

SOUTH AFRICA / JUDGMENT

Fisher and Others v Contribsystems Vertriebs GmbH; Contribsystems Vertriebs GmbH v Amadwala Trading 51 CC and Others (AR644/2016) [2017] ZAKZPHC 49 (17 November 2017)

[2017] ZAKZPHC 49

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Madondo, Masipa, Van Zyl

CASE / FILE NUMBER

AR644/2016

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: AR644/2016

In the matter between:

RICHARD IAIN FISHER FIRST

APPELLANT

BASFOUR 3519 (PTY) LIMITED SECOND

APPELLANT

ROSATI MANUFACTURING CC THIRD

APPELLANT

And

CONTRIBSYSTEMS VERTRIEBS GmbH RESPONDENT

CONTRIBSYSTEMS VERTRIEBS GmbH PLAINTIFF

AMADWALA TRADING 51 CC FIRST

DEFENDANT

RICHARD IAIN FISHER SECOND

DEFENDANT

BASFOUR 3519 (PTY) LIMITED THIRD

DEFENDANT

ROSATI MANUFACTURING CC FOURTH

DEFENDANT

APPEAL JUDGMENT

MADONDO DJP

[1] The appellants appeal against the judgment of Pillay J, handed down on 31 March 2016, in which she dismissed their interlocutory

applications for an order compelling discovery and further particulars.

[2] The appellants were the applicants in the court a quo where they sought an order in terms of Rule 35(7) of the Uniform Rules of Court to compel the production of further documents they had requested under Rule 35(3) and secondly, to compel further particulars in respect of the redacted Libyan and Danish sale agreements and 2013 licensing agreement. The court a quo dismissed both applications and granted the appellants leave to appeal to this Court.

[3] The appeal concerns the documents described in sub paragraphs 1.1 to 1.4 of the defendants' notice in terms of Rule 35(3) issued on 27th July 2015, more fully described in the first schedule of plaintiff's supplementary discovery affidavit dated the 16th of October 2015 and referred to in sub-paragraph 22.2 of the affidavit of Renate Wolfram dated 22nd of February 2016. The documents include: contracts with purchasers; licence agreements with licensees; orders and the plaintiffs invoices issued to purchasers or licensees.

[4] The applicants are the defendants and the respondent the plaintiff in the pending action. For convenience, the parties shall be referred to as they were in the court below. The plaintiff has lodged two alternate claims against the defendants, the first based on contract and the alternate on delict.

[5] The plaintiff is the manufacturer and the distributor of a mobile stadium, seating and grandstand system, marketed and distributed as the Contrib Mobile Seating System (the invention).

[6] On 9 January 2007 the plaintiff and the defendants concluded a written non-disclosure and non-use agreement known as the

Basfour agreement and in terms of which the plaintiff was required to disclose comprehensive “secret information” with regard to the invention to the defendants.

[7] However, in order to ensure confidential treatment of the secret information, the parties further agreed that the defendants were prohibited from using any experience, technical knowledge and information obtained by, during and in connection with a presentation, or in any other form, as well as secret information for purposes other than for giving effect to the agreement and for making use thereof, itself or through third parties free or against payment without the express written consent of the plaintiff, being the

offeror.

[8] Pursuant to the Basfour agreement the plaintiff delivered a sample of its invention, which was a grand stand container with seats and railings (collectively referred to as the seating system), to the third defendant.

[9] In breach of their obligations in terms of Basfour agreement the first, second and third defendants have engaged the fourth defendants to manufacture mobile container seats substantially identical to the plaintiff’s invention for distribution by the first defendant, utilising a process and specifications which are the same as the plaintiff’s process or specifications.

[10] The plaintiff’s process as a whole constitutes one, more, or all of the following; trade secrets; confidential know-how and confidential knowledge. The plaintiff alleges that the first and third defendants both represented by the second defendant, have gained access to the secret information and sample by concluding the Basfour, Umhlanga and Amadwala agreements.

[11] The plaintiff further alleges that in order to enable the fourth defendant to manufacture the Umzansi Mobile seats the first, second and third defendants must have divulged to the fourth defendant strictly confidential or secret information, not to be disclosed to third parties relating to the invention, without the written consent of the plaintiff.

[12] According to the plaintiff the knowledge imparted to the defendants through the delivery of a sample of the seating system in question and the presentation made to the defendants at the inception, constitute secret and confidential information and the defendants have utilised that secret and confidential information unlawfully and copied the seating system.

