

SOUTH AFRICA / JUDGMENT

Ewels v Francis and Others (6497/2022) [2024] ZAWCHC 384 (21 November 2024)

[2024] ZAWCHC 384**COURT**

Western Cape High Court, Cape Town

BEFORE

S G Magardie

CASE / FILE NUMBER

6497/2022

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Source record**FLYNOTES:**

CIVIL PROCEDURE – Discovery
– Vague and globular requests – Further and better discovery – Dispute arising from written agreement – No reasonable basis established for existence of documents sought – Overbroad formulation of notice – Purpose of further and better discovery in terms of Rule 35(3) is not to order parties to undertake the impossible – Application is a fishing expedition and an abuse of the discovery process – Application dismissed – Uniform Rule 35(3) and (7).
IN
THE HIGH COURT OF SOUTH AFRICA
WESTERN
CAPE DIVISION, CAPE TOWN
Case
Number: 6497/2022
In

the matter between:

STEVEN
ERIC EWELS
Plaintiff / Respondent
and
ZOE
FRANCIS
First Defendant / Applicant
GLENNIS
LOCK
CC
Second Defendant
EVELYN
JOHAN PATRICK
Third Defendant

JUDGMENT

MAGARDIE AJ:

1. This is an interlocutory application in terms of Rule 35(7) of the Uniform Rules of Court to compel further and/or better discovery. The Applicant is the First Defendant in pending action proceedings (“the main action”) brought by the Plaintiff against all three Defendants. I shall refer to the parties as they are cited in in the main action.
2. In the present application, the First Defendant seeks an order compelling the Plaintiff to make further and better discovery of some 14 categories of documents listed in a notice given by the First Defendant pursuant to the provisions of Rule 35(3) and (6) (“the Rule 35(3) Notice”). The Plaintiff resists the application primarily on the basis that the documents sought by the First Defendant have either been already discovered, are irrelevant or are not in his possession. The Plaintiff further contends that the application is an abuse and amounts to an impermissible fishing expedition.

Background

and litigation history

3. The dispute between the parties has its genesis in a written agreement concluded between the Applicant and the First Defendant on 23 September 2019. In terms of that agreement, the Plaintiff sold to the First Defendant 100% of his members’ interest share in the Second Defendant, a close corporation which operated and traded as a security services and locksmith business in Somerset West, Cape Town. The purchase price to be paid by the First Defendant in terms of the sale of members interest agreement was an

amount of R5 380.00.00. The agreement further provided that the Plaintiff agreed to finance the agreed adjusted stock value of the business, which value was to be determined by a stock-take carried out on the effective date of the agreement and a further amount of R630 000.00.

4. These amounts were to be secured by a separate agreement and against the property of the First Defendant for a period of 3 years. The sale of members interest agreement also provided that the Plaintiff agreed to a restraint of trade outlined in detail in an annexure to the agreement, for a period of 3 years from the effective date of the agreement, being 1 November 2019. The agreement required the First Defendant to service the amounts referenced in the agreement by at the minimum paying the accrued interest portion on a monthly basis. Capital repayments by the First Defendant were required to be made proportionately at the end of each year of the three-year period provided for in the sale of members interest agreement.
5. The separate agreement contemplated by the sale of members interest agreement was concluded between the Plaintiff and the First Defendant on 1 November 2019 (“the second agreement”). In terms of the second agreement, the Plaintiff granted the First Defendant an opportunity to pay in installments the outstanding amounts still owed in terms of the sale of members interest agreement. The second agreement provided that the balance of the purchase price, amounting to a total sum of R1 230 000.00,

was to be paid by the First Defendant in three equal installments of R410 000.00 payable on 1 November 2020, 31 October 2021 and 31 October 2022 respectively. The second agreement in addition provided for a mortgage bond in the sum of R 1 230 000.00

