

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case Number: 11139/22

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
_____	_____
DATE	SIGNATURE

In the matter between:

**SCRIBANTE CONCRETE (PTY) LTD**

Applicant / Defendant

and

**DRIFT SUPERSAND (PTY) LTD**

Respondent / Plaintiff

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**JUDGMENT**

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**MAHOMED AJ**

*Introduction*

[1] This is an interlocutory application for further and better discovery in terms of Rule 35(3) of the Uniform Rules of Court. The Rule states 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 under 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.”

[2] The applicant is the defendant in an action for breach of a commercial lease agreement.

[3] The agreement is titled “Lease and Material Supply Agreement”. The parties agreed that the respondent would lease property and supply materials, which the applicant would purchase, and the quantity purchased would be used to determine rentals payable.

[4] The rental and purchase of materials are interlinked.

[5] The applicant raised two defences in the main action, viz, it is unable to perform in terms of the agreement due to operation of law and vis major; and that clauses 4.1.1.2 and 4.1.1.3 of the commercial lease agreement under the heading “basic rental” constitute penalty provisions, as contemplated in the Conventional Penalties Act 15 of 1962.

[6] The clauses provide:

“4.1 The monthly rental payable by the Tenant to the landlord shall be calculated as follows:

4.1.1 The Basic Rent which shall be:

4.1.1.1 In the event that the Materials purchased by the Tenant in the preceding calendar month exceeded 4000 mt (four thousand metric tons) the Basic Rent payable in

relation to the following calendar month shall be R 16 325.00 (sixteen thousand, three hundred and twenty-five rand) plus VAT;

4.1.1.2 In the event that the Materials purchased by the Tenant in the preceding calendar month was between 2 000 mt (two thousand metric tons) and 4000 mt (four thousand metric tons) the Basic Rent payable in relation to the following calendar month shall be R100 000.00 (one hundred thousand rand) plus VAT;

4.1.1.3 In the event that the Materials purchased by the Tenant in the preceding calendar month was less than 2 000 mt (two thousand metric tons) the Basic Rent payable in relation to the following calendar month shall be R200 000.00 (two hundred thousand rand) plus VAT.”<sup>1</sup>

### *The Issue*

[7] Whether the payments demanded are penalties in terms of the Conventional Penalties Act 15 of 1962 (“the Act”).

[8] Whether the respondent is entitled to refuse to discover documents due to confidentiality of its business interests.

### *The Submissions*

[9] The applicant, represented by Advocate Nongogo, seeks an order compelling the discovery of documents, as listed in its notice served on 26 August 2022,<sup>2</sup> *inter alia*, audited financial statements; management accounts; vat returns; costing records; and if the respondent has other businesses, the costing and management accounts of those entities, as well.

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<sup>1</sup> Caselines at 001-22 - 001-23.

<sup>2</sup> Caselines at 002-34 – 002-35.

- [10] Counsel submitted that the applicant accepts it must pay the basic rent, however any other amounts stipulated in the clause constitute a penalty.
- [11] It was submitted that the documents requested are related to and necessary to prove its defence.
- [12] It was proffered that any concerns regarding confidentiality, can easily be addressed regarding the way in which access to the documents are permitted and how the documents can be managed.
- [13] Uys SC appeared for the respondent and denied that the clauses above are penalty provisions. Counsel submitted that the clauses set out the basic rental for leased property.
- [14] Counsel contended that the documents sought are irrelevant for the purposes of the defence, and that the applicant seeks the information to interpret the clauses to be penalty clauses, which it submits they are not.
- [15] It was further submitted that the information sought is confidential as the information can be used by competitors to its disadvantage.
- [16] Uys SC submitted that the financial documents relate to financial and costing models of the respondent which do not form part of the lease agreement on which the cause of action is founded.
- [17] The applicant failed to purchase the tonnage as per the agreement during the applicable period and the respondent (plaintiff) alleges that the applicant/defendant is in breach and is indebted to it in the sums of R3 699 477.69 and a further sum of R1 073 088, calculated in terms of the formula set out earlier.