[13] The plaintiff also states that the second, third and fourth defendants, by manufacturing and selling copies of the plaintiff’s

mobile stadium and grand stand system, are unlawfully competing with it. They have achieved this purpose by reverse engineering and copying of the plaintiffs’ containerised seating system.

[14] The plaintiff's alternate claim is based on unfair competition. In addition, the plaintiff seeks an order interdicting and prohibiting the appellants from utilising the sample, technical information, secret information and the documents referred to in the Plaintiff's Particulars of Claim, and from procuring the manufacture of copies of the plaintiff's mobile seats units including Umzansi mobile seats.

[15] While admitting the conclusion of Basfour agreement between the parties and procuring the fourth defendant to manufacture mobile

seats the first, second and third defendants deny that any breaches of the contract have occurred and that the plaintiff suffered any contractual and delictual damages in respect of Umzansi Mobile seats, which the first defendant procured from the fourth defendant, nor were they under any obligation not to use the information the plaintiff supplied. The third defendant pleads that the agreement has never been implemented and that the plaintiff has never disclosed any comprehensive secret information or any other information that is confidential or proprietary to the plaintiff.

[16] The defendants contend that the information in question is not at all secret or confidential, because it has been sold, distributed or manufactured worldwide without restriction, or it is available from subsequent purchasers (supplied by the plaintiff) with or without the plaintiff's consent. The defendants allege that the information has entered the public domain without any act or fault on their part.

[17] The essential issue between the parties is whether or not the required information was confidential or had passed into the public domain.

[18] In preparation for a trial on 27 July 2015 the defendants caused a notice in terms of Rule 35 (3) to be served on the plaintiff. The plaintiff produced redacted versions of the documents sought to be discovered. In the redacted versions, the client's details (names, addresses, contact details) and prices have been blocked out.

[19] The objection to the discovery of the required unredacted documents is not merely based on the allegation that they are irrelevant, but also on the allegation that they contain information that is confidential to the plaintiff because the second, third and fourth defendants are unlawfully competing with the plaintiff. It is alleged that they will therefore unduly benefit from the disclosure of these documents. With regard to the production of the licence agreements, the objection is that the plaintiff had no licence agreements with any other person prior to the date of the institution of the action for the sale of the seating system.

[20] The defendants are not satisfied with the responses given in the plaintiff's in reply launched an application in terms of Rule 35(7) to compel further discovery and the outstanding particulars. In law, they were entitled to take that route as they were of the view that the discovery made and the particulars furnished were incomplete or insufficient. See *Rottcher and another v Beckenstrater* 1954

(2) SA 483 (T).

ISSUES

[21] At issue in this appeal are whether the judgment of the court a quo is appealable and whether the court a quo erred when it refused the defendants' applications to compel discovery and further particulars.

APPEALABILITY TEST

[22] It is settled law that in determining whether a decision is appealable, not merely the form of the order must be considered but also, and predominantly, its effect. *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980

(3) SA 91 (A) at 96H– 97A.

[23] It has been argued on behalf of the defendants that the decision by the court a quo is final in effect since the defendants will not be able to resuscitate their application in the trial court in terms of Rule 35(7).

[24] It is the plaintiff's contention that the dismissal of the defendants' interlocutory application to compel discovery and further particulars is not appealable since it is not necessarily final in effect and does not dispose of at least a substantial

portion of the issues between the parties in the main proceedings.

[25] In *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A) at 532J– 533A the court held that an order is appealable if (i) the decision is final in effect and not susceptible to alteration by the court of first instance; (ii) it is definitive of the rights of the parties; i.e., it must grant definite and distinct relief, and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed. The *Zweni* case was also approved and applied by the Supreme Court of Appeal in *ABSA Bank Limited v Mkhize and Two Similar Cases* 2014 (5) SA 16 (SCA).

[26] The effect of the judgment by the court a quo is to deny the defendant the proper opportunity to investigate and prepare for trial on a material issue of dispute between the parties. The question to be decided is whether the judgment in question is final in effect to such an extent that it is not susceptible to alteration by court of first instance as the defendants allege.

[27] An application to compel discovery in terms of Rule 35(7) is usually made before the trial as in the present case, but it has been held that such an application can be made during the trial, even after evidence has been led when the need arises. *Jacobs v Minister Van Landbou* 1975 (1) SA 946 (T) at 952F–H. There is nothing preventing the trial court from exercising its discretion whether or not it grants an order compelling discovery of the required documents and further particulars relevant to the issues between the parties. The trial court, in the premises, can alter the judgment by granting a fresh application for an order compelling

discovery of the required documents and further particulars relevant to the issues between the parties. The final effect of the interim order by the court a quo will thereby wane and eventually disappear.

