

SOUTH AFRICA / JUDGMENT

Kriel v Bowels (1951/2008) [2010] ZAECPEHC 67; 2012 (2) SA 45 (ECP) (11 November 2010) [2010] ZAECPEHC 67

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J.E Smith

CASE / FILE NUMBER

1951/2008

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, PORT ELIZABETH

Case no: 1951/2008

Date Heard:04/11/2010

Date Delivered:11/11/10

In

the matter between:

MARTIN

PHILIP KRIEL

.....PLAINTIFF

Versus

OCKERT

JOHANNES BOWELS

.....DEFENDANT

JUDGMENT

SMITH J:

- [1] This is an application for an order compelling the defendant to provide meaningful responses to certain enquiries contained in the plaintiff's Rule 37(4) agenda. The plaintiff initially also sought an order compelling the defendant to comply with his Rule 35(3) notice. I have been informed at the commencement of the hearing however that the defendant has since replied adequately to the aforesaid notice and that this aspect is no longer in issue. For the sake of convenience I shall refer to the parties as they are in the main action.
- [2] In the main action the plaintiff claimed damages from the defendant in respect of repairs done to the defendant's trailer. The claim relates to costs in respect of component parts supplied by the plaintiff necessary to carry out the aforesaid repairs, as well as charges due to a third party in respect of work done on the trailer and commissioned by the plaintiff on the defendant's behalf.
- [3] The plaintiff served the Rule 37(4) agenda on defendant on 23 February 2010. On 23 March 2010 the defendant filed a reply thereto.
- [4] The plaintiff did not regard the aforesaid reply as being satisfactory and on 26 March 2010 the plaintiff's attorneys addressed a letter to defendant's attorneys wherein it complained about the lack of meaningful replies to certain paragraphs of the Rule 37(4) agenda. Quite significantly the following is stated in the aforesaid letter:
- "In general, my client is of the view that your client's response to the Agenda in question is evasive, not in the spirit of the Rule and design to frustrate my client's preparation for trial. Accordingly, your client is invited to reconsider his attitude to my client's agenda and given notice that if that Agenda has not been dealt with properly by the close of business on Tuesday, my client will approach a judge in chambers as envisaged in Rule 37(8)(a)"*
- [5] Defendant thereafter filed a further reply under the heading: "Defendant's supplementary written Reply to Plaintiff's enquiries in terms of Rule 37(4)."
- [6] It appears that the application was thereafter set down for hearing on 1 June 2010 but was removed from the roll by agreement between the parties and on the understanding that the defendant "will provide proper answers, in the spirit of the relevant rule" to the plaintiff's Rule 37(4) agenda and comply with the Rule 35(3) notice by 16 July.
- [7] On 23 July 2010 the defendant's attorneys again wrote to plaintiff's attorneys stating an intention to amend its pleadings and that they were awaiting instructions to join a third party to the proceedings. They therefore regarded it as "meaningless" to reply to the Rule 37(4) enquiries and stated that: "We have been advised by counsel that the response to the above rule should be dealt with in a further conference."

- [8] Even on a perfunctory reading of the Rule 37(4) enquiries, and in particular those in respect of which the plaintiff contends there have not been meaningful replies, they are indeed of the kind usually contained in a request for trial in terms of Rule 21. They relate mainly to detail of the causes of the trailer axle's failure and particulars of other damage to the trailer. They are undoubtedly of the kind usually intended to enable a party to prepare for trial.
- [9] Mr Mullins, who appeared on behalf of the plaintiff, submitted that the defendant had for the first time in his heads of argument taken the point that the questions submitted in terms of Rule 37(4) is an abuse of the process of the court and that Rule 21 was the appropriate rule in the circumstances. He submitted further that in the light of the fact that the defendant did purport to respond to the Rule 37(4) enquiries and when plaintiff objected to the inadequacy of the reply, the defendant undertook to provide further and better replies and did in fact, albeit again inadequately, the defendant had committed to the process. He submitted therefore that the defendant had effectively agreed to provide meaningful replies to the aforesaid enquiries. In these circumstances, so he submitted, it was not open for the defendant to resist the application on the aforesaid basis.
- [10] Mr Mullins submitted further that the two rules overlap to a large extent and that they are complimentary and not exclusive of each other. He referred in this regard to the matter of *Bosman v AA Mutual Insurance Association Ltd* 1977 (2) SA 407 (C) at 408 H-409A where Grosskopf J said the following:

"The conclusion set out above may, I think, also be supported by the following reasoning by analogy. Rule 37 serves much the same purpose as the provisions relating to the furnishing of further particulars for purposes of trial. Both are intended to assist in curtailing the proceedings, but Rule 37 should be (and was probably intended to be) of greater significance. Firstly it is designed to secure agreements between the parties, and not mere allegations or contentions as is the case with further particulars. Secondly, a Rule 37 conference is intended to cover a wider ambit than the furnishing of further particulars for purposes of trial - indeed, one of the nine subjects in respect of which an agreement at such a conference is specifically contemplated by the Rule, is "the giving of any further particulars reasonably required for the purposes of trial" (Rule 37 (1) (a) (v))."

