

SOUTH AFRICA / JUDGMENT

Goosen v Muller (1224/2015) [2017] ZAFSHC 212 (3 November 2017)

[2017] ZAFSHC 212

COURT

Free State High Court, Bloemfontein

BEFORE

Murray, AJ

CASE / FILE NUMBER

1224/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case No: 1224/2015

In

the matter between:

H
P GOOSEN
Applicant
and
ANTON
FRIEDRICH MULLER
Respondent
HEARD

ON:

26 OCTOBER 2017

JUDGEMENT

BY: MURRAY, AJ

DELIVERED ON:

3 NOVEMBER 2017

- [1] This is an application to compel the Respondent, the Plaintiff in the main action, to make available for inspection the documents of which the Applicant, the Defendant in the main action, had requested further discovery by way of a Rule 35(3) Notice.

[2] For ease of reference the parties are referred to as they are in the main action. Adv PJJ Zietsman appeared for the Plaintiff and Adv SJ Reinders for the Defendant.

[3] The Plaintiff issued summons against the Defendant due to a runaway fire which on 19 September 2013 spread from the Defendant's

farm Krapfontein onto the Plaintiff's farms. The Plaintiff avers that as a result of the spread of the veld fire, he has suffered damages in the total amount of R 307 756.29. This amount is based on an assessment of the Plaintiff's alleged "losses and expenses" by one PJ Bennett whose report is annexed to the Plaintiff's particulars of claim as Annexure "B".

[4] The parties agreed to a separation of merit and quantum. The Defendant conceded negligence. On 14 March 2016 the Court ordered, by agreement between the parties, that the Defendant be liable for the Plaintiff's "proven or agreed damages". Damages have not been agreed. The Plaintiff therefore has to prove his damages. The quantum of his damages is the only remaining issue in this matter.

[5] The object of discovery was stated in *Durbach v Fairway Hotel Ltd*[1] to be to ensure that before the trial both parties are made aware of all the documentary evidence that is available. Discovery of such documents are intended to assist the parties and the court to discover the truth and, in doing so, to contribute to a just determination of the case.

[6] On 10 July 2015, before the separation of quantum and merit, the Plaintiff filed a discovery affidavit. In Part I of the First Schedule thereof the Plaintiff listed only two documents: a copy of the Deed of the Plaintiff's farms and a copy of the Plaintiff's identity document. In Part 2 of the First Schedule of his affidavit the Plaintiff claimed, in general, that all other documents which he had or has had in his possession, including those "which became of a confidential nature relating to the aspects which are at issue in the action" and those "which had their origin in the Plaintiff's purpose of defending the action", were privileged. The Second Schedule merely listed "none".

[7] On 23 March 2017, in preparation for the quantum trial, the Defendant filed a Notice in terms of Rule 35(3) in which he requested further discovery of a list of specified documents relating to the Plaintiff's alleged losses and expenses. The

Plaintiff only replied four months later, on 27 July 2017. He averred that he was not in possession of Item 5 on the list, the Stock Register which he is statutorily obliged to keep but which had allegedly been lost or destroyed. He did not claim not to be in possession of the other documents on the list, but merely averred that they were all irrelevant to the "issues confined by the pleadings".

[8] To support the alleged irrelevance of the documents, the Plaintiff alleged that the only issue still in dispute in terms of the Pleadings was the methodology that Bennet used to assess the Plaintiff's damages. This averment was based on a submission that, since the Defendant has not proposed an alternative method to calculate the Plaintiff's alleged damages, Bennet's model was the only one before the Court. According to the Plaintiff he could therefore only be compelled to discover documents relevant to Bennet's

methodology. But, he added, since Bennet's methodology merely amounted to an abstract assessment, none of the requested documents were relevant.

[9] First of all, I do not agree with the Plaintiff's averment that in terms of the Pleadings only Bennet's methodology is in dispute, in other words only the method by which he calculated the alleged damages. The averments regarding the Plaintiff's alleged damages are contained in

paragraphs 8 and 9 of his Particulars of Claim, which read as follows:

"8. As a result of the spread of the veldfire onto the Plaintiff's farms, the Plaintiff has suffered damage in the total amount of R 307 756.29.

9. The methodology that was followed in calculating the aforesaid damage is outlined in the report of Mr PJ Bennet appended hereto marked "B".

[10] The Defendant's reply in paragraph 12 of his Plea reads:

"12. AD PARAGRAPHS 8, 9 AND 10 THEREOF:

The contents of the paragraphs under reply, including annexure "B" thereto, are denied as if each and every allegation has been specifically traversed and Plaintiff is consequently put to the proof thereof."