- [28] In the premises, the argument that the order in question is final in effect and appealable since during the trial the defendants will not be able to resuscitate their applications in terms of Rule 35(7) does not hold water. In *Santam Ltd and another v Segal* 2010(2) SA 160 (N), at 164 B-G the court held a decision of a similar nature to be final in effect and therefore appealable. However, the court in *Santam Ltd* warned against the blind following or blanket application of its decision in determining the appealability of all orders refusing or compelling discovery. Each case has to be judged on its own facts.
- [29] It has been argued on behalf of the defendants that the lodging of an application to compel discovery and further particulars will delay the finalisation of the matter and is not cost effective. It will also inconvenience the defendants in the presentation of their case. The fact that a decision may cause a party an inconvenience or place him or her at a disadvantage in the litigation (which an appeal can correct) is not taken into account in determining its appealability. Since the defendants will still be able to bring applications compelling discovery and further particulars during the trial, even after the evidence has been led, I am not satisfied that the defendants have made a case for concluding that the judgment in question is final in effect, and appealable on such ground alone.
- [30] However, the test for the appealability has now been widened and the question is whether the granting of an appeal is in the interests of justice. On the need of a new appealability test Mogoeng CJ in *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) para 40 said:

‘The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the granting of leave to appeal. Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations had relativized the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.’

See also *South African Informal Traders Forum and others v City of Johannesburg and others* 2014 (4) SA 371 (CC) para 20.

COURT’S DISCRETION

- [31] Neither party has an absolute right to discovery and further particulars. The court has a discretion whether or not to order

compliance with the rule. (*Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd* 1971(4) SA 589 (W) at 594H). The Appellate court may only interfere with the decision of the court a quo if it is shown that the discretion has not been exercised judicially, or has been exercised based on a wrong appreciation of the facts or wrong principle of law. (See *Giddey N. O. v J C Barnard and Partners* [2006] ZACC 13; 2007

(5) SA 525 (CC) para 19).

[32] In the court a quo the learned judge agreed with the counsel for the plaintiff that the defendants in their discovery affidavit had failed to make out their case for discovery of the unredacted documents. They attempted to do so in reply and that for that reason alone their applications should be dismissed with costs. In this regard, an affidavit of discovery is conclusive, save where it can be shown

(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 any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made. See *Federal Wine and Bandy Co. Ltd v Kantor* 1958

(4) SA 735 (E).

[33] In *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N) at 560 F-H, a Full bench of the Natal Provincial Division held:

‘[W]hilst the Court should not and would not go behind a party’s affidavit that the contents of a document are relevant, such

affidavit is nevertheless as far as the Court is concerned not conclusive. After an examination of the recognised sources, as well

as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant and disposable documents in his possession or power and may then order further and better discovery or production in conflict with the claim in the affidavit.’

[34] The mere fact that the defendants did not make a case for the documents sought to be discovered in their founding affidavit for discovery, in my view, sufficient reason for ignoring all reference to the sought documents in the discovery affidavit, pleadings and in the admissions by the plaintiff. In my judgment this was an appropriate case where the court a quo ought to have gone beyond the founding affidavit and held in favour of the defendants in this regard. For the consideration of a fair trial, the court needs to ensure that a litigant is entitled to present his or her case without unfair limitations. See *Crown Cork and Seal Co. v Rheem SA (Pty) Ltd* 1980

(3) SA 1093 (W) 1099 G-H.

[35] Acting under the bona fide mistaken belief that it was then common cause between the parties that the seating system was in the public domain worldwide, the court a quo declined to determine the question whether the defendants were entitled to the disclosure of the identity and contact details of the plaintiff's Libyan and Danish customers as well as the 2013 licensing agreement, simply on the ground that it was no longer necessary to do so since the purpose for which it was sought had fallen away. This was not a concession made by the plaintiff and nor was it a concession *ex facie* the pleadings. The concession by the plaintiff, in this regard, was only to the fact that the seating system was only in the public

domain in Libya and Denmark. Whether the seating systems had passed into the public domain worldwide was and still is in dispute.