to be registered over certain immovable property owned by the First Defendant.
6. The First Defendant duly paid an amount of R4.37 million towards the purchase price between 1 and 4 November 2019. On 19 February 2021 the Plaintiff signed the necessary documents transferring his members interest in the Second Defendant to the First Defendant. The members’ interest was transferred to the First and Third Defendants that same day. The First Defendant thereafter and in terms of the second agreement paid an amount of R420 000.00 in respect of the agreed purchase price.
7. No further amounts were paid by the First Defendant in terms of the second agreement in respect of the balance of R820 000.00 plus interest which was due to the Plaintiff in terms of the second agreement. On 6 October 2021 and 5 November 2021, the Plaintiff directed correspondence to the First Defendant placing her on terms to rectify what the Plaintiff considered to be her breach of the agreements concluded between the parties. T
8. The First Defendant responded through her attorneys on 23 November 2021. In her response, the First Defendant contended, for the first time and some two years after concluding the agreements with the Plaintiff, that the second agreement was unlawful and void because it amounted to a credit agreement as defined in the in the National Credit Act 34 of 2005 (“the NCA”) and the

Plaintiff was not registered as a credit provider in terms of section 40(1) and 89(2) of the NCA. The First Defendant’s attorneys in addition alleged that the Plaintiff had been acting in breach of the restraint of trade provisions of the sale of members interest

agreement. The First Defendant proposed that that the parties enter into a fresh agreement in terms of which all amounts already paid by the First Defendant would be repaid by the Plaintiff, the First Defendant released from further obligations in terms of the agreements and that the Plaintiff would undertake to agree to what was described as an “enhanced restraint”.

9. On 2 December 2021 the Plaintiff’s attorneys responded confirming that the Plaintiff accepted what it contended was the First Defendant’s repudiation of the agreements. The Plaintiff required the First Defendant to provide all financial and other documents relating to the Second Defendant and effectively demanded that the business be handed back to the Plaintiff.
10. In relation to the monies paid by the First Defendant in part payment of the purchase price, the Plaintiff tendered to pay these funds to the Plaintiff’s attorneys in trust pending a determination of a damages claim by the Plaintiff in respect of damage caused by the First Defendant to the Second Defendant’s business. The First Defendant’s attorneys replied on 9 December 2021 stating that the First Defendant accepted the Plaintiff’s repudiation of the sale of members interest agreement and that the agreement was cancelled.
11. Following these events, the Plaintiff applied to the High Court for interim relief for the return of the Second Defendant’s business to the Plaintiff and cancellation of the agreements between the parties, pending the determination of an action to be instituted by the Plaintiff against the defendants (“the interim relief proceedings”). On 24 June 2022 Goliath AJP dismissed the application for interim relief with costs.
12. The Plaintiff had at this stage instituted the main action against the Defendants. In that action and by combined summons issued on 2 March 2022, the Plaintiff sought orders for inter-alia the cancellation of the agreements and restitution including restitutionary damages. The particulars of claim provide for the restitutionary damages to be determined through the appointment of a valuer to value the Second Defendant’s business as at the date of cancellation of the agreements. In addition, orders are sought for the appointment of a forensic auditor to calculate profits made by the business until the date of cancellation of the agreements as well as an order that the First Defendant pay to the Plaintiff the difference between the purchase price of the business and the sum set by an appraiser in respect of the valuation of the Second Defendant’s business as at the date of cancellation. In the alternative, the Plaintiff seeks an order for the payment of contractual damages in the amount of R820 000.00 being the outstanding sum in terms of the sale of members interest agreement.
13. On 7 March 2022 the Defendants filed a notice of exception contending, on the basis of some seven listed grounds of complaint, that the Plaintiff’s particulars of claim lacked averments necessary to sustain a cause of action, were bad in law and vague and embarrassing. The exception was delivered on 8 July 2022. The opposed exception proceedings came before Francis J, who dismissed the exception with costs on 8 March 2023.

14. The First Defendant filed her plea in the main action on 3 April 2023 together with a claim in reconvention. In her claim in reconvention, the First Defendant seeks inter-alia orders declaring the agreements unlawful and void in terms of the NCA and an order which she pleads as “...a just and equitable order based on the facts and circumstances pleaded in the First Defendant’s

claim in reconvention”. In the alternative, the First Defendant pleads that in the event that it is found that the sale of members interest agreement was not unlawful and void, that the agreement was validly cancelled due to repudiation thereof by the Plaintiff. On this alternative basis, an order is sought by the First Defendant tendering the return of the members interest in the Second Defendant, payment of damages suffered by the First Defendant. interest thereon and costs. The First Defendant’s claim in reconvention does not specify the damages allegedly suffered by the First Defendant and instead seeks an order that the quantification of such damages are to stand over for later determination.