[my underlining]

[11] In my view it is clear from paragraph 12 of the Defendant's Plea that he denies not only the contents of the paragraphs 8 and 9 in the Plaintiff's particulars of claim which deal with the Plaintiff's alleged damages, but also disputes the contents of Bennet's report which is appended to the Plaintiff's particulars of claim and which purports to quantify the Plaintiff's alleged losses and expenses.

[12] It is therefore not only the alleged amount of damage or the methodology that Bennet applied to arrive at that amount that is in dispute, but everything in the report, including, for instance, the various categories of damage allegedly sustained, and the facts and numbers supplied to Bennet which he used as basis for his estimates and assessments. In other words, it is not only his conclusions or the method which he used to arrive at those conclusions that was denied in the Plea, but also the facts and premises on which he based his assessment and which resulted in his estimates, calculations or assessment which were placed in dispute.

[13] In *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*[2] the court stated that:

“The damage to be compensated is the patrimonial loss of the injured plaintiff. Whether there has been such a loss and what the amount of that loss is, are questions of fact to be decided on the evidence. The measure of the loss and the evidence proving the loss may vary according to the circumstances of each case. A formalistic approach is to be avoided. The methods which can be employed to determine the extent of damage suffered may differ from case to case and there may in a particular case be more than one method which can appropriately be applied.”

*“... a Court must, furthermore, where there has been proof of damage to property, make an assessment of the quantum of damages on the material placed in evidence before it even if on that evidence it is not possible to compute the amount of damages precisely. *Turkstra Ltd v. Richards*, 1926, 1926 T.P.D. 270. The last-mentioned principle is subject to the proviso that it is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence or, in inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made.”*

“If there is no or an insufficient evidential basis upon which the loss can be assessed on the probabilities, then no assessment of damages can be made for lack of proof of the quantum of those damages.”

“The onus is upon plaintiff to adduce evidence upon which the Court can determine that market value or diminution in value and thus ascertain the loss incurred by and the compensation due to the owner.”

Obviously, then, the Defendant and the Court must be placed in a position to test and question a Plaintiff's alleged damages by means of proper discovery of documents that are *prima facie* relevant. That, after all, is the very purpose of proper discovery.

[14] The various items for which the Plaintiff claimed damages in the total amount of R 307 756.29 were specified and assigned

specific assessed values in Bennet's report were:

14.1 A damaged boundary fence with Coetzer

- R 8 321.65

14.2 A damaged boundary fence with Ludik

- R 5 640.21

14.3 Internal fences on the farms Bergfontein

& Avignon

- R 8 993.31

14.4 Loss of grazing (195 ha)

-R 205 801.33

14.5 Damage to livestock water infrastructure

- R 9 252.07

14.6 Consequential Losses:

14.6.1 Lamb losses

- R 51 170.40

14.6.2 Cost of care of orphaned lambs

- R 12 792.60

[15] Someone had to have provided Bennet with the facts and information to assess the alleged damage or losses assigned to the specified

categories. That the source of this information is the Plaintiff himself, is clear from paragraph 2 on page 3 of Bennet's report where he describes the source and purpose of Annexure "B" as follows :

"My instruction from Mr H Buchner of Honey Attorneys is to quantify the losses claimed by Mr A F Muller as a result of this fire" and, with the aid of a field inspection on 5 March 2014 "the following losses and expenses as stated by the claimant as a result of the fire have been corroborated by me."

[my italics and my underlining]

[16] But Bennet also indemnified himself by stating in his report:

"I am not in a position to guarantee the accuracy of the documentation and information provided to me by the parties concerned, but accept them in good faith."

[17] On Bennet's own version, therefore, he was provided with documentation and information which enabled him to assess and even allegedly "corroborate" the Plaintiff's claimed losses. It is inconceivable that the Plaintiff could provide Bennet with sufficient documentation

and information for the latter to be able "to corroborate" the losses and expenses claimed by the Plaintiff, yet claim that none of documents requested by the Defendant are relevant to the calculation or determination or verification of the nature and quantum of the damages which the Plaintiff is alleged to have sustained.

[18] In *Swissborough Diamond Mines v Government of the RSA*[3] Joffe J stated that the broad meaning ascribed to relevance is circumscribed by the requirements in both subrules (1) and (3) of rule 35 that the document must be one 'relating to' (35(1)) or which 'may be relevant to' (35(3)) 'any matter in question' which in turn is determined from the pleadings. In the instant case, that matter is Plaintiff's alleged damages.