[36] The inevitable conclusion is that the court a quo exercised its discretion and came to the decision, not to make a determination whether or not the defendants were entitled to the

disclosure of the documents sought, based on the wrong appreciation of the facts. This is evident in the court's concession that it erred in finding that since the plaintiff had acknowledged that the seating system was in the public domain in Libya and Denmark, the public domain issue was no longer in dispute and thus that the information sought (*viz* the identity and contract details of the purchasers and the 2013 licensing agreement) were no longer relevant (application for leave to appeal judgment). The court a quo, acting on the erroneous impression that the plaintiff conceded that Libyan and Danish purchasers were not subject to any secrecy

constraints, concluded that the seating system was in the public domain worldwide, which according to the plaintiff was not the

position. This constitutes a misdirection on the part of the court a quo in the exercise of its discretion in determining the issues between the parties.

[37] This Court at liberty, to reconsider the issues and should, therefore, go on to decide the questions afresh.

[38] The purpose of discovery is stated in *Dubach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083 as to 'ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated.'

[39] Discovery ranks with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems: Properly employed where it is called for, it can be, and often is a devastating tool. The *MV Urgup: Owners of the Urgup v Western Bulk Carriers (Australia) Ltd and others* 1999 (3) SA 500 (C) at 513G-H.

- [40] Discovery assists the parties and the court in exposing the truth and, by doing so, helps towards a just determination of the case, and it saves costs. See *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 445-6; *Santam Ltd v Segal* para 6.
- [41] The essential feature of discovery is that the person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. Discovery is not intended to be used as a sniping weapon in preliminary skirmishes. *MV Urgup* case at 513I; *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) para 15.
- [42] There is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35 (12). Information must be decisive of the dispute between the parties, i.e. it would bring an end to the dispute. It must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. See *MV Urgup* case, 513H-L; see also *Unitas Hospital v Van Wyk and another* [2006] ZASCA 34; 2006
- (4) SA 436 (SCA) para 19 at 445A.
- [43] There is only an obligation to make discovery of documents which may – not which must – either directly or indirectly enable the party requiring the affidavit of discovery either to advance his or her own case or damage the case of his or her adversary.
- [44] A litigant may refuse to disclose a document if he would be able to claim privilege for its contents on any grounds. Privilege is a matter falling within the law of evidence rather than procedure. See *DT Zeffert* *The South African Law of Evidence* 2003 at 579. But, the court must exercise its discretion to order discovery if justice cannot otherwise be properly done. *Moulded Components and Roto Moulding SA (Pty) Ltd v Councorakis and another* 1979
- (2) SA 457 (W) at 462H – 463B.
- [45] A party may validly object to the production of a document or tape recording if it is privileged. The grounds on which the privilege is claimed must, however, be fully set out and be stated sufficiently clearly for the court, if called upon, to decide whether or not the documents or tape recordings are in fact privileged from production. See *Ferreira v Endley* 1966
- (3) SA 618 (E) at 620H – 621A. See also *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116; *Tractor and Excavator Spares (Pty) Ltd v Groenedijk* 1976
- (4) SA 359 (W) at 362G – 363A. The mere claim of privilege is certainly no reason for omitting all reference to the documents in the discovery affidavit.
- [46] The onus is on the party who refers to a document to set up facts relieving him or her of the obligation to produce it; such as privilege, irrelevance or that the document is not in his or her possession and that he or she is therefore unable to produce it. Documents are privileged from discovery if their discovery would have the effect of disclosing the evidence of either party. *Freeman v Freeman* 1921 WLD 1; *Brill v The Mutual Life* (1905) 22 SC 421 at

423; *Sed Contra Centre for Child Law v Hoëskool Fochville and ano* 2016(2) SA 121 (SCA) at para 18.

[47] The respondent resists the obligation to discover the documents in an unredacted form on the ground of the breach of confidentiality. The plaintiff alleges that the documents sought to be discovered contain confidential business information and that the discovery thereof will unduly benefit the defendants as they are unlawfully competing with it.

[48] Rule 35 does not recognize confidentiality as a ground for refusing discovery. The onus rests on the plaintiff to establish that the documents sought to be discovered are privileged. Resistance to producing documents on the ground that they contain items of a confidential nature does not per se in our law confer on them any privilege against disclosure. *Unilever plc and another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) 339J – 340A.

[49] In *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385B-C, about a party sought to discover, Colman J said:

‘... It need disclose nothing that is not material; but what is material, in the wide sense that that word bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be, unless, of course, the relevant items in the claim has been formally abandoned so that the entries and documents have ceased to have any materiality to anything still in issue between the parties.’