15. Given the nature and tenor of the litigation which transpired at that stage, it came as no surprise that the discovery process would not be smooth sailing.
16. On 4 July 2023 the First Defendant filed her discovery affidavit followed by the Plaintiff who filed his discovery affidavit on 12 July 2023. On 2 August 2023 the First Defendant filed a Notice in terms of Rule 35(3) and (6) requiring the Plaintiff to make further and better discovery of 14 categories of documents listed in the notice.
17. The Plaintiff did not respond to the Rule 35(3) and (6) notice within the time period of 10 days stipulated by the rule. The First Defendant then proceeded on 30 August 2023 with an application to compel compliance in terms of Rule 35(7). The application was served on 25 August 2023 and the matter set down for hearing on 11 September 2023.
18. On 25 August 2023 the Plaintiff served an affidavit in response to the Defendant’s Rule 35(3) and (6) notice. The Rule 35(3) and (6) application came before Thulare J on 11 September 2023. An order was granted by agreement withdrawing the First Defendant’s Rule 35(7) application and directing the Plaintiff to pay the First Defendant’s costs. The First Defendant remained dissatisfied with the Plaintiff’s response to its Rule 35(3) and (6) notice.
19. On 4 October 2023 the First Defendant instituted a second Rule 35(7) application, this being the present application before the court, for orders directing the Plaintiff to fully comply within 10 days with its Rule 35(3) notice. On 6 December 2023 the Plaintiff filed a supplementary discovery affidavit discovering an additional 44 listed documents.
20. Before addressing the documents in respect of which the First Defendant demands further and better discovery, it will be useful to restate some of the main principles which apply to applications of this nature.

Further and better discovery in terms of Rule 35(3)

21. Rule 35(3) 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 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.”

22. Rule 35(3) does not confer a party relying on the rule with an unrestricted entitlement to compel further disclosure of documents

following discovery which has already taken place. The scope of the rule is limited by three main requirements. The first is that there must be a proper identification of the documents sought, the second requirement is specificity in the documents so identified and the third is the relevance of the documents themselves. The purpose of the rule was explained as follows in *The MV Urgup: Owners of The MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others*[1]:

“These subrules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent's possession or under his control which may be relevant to the issues and which he is able to specify with some degree of precision. In the case of Rule 35(3) the intention is to supplement discovery which has already taken place, but which is alleged to be inadequate. Rules 35(3) and (14) do not afford a litigant a licence to fish in the hope of catching something useful.”

23. A litigant relying on Rule 35(3) is not entitled to content itself with vague and globular descriptions of documents which it purports to identify in a Rule 35(3) Notice.
24. A maladroitness approach to the identification of such documents will therefore not pass muster. Specificity not generality is what is required. Joffe J put it thus in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*: [2]

“...In particular, the degree of specificity of the documents that the party dissatisfied with the discovery must comply with in the notice must be determined. The importance of this requirement cannot be understated. A party can clearly be severely prejudiced by a notice which does not exhibit the necessary degree of specificity. Failure to comply with that requirement can result in an order compelling compliance, and failure to comply therewith can result in the claim dismissed or defence being struck out in terms of Rule 36(7).”

25. The discovery process is premised on honesty, good faith and requires parties obliged to make discovery to do so on oath. Where a party deposes to an affidavit stating that he or she does not have additional documents in his possession other than what has been discovered, such an affidavit is generally regarded as conclusive. A court will consequently be loath to go behind a discovery affidavit and order further or better discovery, except in limited and exceptional circumstances. These include the existence of reasonable grounds for supposing that the party has or had other relevant documents in its possession or control, male fides or the party having misconstrued the principles on which a discovery affidavit should be made. [3]

The documents sought by First Defendant in terms of Rule 35(3)

Communications between the Plaintiff, his agent and potential purchasers of the business