- [19] Regarding relevance, the court in *Santam v Segal*[4] furthermore emphasised that it is important to note that assessment of relevance is objective and not subjective. It is not for the party's legal representative or for the party himself to decide what he thinks the issues are and what documents are relevant to them. Relevance is for the Court to determine.
- [20] It is unacceptable, therefore, that the Plaintiff could simply rely on what he calls an 'abstract' assessment of alleged damages in order to escape having to discover the documents which could assist the Defendant and the Court to test and evaluate the reasonableness of the damages which, according to Bennet, the Plaintiff claimed and which, in terms of the Court Order of 14 March 2016 (Annexure "HP1" to the application), the Plaintiff has to prove in the absence of an agreement.
- [21] The question of relevance is normally answered by reference to the pleadings. The basic principle was formulated in *Compagnie*[5]
- "... any document must be disclosed which it is reasonable to suppose contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences. Discovery is thus not necessarily limited to documents which would be admissible in evidence."*

Significantly, the court concluded that, "accordingly, the test is wider than direct relevance to the pleaded issues". [my underlining]

- [22] The fact that, by Bennet's own admission, he is unable to guarantee the accuracy of the documentation and information which served as the points of departure in his assessment, and therefore by implication, the accuracy of his assessment itself, in my view simply makes it all the more essential for the Plaintiff to comply with the provisions of Rule 35(3). Bennet states that the opinions stated in the report are his and are based on the consideration of the factors available to him. He makes his calculations *inter alia* on the basis of what he assumes to be the cost price of materials.
- [23] The court in *Replication Technology Group v Gallo Africa Ltd*[6] held that discovery is a procedure whereby a party to an action may ascertain what documents relating to the matter in issue are in the possession of the opponent. A litigant is entitled to have disclosed to him the items discovered and to inspect and make copies of them. Which, of course, is what the Defendant in this application is asking for.
- [24] The Defendant explained that he requested the documents:
- 24.1 Because they were necessary for trial preparation;
- 24.2 Because he was being prejudiced by the Plaintiff's refusal to discover and make available for inspection the requested documents;
- 24.3 Because they are or may be relevant to the issue regarding the Plaintiff's damages;

24.4 Because they are needed to enable the Defendant to make a settlement offer, if necessary, if the Plaintiff did indeed suffer damages, once the Defendant had been put in a position to determine the reasonableness of the extent of the damages;

24.5 Because they are needed to enable the Defendant to test and determine the correctness of the Plaintiff's allegations and eventually to enable the Defendant to test them in cross-examination;

24.6 Because they are needed to enable the Court to correctly determine the Plaintiff's damages;

24.7 Because the Plaintiff bases the total alleged damages suffered on Bennet's report, although it is clear from the report itself that Bennet bases his estimates, calculations and assessment on, and draws his conclusions from, the documentation and information which the Plaintiff provided to him, while Bennet himself states that he is not in a position to guarantee the accuracy of the documentation and information provided to him;

24.8 Because, in the absence of the livestock register, the Plaintiff's financial statements, and more particularly his balance sheets, will indicate whether he even had livestock at the time of the incident (e.g. the 688 ewes "heavy in lamb" separated and the 482 lambs "finally weaned") which Bennet used to estimate livestock losses, whether any or how many livestock indeed had to be withdrawn from grazing (e.g. the "Large Stock Units" referred to in Bennet's report); what alternative ration was provided, if any, what supplementary concentrates, and in what amounts, were used, if any, and what transport costs for the feed were indeed incurred, if any.

[25] These appear, prima facie, to be cogent reasons for requesting the discovery of the documents listed, especially in view of the alleged lost or destroyed Livestock Register, the discovery of only the Plaintiff's identity document and title deed, and the Plaintiff's reliance on a report of which the accuracy of the documents and information on which it is based, cannot, by the compiler's own admission, be guaranteed. And especially, furthermore, in view of the court order of 14 March 2016, granted by agreement, which stipulated that the Defendant is liable to pay the Plaintiff's "proven or agreed damages."

[26] To assess the relevance of the documents requested, and the legitimacy of the Plaintiff's responses to the various categories of requests, one needs to have regard to Bennet's report itself.

[27] Bennet's report is titled "Assessment of Losses incurred on the Farms, Bergfontein No 280 and Avignon No 961..." and refers to the "losses and expenses" claimed by the Plaintiff. It is inconceivable that an insurance company would, for instance, pay a farmer who allegedly suffered

various stock losses, or claims to have had various expenses, or relies on a devaluation of some of his insured assets due to, for instance, theft or hail, without having been provided with all the relevant facts on which his claims are based.

[28] Similarly in a matter like this: the Defendant is entitled to test the Plaintiff's claims and to cross-examine the Plaintiff and his witnesses in order to determine the reasonableness of such claims. To that end he is entitled to discovery of the documents which are or may be relevant to the matter in dispute between the parties, namely the Plaintiff's alleged damages.