[50] In that case one of the issues was damages suffered by one of the parties. The objection to discovery was that the applicant was its trade competitor and that disclosure of what was relevant to the action might also involve disclosure of confidential information,

which the respondent did not want its competitor to see. Instead of discovering its books of account the party claiming had proffered an auditor's report.

[51] The confidentiality of the information which the plaintiff passed on to the appellant in this case is still in issue between the parties. Therefore, the documents sought to be discovered have some materiality to the issues between the parties. Reference to the documents in question in the affidavits and pleadings is, firstly indicative of the fact that they are relevant to the action. See *MV Alina 11 Transnet Med v MV Alina 11* 2013

(6) SA 556 (WCC) para 24. Secondly, the respondent concedes their relevance in its supplementary discovery affidavit and that they are related to matters in question in the action (Vol.3, pp 198 – 200 of the record).

[52] A discovery affidavit is taken to be prima facie conclusive, as to both the possession of documents or tape recordings and the relevance of their contents, and the court will not reject the affidavit unless a probability is shown to exist that the dependent is either mistaken or false in his assertion. *Caravan Cinemas (Pty) Ltd v London Film Productions and others* 1951 (3) SA 671 (W) at 675 H- 676 E.

[53] The essential element of the plaintiff's cause of action under the contractual claim is that the sample which it furnished to the defendants constitutes secret information as envisaged in the Basfour agreement and which remains the property of the plaintiff in terms of such agreement. The defendants deny that the sample they received from the plaintiff constitutes secret information, and allege that such information have become of the public domain. The plaintiff has made positive allegations of supply to third parties. It cannot, therefore, withhold relevant information. If the confidentiality attached to the documents may be compromised, that is an inevitable consequence of the plaintiff's having referred to them in their pleadings. Unilever case, at 341J – 342A.

[54] In *Santam Ltd v Segal* supra in para 8 and para 9 at 165 B the court held that privilege is not the only ground upon which one can object. Discretion to refuse

production of documents should most commonly be applied where disclosure would breach confidentiality involving a third party. The position may be the same if the document sought to be discovered tends to incriminate the party making discovery or expose him or her to a risk of any kind or penalty or forfeiture of any nature. The onus rests on the plaintiff of establishing that the documents sought to be discovered are privileged. In my view, it has failed to raise any valid objection based on the alleged privilege

(confidentiality) to justify the resistance to discovery and production of the unredacted documents.

[55] A party is required to discover every document relating to the matter in question, which is material to any aspect of the case. See *Durbach v Fairway Hotel Ltd* 1949

(3) SA 1081 (SR). It therefore follows that a document which has no relevance whatsoever to the issues between the parties need not be disclosed.

[56] In the Rule 35 (3) notice the defendants seek all documents relating to the supply by the plaintiff of the seating system to any person and such documents include, contracts with purchaser, licence agreements with licensees, purchase or supply orders and plaintiff's invoices issued to purchasers or licensees. The defendants allege that these documents will enable them to determine whether or not the information in question was confidential, or whether it had entered the public domain.

[57] The respondent has discovered and produced the documents setting out the terms of Libyan and Danish sales, save for the redacting of client, details and prices in respect of which confidentiality is claimed. The objection to production of such documents, other than on the ground of confidentiality, is that the terms of the agreements between the plaintiff and the purchasers, into which the defendants wish to make their own enquires, are clear from the redacted agreements. According to the respondent discovery entitles a person to the documents, not access to unnecessary and speculative lines of enquiry.