26. The first category of documents sought by the First Defendant in terms of Rule 35(3) are described in paragraph 1 thereof as “...All written and electronic communications between the Plaintiff on the one hand and Mr. Peter Tychsen on the other hand.” Mr. Peter Tychsen is the agent and business broker who represented the Plaintiff in the sale of members interest agreement.
27. The First Defendant seeks in paragraph 2 of her Rule 35(3) notice, “all written and electronic communications between the Plaintiff on the one hand and any other potential purchasers of the interest in the Second Defendant other than the First Defendant on the other hand.” In his response to the Rule 35(3) Notice, the Plaintiff contends that he has already discovered the requested information sought in paragraphs 1 and 2 of the notice. The Plaintiff states in his answering affidavit that all the communications with Mr. Tychsen in his possession are already in the possession of the Defendants as they were attached to the affidavits filed in the interim interdict proceedings and were in any event discovered in a later discovery affidavit on 6 December 2023. The Plaintiff goes on to state that he does not have any other communications with Mr. Tychsen in his possession that he is aware of.
28. In a somewhat unusual procedure, the First Defendant’s founding and replying affidavits in the present application were deposed to by her attorney of record. The First Defendant herself filed confirmatory affidavits. In the replying affidavit, the Plaintiff’s emphatic assertion that he was not in possession of additional communications with Mr. Tychsen, was disputed.
29. The First Defendant in this regard sought to rely on an email exchange dated 18 August 2019 between herself and Mr. Tychsen, an email which the deponent to the replying affidavit states “...relays a number of instructions from the Plaintiff in response to queries raised by the First Defendant.”
30. Mr. Stelzner SC, who appeared on behalf of the Plaintiff, correctly pointed out that the aforesaid email from Mr. Tyschen to the First Defendant in fact does no so such thing. The email makes no reference whatsoever to any “instructions” from the Plaintiff, whether written, oral or in any other form. In reliance on the email exchange of 18 August 2019, the deponent to the

First Defendant’s replying affidavit states that is “...it is clear...that there are further communications between the Plaintiff and Mr. Tyschen.”

31. Precisely how and on what factual basis the First Defendant states that the existence of further communications between the Plaintiff and Mr. Tychsen is so “clear”, is not explained. The statement constitutes no more than speculation. It is not only bereft of any factual basis but is based on a wholly incorrect description of the evidence.

32. No reasonable grounds have in my view been shown from the pleadings or the previously discovered documents which demonstrate that the additional documents sought in paragraphs 1 and 2 of the Rule 35(3) Notice in fact exist and are in the possession of the Plaintiff. I am therefore not persuaded that there are any grounds to reject the Plaintiff's statement on oath that he is not in possession of the documents sought in paragraphs 1 and 2 of the First Defendant's Rule 35(3) notice other than those which he has already discovered.
33. Rule 35(3) requires a reasonable basis to be established for the existence of documents sought by way of an order for further and better discovery. None has in my view been established in relation to the documents sought in paragraphs 1 and 2 of the First Defendant's Rule 35(3) Notice.
34. That the First Defendant subjectively believes and speculates that such documents may possibly exist and have not been discovered by the Plaintiff, is simply not good enough.

Documentation relating to Vengeance Security Solutions and/or Evolution Supply Chain (Pty) Ltd

35. The First Defendant in her Rule 35(3) Notice seeks documentation relating to Vengeance Security Solutions ("Vengeance"),

a security services business which the Plaintiff states he opened after cancellation of the first agreement with the First Defendant.

The business of Vengeance was conducted through Evolution Supply Chain (Pty) Ltd, a pre-existing property company owned by the

Plaintiff.

36. The First Defendant contends that Vengeance has unlawfully competed with the Defendants during the period between the sale of members interest agreement and the date of the First Defendant's Rule 35(3) Notice. The Plaintiff denies this and contends that Vengeance only opened shop in November 2022 after cancellation of the sale of members interest agreement and at a time when the restraint of trade clause no longer applied.
37. Paragraph 3 of the Rule 35(3) notice requires the production of "All written and electronic communication, including but not limited to correspondence, WhatsApp communications, SMS's quotes and invoices in respect of services rendered and goods supplied by the Plaintiff, Vengeance Security Solutions and/or Evolution Supply Chain (Pty) Ltd ("Evolution") from September 2019 to date." The same generic description i.e. "All written and electronic communication, including but not limited to..." is utilized in paragraph 4 of the notice but in that instance is directed at all written and electronic documentation "...in respect of security equipment purchased by the Plaintiff, Vengeance Security Solutions and/or Evolution from 23 September 2019 to date."