[29] Therefore, even though Bennet's assessment may be 'abstract' in the sense that he advanced different abstract theories regarding, for instance, the price of various alternate feeds, roughage, concentrates and supplements, or the abstract

assessment of the number of LSU's that "needed to be withdrawn from the burnt veld" to assess loss of grazing,

or made use in some instances of 'external sources' to provide prices which he could apply in his estimates, such as "the industrial price of milk as paid by the dairy company Clover", or calculated the costs of alternative ration by, for example, calculating that at the cost of second-grade lucerne ranged between R2 000,00/ton and R3 640,80/ton, he still had to base his calculations and estimates on real facts and documents pertaining to the actual circumstances on the Plaintiff's farms which, according to his report, was provided to him "by the parties concerned".

[30] In *Herbstein & van Winsen* it was stated[7] that

"Our law recognises that proper mutual discovery in litigation ... enables the Judge to decide the case in the light of contemporary documentary material which is often more valuable than the oral testimony."

And, furthermore, that:

"The scope of discovery ... is wide. It extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence but which may fairly lead to an enquiry relevant to the issues. "

[31] That Bennet's assessment of the Plaintiff's losses and expenses cannot be simply be accepted, unchallenged, as absolutely reliable or accurate, and that therefore neither the Defendant nor the Court can reasonably be expected to accept, unchallenged and untested, the total 'losses' which the plaintiff claimed and which Bennet arrived at, is clear not only from such warnings as the latter's stated inability to guarantee the accuracy of the documents and information on which his assessment is based, but also from such remarks as the one regarding his estimate of total loss of grazing on p. 9 of his report:

"The availability of rented grazing was non-existent due to lack of rain in the district... In the event of grazing not being available I assess the cost of the cheapest reasonable alternative."

I have not established whether relief grazing (free of charge) was offered to the claimant as a gesture of good neighbourliness and community cooperation as is usually the case in times of natural disasters. [my underlining]

The baseline cost of loss of grazing will, therefore, be determined by using the cost of providing an alternative ration.”

[32] The cost of the alternative ration is, in turn, influenced by different variables, such as extent and value of different potential

ingredients. There is no indication in the report of what the Plaintiff actually used as an alternative ration, or even whether he indeed used such alternative ration.

[33] Regarding the alleged cost of raising orphaned lambs, for instance, the report states that

“the plaintiff was fortunate in that he had a dairy herd on the property and was able to supply the orphaned lambs with milk. It is normal to feed orphans for ± 122 days till weaning if no concentrates are added to the ration.”

But there is no indication that the lambs were indeed fed for 122 days before being weaned, or whether concentrates were indeed added to the ration.

[34] To do his calculations regarding lambing mortality, he simply accepted that the Plaintiff had separated 688 ewes that were heavy in lamb and that they were placed in a camp.

[35] The documents regarding which the Defendant requested discovery in terms of Rule 35(3) are described below, with the Plaintiff’s

reply to the various categories of documents requested listed underneath:

35.1 Item 1: The Plaintiff’s financial statements for the financial years ending on 28 February 2011, 28 February 2012, 28 February 2013, 28 February 2014 and 28 February 2015;

35.2 Item 4: All Plaintiff’s invoices for the purchase and sale of livestock from 1 March 2012 to 1 March 2015;

35.2.1 The Plaintiff’s response to items 1 and 4:

“Since I do not claim a loss of income as a result of the fire”... “the financial statements are for purposes of the issues raised herein, irrelevant.”

35.3 Item 2: All Plaintiff’s invoices for the purchase of wire and all components for the repair of wire fencing which plaintiff between 19 September 2013 and 28 February 2016;

35.3.1 The Plaintiff’s response to item 2:

“It is evident that the claim for damage to fences is premised on an assessed loss of the depreciated value of the fences” and “where extensive repairs were needed, the additional loss is premised on the assessed loss of the cost of repairing the fences.

The depreciated value of the fences and the cost of repairs is evidence only of damage in the form of a diminution in value. As such the repairs need not actually have been effected, and the question whether I intend to have such repairs done is also irrelevant.

The depreciation in value of the fence and the cost of repairs is thus an abstract measure of damage. In the circumstances the requested documentation is irrelevant.”

35.4 Item 3: All Plaintiff’s invoices for the purchase of feed and other feed products between 19 September 2013 and 28 February 2016;

35.5 Item 6: All Plaintiff’s invoices and receipts for the transport of feed and feed products from 28 February 2012 to 28 February 2016.