[18] At paragraph 3 of the plea,<sup>3</sup> the applicant sets out its defence. It pleads the amounts claimed constitute a penalty, no replication is filed, and the respondent has joined issue with this plea.

[19] Counsel for the respondent argued that the financial documents are extrinsic to the agreement and are being sought to interpret the provisions of the agreement. The court ought not to indulge the applicants in its subjective belief that the clause constitutes a penalty. The agreement is unambiguous and the financial information irrelevant.

[20] Counsel for the respondent referred to various principles including the parol evidence rule, and argued that the information sought proves that the defence is actually inadmissible.

### *Judgment*

[21] Rule 35(3) is couched in broad terms and must mean any document which is of relevance to the matter.

[22] In *Rellams (Pty) Ltd v James Brown & Hamer Ltd*,<sup>4</sup> the court referred to the test for relevancy being if the documents sought contains information that may directly or indirectly enable the party requiring the documents to either advance its case, alternatively damage the case of its adversary, such document is deemed relevant.

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<sup>3</sup> Caselines at 001-107.

<sup>4</sup> 1983 (1) SA 556 (N) at 563H - 564B.

- [23] In *Federal Wine and Brandy Co Ltd v Kantor*,<sup>5</sup> the court confirmed that the relevance of a document must be determined by reference to the pleadings and the issues raised.
- [24] Given the nature of the agreement and rental linked to the purchase of materials, the information may be relevant and necessary to advance the applicant's defence to demonstrate the fairness and reasonableness of the amounts claimed payable as linked to tonnage purchased.
- [25] The rental payable is a critical "aspect" of the agreement and to the determination of whether the clauses are in fact penalties as contemplated in the Act.
- [26] The applicant seeks to establish by reference to the documents whether the prejudice allegedly suffered by the respondent over the two months when the applicant failed to purchase the required tonnage, is proportional to the amounts being claimed.
- [27] I agree with Mr Nongogo that confidentiality is not a bar to discovery of a document.
- [28] A practical approach to ensuring confidentiality of the information can be achieved between the parties, where parts of documents can be marked as confidential.<sup>6</sup>
- [29] In *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd*,<sup>7</sup> Colman J, regarding confidential commercial information, stated:

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<sup>5</sup> 1958 (4) SA 735 (E) at 735B-D.

<sup>6</sup> See *Tetra Mobile Radio (Pty) Ltd. v Member of the Executive Council of the Department of Works and Others* [2007] ZASCA 128; 2008 (1) SA 438 (SCA) at para 14.

<sup>7</sup> 1968 (3) SA 381 (W).

“The respondent would, I was told, rather abandon part of its claim than make such information available to the applicant. I have some sympathy for the respondent in that regard, but I am unable to assist it. It need disclose nothing that is not material; but what is material, in the wide sense which that word bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be, ... .”<sup>8</sup>

[30] On a plain reading of the clauses and their effect in the event the respondent failed to purchase the metric tons set, it is reasonable to conclude that the provisions are penal in effect. The rentals increase dramatically by either R100 000 or R200 000 additional to the basic amount of R16 325.00.

[31] I take the view that the documents as requested must be made available to the applicants to provide a contextual interpretation of the clauses in order to pursue its defence.

I make the following order:

1. The respondent is ordered to make available all documents listed at paragraphs 1 - 6 of the applicant’s Rule 35(3) notice served on 26 August 2022.
2. The respondent is to pay the costs of this application.

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**ACTING JUDGE S MAHOMED  
JUDGE OF THE HIGH COURT  
JOHANNESBURG**

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<sup>8</sup> Id at 385A-C.

Date of Hearing: 16; 19 October 2023

Date of Judgment: X November 2023

**Appearances:**

For Applicant: Advocate I Nongogo

Instructed by: Friedman Schekter

For Respondent: Uys SC

Instructed by: Brand Potgieter Inc.