38. The term “overbroad” is a misnomer when describing the veritable swathe of unspecified documents sought by the First Defendant in paragraphs 3 and 4 of her Rule 35(3) Notice. The First Defendant in effect seeks the production by the Plaintiff of literally any and all conceivable known forms of recorded written and electronic communication by the Plaintiff and Vengeance over a three-year period, limited only by the documents being in respect of “services rendered and goods supplied” and “security equipment purchased”. Such documentation is sought irrespective of when exactly during this three-year period and to whom such documentation or communications were directed.
39. The nondescript formulation “services rendered and goods supplied” and “security equipment purchased” scarcely assists in determining precisely what documentation is included or excluded by paragraphs 3 and 4 of the Rule 35(3) Notice. The specificity required by Rule 35(3) for the identification of documents sought by way of further and better discovery, is entirely absent.
40. A few hypothetical examples illustrating the unrestricted scope of paragraphs 3 and 4 of the Rule 35(3) notice come readily to mind. Would an informal Whatsapp exchange between the Plaintiff and an acquaintance regarding the type of services offered by his new locksmith / security services business be included within paragraph 2 of the notice and subject to further discovery? Or say a receipt for a set of replacement batteries purchased by the Plaintiff for a security gate access remote at his home? Would a Whatsapp exchange between a customer requiring locksmithing services and one of the Plaintiff’s employees be subject to discovery because it relates to “services rendered and good supplied”?
41. The possibilities and various permutations of what is possibly included and subject to discovery in terms of the Rule 35(3) notice, are endless. It is however precisely such an outcome which the requirement of specificity in a Rule 35(3) Notice is meant to guard against.
42. It is in my view not consistent with principles of fair civil litigation for a party to whom an overbroad broad and generalized Rule 35(3) notice is directed to have to effectively guess what is included within the scope of the notice and what is not.
43. There is a further fundamental difficulty with the First Defendant’s formulation of paragraphs 3 and 4 of her Rule 35(3) Notice. In her replying affidavit in the current application, the deponent confirms that the First Defendant’s pleaded case in her claim in reconvention is that the Plaintiff’s alleged unlawful breach of the restraint of trade provisions of the sale of

members interest agreement, occurred in the period prior to the alleged cancellation of the agreement. In addition and on her own version, in the letter from her attorneys dated 9 December 2021, the First Defendant expressly accepted the Plaintiff’s repudiation of the sale agreement and confirmed that the agreement was cancelled.

44. That being the case, it is difficult to understand on what possible basis the First Defendant maintains that she is legitimately entitled to request documents relating to the Plaintiff's Vengeance security business covering the entire period of 23 September 2019 to 2 August 2023, the latter being the date of her Rule 35(3) Notice and a date some 20 months after the agreement had already been cancelled. No argument of any degree of persuasion was advanced by the First Defendant as to why the Plaintiff would be acting unlawfully in engaging in a new security / locksmith business after 9 December 2021 when the agreement had on the First Defendant's own version already been cancelled and the restraint of trade was no longer effective.
45. If the Plaintiff was no longer subject to a restraint of trade and lawfully entitled to conduct such a business following the cancellation of the agreements on 9 December 2021, I see no conceivable legal basis why he would nonetheless be obliged to discover and hand over to the First Defendant vast swathes of documentation relating to his lawful operation of that business.
46. The machinery of discovery provided by the Uniform Rules of Court does not exist to enable or confer some form of broad and untrammelled

pre-litigation right to trawl through a persons' papers, correspondence and documents in the hope of building a case against

that person. A party is only entitled to discovery when the litigation battle lines have already been drawn and the legal issues

established. The principle does not operate the other way around. Discovery is not a tool designed to put a party in a position to draw the battle lines first and then later establish the legal issues.[4]

