embarrassment or prejudice in the preparation of his case, it would otherwise be entitled to know what case it has to meet. In general however, the purpose of particulars for trial is not to elicit evidence or information which will emerge under cross-examination. A part of the difficulty with which this

Court was confronted was the illusion between the application of Rule 35 and Rule 21, contained in the arguments presented by the defendant and reflected in its papers. Where a party brings an application to compel in terms of Rule 21(4), a Court retains a discretion whether or not to order the furnishing of further particulars. This was confirmed in *Szedlacsek v Szedlacsek* 2000 (4) SA 147 (E) at 150 where Leach, J (as he then was) said:

“It is clear from the words of the sub rule that this Court retains a 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 sa of right, should the opposing party fail to deliver further particulars timeously or sufficiently, but must set out sufficient information to enable the Court to consider whether or not to exercise its discretion in his favour...”

As indicated, in this case the notice of motion was not properly correlated with the founding affidavit. Secondly, where the pleadings, are read with the response to the request by defendant, the criticism in effect which followed appears to be that what is required is a production of evidence or information to be presented during the trial, exactly that which the Courts have warned is not part of either of these rules.

Throughout his argument Mr Tredoux contended that the plaintiff must prove that which was done, by whom it was done, where it was done and what was charged, information that the defendant claims it is entitled to for the purposes of the preparation of the trial. However, as observed, the defendant attempts to justify a voluminous request by alleging that the plaintiffs' particulars of claim are defective and does not provide sufficient information to enable the plaintiff to prepare adequately for trial.

If the particulars of claim are defective, there is an appropriate course of action to be followed. That is to raise an exception. The defendant alleges that the plaintiffs' particulars of claim contain no averments as to the identities of the personnel who were appointed on an ad hoc basis, the nature of the services actually rendered and the time spent. Plaintiff denies these allegations. However, as is evident from the particulars of claim, the plaintiffs' personnel are set out in paragraph 8.4 of the particulars of claim as I have reproduced them in this judgment.

The details of the service rendered are set out in minutes of meetings which have already been discovered by the plaintiff, including the fact that there were minutes contained of 25 directors' meetings held during the period 20 June 2012 to 8 July 2013. The minutes set out in detail the services rendered by the plaintiffs. See discovery item #395 to item #419.

Further, plaintiff states in the answering affidavit that it discovered all documents recording actual time spent in its possession. The defendant then alleges that the plaintiff provides no supporting documents to prove the nature or extent of the services rendered to the defendant and, as such, disputes whether the services were in fact rendered.

The point is that the plaintiff has denied that it was ever required to submit supporting documents as alleged by the defendant. This particular version has considerable credibility, as I have emphasised earlier, defendant paid an amount R2 334 447.54 in respect of services rendered by plaintiff without requesting or requiring any supporting documents. In other words defendant paid that considerable sum of money on the very invoices of which it now complains.

Nowhere does Mr Tredoux in his heads of argument deal with these payments made by the defendant. There is, in short, a stunning silence about this course of payment was allowed to develop.

In summary, the defendant has misconstrued the law in respect of the scope of Rule 21 and the particulars which may be requested. Rule 21, as I have indicated, may only be utilised in respect of particulars which are strictly necessary to enable the defendant to prepare for trial. In particular, evidence may not be sought by way of request for trial particulars. The very purpose of the Rule 21 is not to adopt some variation of American procedure whereby witnesses are deposed and in which the entire reward(?) stands disclosed prior to the trial taking place. That is not the scope or purpose of Rule 21 but it was basically the approach which regrettably was adopted by defendant in this case.

COSTS

In my view, the application has no merit. I must now deal with the question of costs as Mr Butler submitted that a punitive costs order is justified on the following grounds:

The request was abusive.

Annexing 375 pages is unnecessary annexures to this application was vexatious.

The application is fatally defective for its reliance on law which does not apply in this case.

In numerous instances the application was confused or illogical as I have indicated with regard to the gaps in the notice of motion and its lack of link to the founding affidavit.

In numerous instances, according to Mr Butler, the defendant did not trouble to apply its mind to the discovery provided and the

particularity that was contained therein.

The replying affidavit in which a new case was made out runs to some 600 pages.

Plaintiff was subjected to 1400 questions and 600 pages of application.

Two thirds of the invoices were already paid on the same basis.

The law in relation to a punitive costs order was made clear many years ago in the case of *In Re: Alluvial Creek Ltd* 1929 CPD 532 at 535 where Gardiner, JP said:

“An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court consider should be punished, malice, misleading the Court and things like that but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious and, by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their cause and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other party ought not to bear.” (my emphasis)

In my view, this case falls squarely within the scenario set out by the learned Judge President. There is no suggestion that the intent of the defendant was anything other than grounded upon “the most firm belief in the justice of its cause”. But when a case is brought which generates 1400 questions and a voluminous (illegible), when there is no detailed examination of that which is requested in the notice of motion and whether it is supported in its entirety by the founding affidavit, when the case is made out essentially in reply, when there is confusion as to the scope of that which can be brought under Rule 35 as opposed to that which can be brought under Rule 21, when two thirds of the invoices of which there is now a complaint were deemed sufficient for payment to be generated by defendant In Re Alluvial Creek becomes applicable. When a plaintiff is subjected to this set of requests, where it is already, in my view, diligently answered that which was requested earlier, there can be little doubt that, even though there was no intent necessary to be vexatious or to postpone, the inevitable, this is a case where a punitive costs order is justified.

FOR THIS REASON THE APPLICATION IS DISMISSED WITH COSTS, INCLUDING THE COSTS OF TWO COUNSEL ON AN ATTORNEY AND CLIENT BASIS.

DAVIS, J

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