- [11] Mr Nepgen who appeared on behalf of the defendant, however correctly pointed out that this matter dealt with the old Rule 37 which specifically contemplated the providing of further particulars reasonably required for the purposes of trial.

- [12] Rule 37(4) reads as follows:

"Each party shall, not later than 10 days prior to the pre-trial conference, furnish every other party with a list of –

- (a) the admissions which he requires;
- (b) the enquiries which he will direct and which are not included in a request for the particulars for trial; and

(c) other matters regarding preparation for trial which he will raise for discussion.”

[13] Mr Nepgen submitted further that the overriding purpose of Rule 37 is to provide a platform for the parties to reach agreement on issues to facilitate a limitation thereof for the purposes of trial. He referred in this regard to the matter of Paterson N.O. v Kelvin Park Properties CC 1998 (2) SA 89 (E) at 104C-D where Leach J said the following:

“The procedure laid down by the subrule is merely to enable the respective parties to prepare properly for a Rule 37 conference, to facilitate the smooth running of that conference and to enable them to reach agreement on as many issues as possible without unnecessary delay. A formal notice is not envisaged by the subrule; all that a party is expected to do is to provide his opponent with a list of the items he wishes to discuss to enable him to prepare for the conference. The procedure of filing formal notices and replies thereto purportedly under this subrule amounts to an abuse of the process of the Court.”

[14] Mr Nepgen submitted further therefore that there is no provision in Rule 37 to compel a party in respect of the enquiries directed in terms of Rule 37(4).

[15] It so that Rule 37 is intended primarily to curtail the duration of a trial, narrow down issues, cut costs and facilitate settlements. Parties are required to attempt, in a bona fide manner, to reach settlement either on issues which could serve to shorten the proceedings or resolve the main issues.

[16] A party can however not be compelled to agree to anything during the course of Rule 37 proceedings. This much is evident from the fact that Rule 37(8)(c) provides that even in a case where a conference had been convened before a judge in chambers, the judge may give directions which might promote the effective conclusion of the matter, but only with the consent of the parties. It appears that the remedy for any party who is frustrated by the lack of cooperation from the other party during Rule 37 proceedings, is to request for a conference to be convened before a judge in chambers in terms of Rule 37(8). The plaintiff gave an indication of his intention to pursue this course of action in the letter to the defendant’s attorneys on 26 March 2010 but for some reason did not do so. I am in agreement with Mr Nepgen’s submission that these enquiries should have been contained in a request for particulars for trial in terms of Rule 21. It is abundantly clear from Rule 37(4) that a formal request in the form

served and filed by the plaintiff in this matter is not contemplated. What is contemplated is a list to be provided to the other party not later than 10 days before the pre-trial conference, inter alia, of enquiries which he will direct and which are not included in the request for particulars for trial and other matters regarding

preparation for trial which he will raise for discussion. The list of enquiries is therefore intended to relate to matters which will be discussed at the pretrial conference. The remedy therefore available to any party who is frustrated by a lack of cooperation or bona fides on the part of his opponent, is to request that a conference be held before a judge in chambers. The Rule clearly does not envisage a formal request to which there must be a formal reply. See Paterson N.O. v Kelvin Park Properties CC (supra).

- [17] I am also not convinced that the defendant had in effect agreed to provide the further and more meaningful replies as was contended by Mr Mullins. It is clear from the correspondence between the parties that the defendant had adopted the attitude that these issues should be discussed at a conference and specifically stated that it had been advised accordingly by counsel. This is therefore not a case where a party is attempting to renege from an agreement reached during the course of pre-trial proceedings. For these reasons the defendant can in my view not be compelled to provide the "more meaningful" replies which plaintiff seeks in terms of Rule 37(4). For this purpose the plaintiff will be constrained to request particulars for trial in terms of Rule 21.
- [18] There is in my view a further difficulty with the nature of the relief sought by the plaintiff and that is that the court is called upon to pronounce upon the adequacy of the replies provided by the defendant and to give directions regarding the content of the further replies in order for them to constitute a "meaningful" response to the plaintiff's Rule 37(4) agenda. Such an approach will in my view serve to undermine the primary objectives of Rule 37 proceedings which I have referred to above.
- [19] Mr Nepgen has submitted that the plaintiff has deliberately abused the process of this court and that a punitive costs order should therefore be made. I am of the view that there is no basis for such an order. The plaintiff appeared to have proceeded on the basis of bona fide belief that the defendant was committed to provide the further and better replies.
- [20] In the result I make the following order:

- (1) The application is dismissed;

The plaintiff is ordered to pay defendant's costs on the party and party scale.

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Advocate Mullins

Attorney for the Applicant : Boqwana Loon & Connellan

4 Cape Road

PORT ELIZABETH

Ref: Mr. L. Schoeman/wjd/K44466

Counsel for the Defendant : Advocate Nepgen

Counsel for the Defendant : Booysens & Rossouw Attorneys

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Ref: ME Rossouw/wlf/BRS070

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