Documentation relating to the Plaintiff's employees and Second Defendant's current or historic clients

47. Paragraph 5 of the Rule 35(3) notice seeks discovery of "All written and electronic communication, including but not limited to correspondence, WhatsApp communications, SMS's between the Plaintiff and/or employees of the Plaintiff and/or Evolution on the one hand and any current or historic clients of the Second Defendant on the other hand."
48. The Plaintiff in his answering affidavit objected to the request on the basis that no time period was specified in the Rule 35(3) notice and that the failure to do so rendered the notice overbroad.
49. In his replying affidavit, the First Defendant's attorney expressly conceded the point. He states that "...upon further consideration of the Notice read together with the answering affidavit, I concede that, due to the fact that the dates are unspecified, the request in respect of the item under reply is too broad. A further, more specific, Rule 35(3) notice will be filed in due course to remedy the error." (emphasis added).

50. No such replacement Rule 35(3) notice was however filed by the First Defendant to remedy its admitted overbroad request in paragraph 5 of the Rule 35(3) Notice. On the contrary and flying in the face of this plainly admitted concession in the First Defendant's replying affidavit, it was contended in the First Defendant's written argument that the First Defendant remained entitled to further and better discovery of the documents set out in paragraph 5 of the Rule 35(3) Notice.
51. When pressed on this aspect in the course of oral argument, Mr. Kulenkampff, who argued the case for the First Defendant, adopted a novel approach. He promptly abandoned the concession made on oath by his instructing attorney, contending instead that the concession had been incorrectly made and that the court was not bound by it.
52. It of course is so and it is trite that a court is not bound by an incorrect legal concession. This however is subject to the proviso that the court must consider the legal concession to have been wrong in law. The legal concession by the First Defendant's attorney that paragraph 5 of the Rule 35(3) notice was overbroad in the absence of any qualification as to time, was however in my view, entirely correct.
53. The overbroad formulation of paragraph 5 of the Rule 35(3) Notice suffers from an additional flaw. In the Plaintiff's answering affidavit, he states that he does not know who the Second Defendant clients are and it is not clear who are the Second Defendant's "historic" clients. This statement by the Plaintiff is not addressed let alone disputed in reply.
54. Paragraph 5 of the Rule 35(3) Notice has been correctly conceded by the First Defendant to be overbroad. There is no basis to order to Plaintiff to discover documents and communications with present and "historic" clients of the Second Defendant when it is undisputed that the Plaintiff does not even know who these persons are.
55. The purpose of further and better discovery in terms of Rule 35(3) is not to order parties to undertake the impossible.

Lists of clients and suppliers

56. Paragraphs 6 and 7 of the Rule 35(3) Notice seeks discovery of lists of the clients and suppliers of the Plaintiff and Vengeance "from 23 September 2019 to date". The reference "...to date" indicates that the time period for the documents sought relates to the date of the present application in April 2024. The Plaintiff disputes that there is any legal basis for a competitor to obtain a list of suppliers or customers of another competitor.
57. I have earlier pointed out that it is common cause that the agreements were cancelled on 2 alternatively 9 December 2021. The cancellation of the agreements from that date rendered the restraint of trade provisions inoperative. The Plaintiff was legally entitled and free to compete with the Second Defendant after the agreements had been cancelled and the restraint of trade was no longer applicable.

58. It is entirely unclear to me what legal basis would justify ordering the Plaintiff's current client and supplier documentation for his lawfully operated business, to be provided to the Defendants, who are his competitors. The argument apparently being advanced by the First Defendant, is that these documents, which she claims would demonstrate unlawful competition, are "relevant" to her future claim based on section 85(9) of the NCA and the exercise of the Court's just and equitable powers under that section. I fail to see any such relevance.
59. Firstly, the First Defendant's claim in reconvention is plainly not a claim for delictual or contractual damages arising from unlawful competition. Secondly, the agreements in respect of which an order is sought for voidness and just and equitable relief under section 89(5) of the NCA, were concluded in September 2019 and cancelled in December 2021. I am not persuaded that lists of the Plaintiff's clients and suppliers as at April 2024 have any relevance to the First Defendant's pleaded counter-claim, which is not a contractual claim but instead a claim for declaratory relief relating to events and contracts which were concluded in 2019 and 2021, some five and three years ago respectively. This applies more so when there is no cognizable claim of unlawful competition advanced by the First Defendant in respect of the period after the date of cancellation of the agreements in December 2021. The absence of such a claim is hardly surprising given that any restraint of trade previously binding on the Plaintiff became inoperative from 9 December 2021 when the First Defendant herself confirmed that the agreements had been cancelled.