35.5.1 The Plaintiff’s response to items 3 and 4:

“The costs of loss of grazing is determined by using the assessed cost of providing an alternate ration...”

35.6 Item 5: Plaintiff’s livestock register as required by the Livestock Act or otherwise kept by Plaintiff for the period 1 January 2012 to 1 March 2015;

35.6.1 The Plaintiff’s response to item 5:

“I kept a livestock register for the period under discussion, the said register is not in my possession anymore as it has been lost or destroyed.”

35.7 Item 7: All Plaintiff’s invoices for water pipes and equipment as set out in paragraph 6 of PJ Bennet’s report;

35.8 Item 8: All Plaintiff’s invoices and receipts related to the labour cost of R 3232.50 as set out in PJ Bennet’s report.

35.8.1 The Plaintiff’s response to items 7 and 8:

“the methodology followed in assessing the damages to infrastructure is premised on the reasonable cost of repairs which, by nature is an abstract measure of damage and need not actually have been effected.”

35.9 Item 9: All Plaintiff’s invoices and receipts for the purchase of milk as set out in paragraph 7(b) of PJ Bennet’s report.

35.9.1 The Plaintiff’s response to Item 9:

“The price of milk referred to in the calculation of Mr Bennet represents the industrial price of milk at the time when the loss was suffered. In other words it represents the price of milk which I would have received from my dairy business had it not been that I had to utilise the milk to feed orphaned lambs, as is provided for in paragraph 7(b) of Mr Bennet’s assessment. ”

[36] Although I accept Mr Zietsman’s argument that the Plaintiff need not have replaced everything that was damaged in order to claim to have suffered damages, the Plaintiff is still bound by the court order which determines that he is to be compensated only for his proven or agreed damages. It would have been in his best interests, therefore, to do proper discovery of the documents which could have sustained his claim, or provided the Court with the necessary documentation to determine the reasonableness of his claim. In the absence of any documentation but the copies of the Plaintiff’s his identity document and

title deed of the relevant farms, I deem the requested documents to be prima facie relevant, or potentially relevant to the determination of the quantum of damages which is still in issue in this matter.

[37] I agree with Mr Reinders that, if the Plaintiff had to incur expenses due to the fire and as a result thereof is in possession of documentation regarding his expenses and losses, it is hard to understand how insight into that documentation constitutes a fishing expedition, as alleged, and that it is difficult to see how insight into those documents, which the Plaintiff did not deny having in his or his attorney's possession, can prejudice the Plaintiff.

[38] In *Swissborough Diamond Mines v Government of the RSA*[8] Joffe J reviewed the authorities relating to rule 35(1), (2) and (3) and the requirement of relevance. He quoted with approval the principle stated by Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co*[9]

"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of those consequences."

[39] I have considered the documents listed in items 1 – 9 of the Rule 35(3) Notice as well as Defendant's reasons for requesting further discovery of the specific documents. For the reasons advanced above, these documents will in my view either advance the Defendant's case or damage the Plaintiff's case and are therefore relevant.

[40] In my view the Plaintiff's first discovery affidavit with only the identity document and the Title Deed discovered, fell far short of the requirements for proper discovery in terms of the provisions of Rule 35 and as set out in the cases above, which led to the need for this request for further and better discovery. There is no need to deviate from the normal principle that costs should follow success.

[41] In the premises I make the following order:

1. The Plaintiff is ordered to make available for inspection as meant in Rule 35(6) all the documents referred to in paragraphs 1-4 and 6-9 of the Defendant's Rule 35(3) Notice, Annexure "HP3" to the Application, within five (5) days of service of this order upon the Plaintiff's attorney of record;
2. The Plaintiff is ordered to pay the costs of this application.

H. MURRAY, AJ

On behalf of the Applicant/Defendant: Adv SJ Reinders

Symington & de Kok Attorneys

BLOEMFONTEIN

On behalf of the Respondent/Plaintiff: Adv PJJ Zietsman

Honey Attorneys

[1] 1949(3) SA 1081 (SR) at 1083.

[2] 1976 (2) SA 111 (C) at 118.

[3] 1999 (2) SA 279 (T) at 316 – 317.

[4] 2010(2) SA 160 (NPD) at para [9] at 165.

[5] Supra, QBD 55 at 63l

[6] 2009 (5) SA 531 (GSJ) at para [5] at 535 D – E.

[7] The Civil Practice of the Supreme Court of South Africa 4th Edition (1997).

[8] 1999 (2) SA 279 (T) at 316 - 317

[9]

(1982) 11 QBD 55; Carpede v Choene NO 1986 (3) SA 445 (O) at 452.

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