- [58] In *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1991 (4) SA 214 (Tk) at 216B-F Hancke J held that if documents are prima facie relevant to the issue before the court and hence discoverable, it is not appropriate to decide on the weight of those documents at the time of an application to compel discovery. Consequently, discovery may not be refused on the ground that no weight can be attached to the documents.
- [59] With regard to the production of the 2013 Licensing agreement the objection is that it is inherently irrelevant since it was concluded four years after the institution of the action, and after the end of the five year period of the Amadwala Agreement regulating the rights and obligations of the plaintiff and the defendants.
- [60] Relevance is a matter for the court to decide, having regard to the issues between the parties. See *MV Alina* 11, supra at paras 24 to 25. It does not depend upon the subjective views of the legal representatives of the party making discovery. *Santam Ltd* supra para 9 at 165C-D. The party has to provide access to documents which could be part of the issues and whatever documents could be relevant.
- [61] The defendants allege that the seating system was in the public domain alternatively would in future be entering the public domain since it has already been sold in numerous countries around the world without restrictions.
- [62] The plaintiff has allegedly been distributing seating systems in various parts of the world and the defendants intend to establish the terms under which they were so sold and more particularly whether they were sold out rightly without restrictions or subject to conditions relating to confidentiality. Further, it is common cause between the parties that the plaintiff did supply seats to Libya and Denmark. For the defendants to investigate the circumstances of the supply, how many seats were supplied and the terms and conditions of the supply, they are required to make contact with those clients, and if necessary, call them as witnesses or obtain documents from them which will assist them in the presentation of their case.
- [63] The important point to note is that assessment of relevance is objective and not subjective. *Santam Ltd v Segal* supra. The unredacted documents including the licensing agreement are relevant for the determination of the question whether or not the information relating to seating systems was confidential and whether or not it is now or will enter in the public domain.
- [64] The rationale for the objection to the production of unredacted documents is that the defendants are the plaintiff's business competitor. Whether the defendants are unlawfully competing with the plaintiff also involves a determination of whether the seating systems and related information are objectively secret. Accordingly, the inevitable conclusion is that the documents sought to be discovered are relevant to the matter in question.
- [65] The plaintiff is not allowed to disclose only redacted documents, instead of the unredacted documents which is not proper compliance

with the rules. The party requesting discovery is entitled in terms of the rules to have full and complete discovery on oath. See the Ferreira *supra* at 621C.

[66] A party is not entitled to redact relevant portions of a discoverable document. It is only irrelevant portions of a document that may be redacted. *Universal City Studios v Movie Time* 1983

(4) SA 736 (D) at 749D-H.

[67] If the court is satisfied that the application to compel compliance with the rule relating to discovery constitutes a fishing expedition or that justice will not be done by ordering discovery, the application may be refused. In the light of what I have indicated above, the disclosure of the documents sought may enable the defendant to embark on various trains of enquiry to advance their case or to damage the plaintiff's case.

[68] Information gleaned from the licensees; their correspondence with the plaintiff; the current contracts with the plaintiff and information concerning the seating systems worldwide could lead to a train of enquiry to assist the defendants in testing whether secrecy obligations were imposed on the purchasers; whether those purchasers have manufactured similar seating systems themselves and the extent to which those purchasers have manufactured and distributed such seating systems. The details sought would also help the defendants to establish whether the seating systems were ever in the public domain, if the answer is in the affirmative, when they entered the public domain, and to what extent they have been distributed or manufactured worldwide with or without protection. The licensing agreement is relevant to show whether or not the information was or is confidential and protected.

[69] It is not in dispute that the court *a quo* acted on a wrong apprehension of the facts when it exercised its discretion to refuse the defendants' application to compel discovery and further particulars. In the premises, the interests of justice and fair trial considerations dictate that the court *a quo* ought to have exercised its discretion in favour of the defendants and compelled the discovery of the complete documents and further particulars sought and which would enable the trial court to reach a fair and just determination of the issues between the parties.

ORDER

[70] In the result I propose the following order:

- (a) The appeal succeeds.
- (b) The respondent (plaintiff) is directed to make available for inspection by the defendants' attorneys of record and counsel the documents described in the first schedule (part two) of the plaintiffs' supplementary discovery affidavit dated the 16th October 2015, and to permit the said legal representatives to make copies thereof within five (5) days of the service of this order upon the plaintiff's attorney of record.

- (c) The plaintiff is directed to make available for inspection by the defendants' attorneys and counsel the 2013 licensing agreement referred to in sub-paragraph 22.2 of the affidavit of Renate Wolfram dated the 22nd February 2016, and delivered in the application to compel discovery, and to allow the said legal representatives to take copies thereof within five (5) days of the service of this order upon the plaintiff's attorney of record.
- (d) In the event of the plaintiff failing to comply with paragraphs (b) and (c) of this order, the defendants are granted leave to apply on the same papers, supplemented in so far as may be necessary, for an order dismissing the plaintiff's claims with costs.
- (e) Costs of the appeal are reserved for determination by the trial court.

I agree

MASIPA J

I agree, it is so ordered

VAN ZYL J

Date reserved: 7 August 2017

Date delivered: 17 November 2017

Plaintiffs' counsel: Adv Stokes/ Adv Bingham

Instructed by: Venns Attorneys

Ref: R Stuart- Hill

Defendants counsel: Adv Kemack SC

Instructed by: J Leslie Smith & Co

Ref: Mr W Smith

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