PSIRA Registration documents

60. Paragraph 8 of the Rule 35(3) Notice requires the Plaintiff to discover "...The Plaintiff's and Evolution's Private Security Industry ('PSIRA') registration applications."
61. The First Defendant claims in her founding affidavit that these documents relating to the registration status of the Plaintiff and Evolution / Vengeance are "...central to the dispute regarding whether or not the competition was unlawful on the basis of a contravention of a statutory prohibition." In paragraph 9, the First Defendant seeks "... All written and electronic communication, including but not limited to correspondence, WhatsApp communications, SMS's between

representatives of PSIRA on the one hand and the Plaintiff, any representatives of Vengeance Security Solutions and/or any representatives of Evolution on the other hand from September 2019 to date."

62. The Plaintiff has annexed to his answering affidavit the PSIRA registration certificates in respect of the Plaintiff and Vengeance. These documents confirm without a doubt that the Plaintiff has been lawfully registered with PSIRA as a security services provider since 2 October 2006 and Vengeance has been lawfully registered as a security services provider since 27 January 2023.

63. The First Defendant's founding affidavit deposed to on her behalf purported to justify the further discovery sought in paragraphs 8 and 9 of the Rule 35(3) Notice. The First Defendant's deponent in this regard states that the pleadings allege that the Plaintiff provided security services and represented that he was registered to offer services for which he was not PSIRA registered. The allegation that the Plaintiff was not so registered is demonstrably false. That aside, it is difficult to understand what conceivable relevance historical documents relating to the registration of the Plaintiff as a security services provider would have to the First Defendant's counter-claim for relief in terms of section 89(5) of the NCA.
64. No sustainable legal grounds were advanced by the First Defendant in argument to justify the further discovery sought in paragraphs 8 and 9 of her Rule 35(3) Notice. None have in my judgment have been established.

Documentation relating to Plaintiff's employees

65. At paragraphs 10 and 11 of the Rule 35(3) Notice, the First Defendant seeks documentation and "communications" of virtually any conceivable and possible description under the sun relating to the Plaintiff's present employees, persons previously employed by the Second Defendant, their employment contracts and "any agreements with any contractors performing work on behalf of the Plaintiff and or Vengeance." The documents sought are stated to cover the period 23 September 2019 and 1 June 2022 to date.
66. The ostensible basis on which these documents are sought are allegations by the First Defendant that the Plaintiff "enticed staff members of the Second Defendant to abscond and work for him and/or Evolution" and "obtained confidential information of the First and Second Defendant from the employees so enticed."
67. The plainly overbroad description of documents sought in this regard is obvious. They would for example notionally include within its scope an employment contract between the Plaintiff and his domestic worker and any other agreement between the Plaintiff and a contractor "performing work for the Plaintiff", irrespective of whether such work has anything to do with the Plaintiff's security services business. The First Defendant seeks documents and unspecified "communications" between the Plaintiff and his staff members from September 2019 to the date of the notice. According to the Plaintiff, the security services company Vengeance established by the Plaintiff was however only established in late June 2022.
68. The documentation sought in paragraphs 10 and 11 of the Rule 35(3) Notice is in my view overbroad, unspecified and furthermore irrelevant to the First Defendant's pleaded cause of action based on section 89(5) of the NCA.

Plaintiff's financial statements, credit applications and bank statements

69. The Rule 35(3) Notice seeks at paragraphs 12 to 14 discovery of all of the Plaintiff's and Vengeance's financial statements, credit applications and bank statements for the period 23 September 2019 to the date of the notice in April 2024.
70. The Plaintiff's pleaded cause of action in her counter-claim is for a declaratory order that the agreements between the parties are unlawful and void and for a just and equitable order in terms of section 89(5) of the NCA. No contractual or delictual claim for damages whether due to unlawful competition or otherwise is advanced by the First Defendant.
71. I am unable to agree with the argument that in making a just and equitable order under section 89(5) of the NCA, the remit of the court is entirely unrestricted and would include an assessment of any evidence whatsoever relating to complaints by the First Defendant, claims of alleged unlawful competition, allegations regarding enticement of employees and conduct post the cancellation of the agreements. The conduct of the Plaintiff following the cancellation of the agreements, which is in any event disputed, is in my view entirely irrelevant to a determination of what may be just and equitable by virtue of a declaration of voidness in respect of those agreements.
72. The order sought for discovery of the Plaintiff's personal bank statements in terms of paragraph 14 of the Rule 35(3) Notice is entirely unsupported in the founding affidavit, save for a bland statement that "...it is submitted that the documents sought are both relevant and sufficiently particularised."
73. No attempt whatsoever is made to demonstrate why the Plaintiff's personal bank statements for a period of some five years, are relevant to the First Defendant's pleaded counter-claim. It must be made clear to First Defendant that the right to privacy under section 14 of the Constitution exists for a reason. It is for the Court to ensure that privacy rights are respected in discovery processes and that only relevant documents are subject to discovery in terms of the Uniform Rules.

Costs

74. I am of the view that the First Defendant's application to compel further and better discovery is without merit and fails on each of the bases on which it has been advanced.
75. The First Defendant's conduct in this litigation warrants comment. The First Defendant has on numerous instances in this application contended, without any sustainable factual or legal basis to do so, that the Plaintiff has lied under oath and acted male fide. Where alleged evidence of the apparent existence of additional documents in the possession of the Plaintiff has been referred to by the First Defendant, for example the email exchange between the First Defendant and Mr Tychsen on 18 August 2019, such evidence has been wrongly described. Indeed this a charitable description of the First Defendant's conduct in this specific regard.

76. Allegations are made by the First Defendant that the Plaintiff illegally operated as a security services provider without being registered to do so, which allegations were shown to be demonstrably false. The demand for further discovery embodied in the Rule 35(3) notice has been cast in virtually all instances in an overbroad manner with no regard for the important requirement of precision and specificity for such notices.
77. Concessions are made by the First Defendant's attorney on oath regarding the overbroad nature of certain requests for discovery, only for the concession, which was rightly made, to be purportedly withdrawn by the First Defendant's counsel at the last minute and in the course of oral argument. The Court has been saddled with a slew of irrelevant documents annexed to the First Defendant's founding affidavit, including a 32 page affidavit by the First Defendant in unrelated harassment proceedings in the Somerset West Magistrates Court.
78. This application and the manifestly overbroad terms of the further discovery sought by the First Defendant, is in my judgment a classic case of a fishing expedition and an abuse of the discovery process.

Order

79. For these reasons I made the following order on 12 August 2024:

1. The Application in terms of Rule 35(3) is dismissed.
2. The Applicant / First Defendant is to pay the costs on Scale C.

S G MAGARDIE

Acting Judge of the High Court

APPEARANCES

For Applicant / First Defendant: D Kulenkampff

Instructed by:

Kulenkampff & Associates

For Respondent / Plaintiff: R Stelzner SC

Hannes Pretorius, Bock & Bryant

Date of hearing: 24 April 2024

Date of Judgment: 21 November 2024 (electronically)

- [1] The MV Urgup: Owners of The MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others 1999 (3) SA 500 (C) at 515.
- [2] Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 321.

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- [3] Federal Wine & Brandy Company Ltd v Kantor 1958 (4) SA 735 (E) 749H and the cases referred to in Van Loggerenberg, Erasmus: Superior Court Practice (2023), D1- 472A, footnote 1.
- [4] STT Sales (Pty) Ltd v Fourie 2010
- (6) SA 272 (GSJ) at paragraph [16] and [17].
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Prepared on 12 October 2026 · Esheria