


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	✓
(3) REVISED. ✓	
<u>2013/2014.</u>	
DATE	SIGNATURE

CASE NUMBER: 93685/2015

In the matter between:

CHEMSYSTEMS a division of AECI LIMITED

Plaintiff

And

QUINTIN MARAIS

First Defendant

ANDREW LANG

Second Defendant

PASEKA VINCENT KGANYAGO

Third Defendant

ROLFE'S CHEMICALS (PTY) LTD

Fourth Defendant

JUDGMENT ON INTERLOCUTORY APPLICATION

SARDIWALLA, J

[1] These motion proceedings are interlocutory to a pending action between the plaintiff and the defendants (the action). In this application the plaintiff seeks an order to compel the defendant to deliver documents sought under two notices in terms of rule 35(3) and 21 (4) of the Uniform Rules of Court, dated 18 March 2018 to compel the furnishing of certain further particulars that were requested under rule 21.

[2] The plaintiffs' case in the action is that during the periods of 2005-2007 respectively employment contracts were entered into between the plaintiff and the first to third defendants. In terms thereof the plaintiff appointed the first defendant as a Divisional Manager and the second defendant as a Sales Manager respectively. Chemical Services Limited "Chemserve" is a subsidiary of AECI Limited and SA Paper Chemicals is a known subsidiary of "Chemserve", which now operates as Simitri Speciality Chemicals. The plaintiff formulates a recipe of chemicals (which include a combination of chemicals, Simitri's Speciality Chemicals and specialty chemicals developed by the Simitri business to be used by the tanneries to which it supplies its chemicals known as the "Simitri recipe". The fourth defendant is a known competitor of the plaintiff. The essential dispute between the parties is that the formulae used by the Simitri business in the formulation of its specialty chemicals known as the "Simitri Recipe" constitutes trade secrets alternatively confidential information and which is not public knowledge or property.

[3] Initially the plaintiff launched an application for interdictory and ancillary relief against the defendants which was referred to oral evidence on 11 March 2014. However before the application was heard on its merits the plaintiff instituted action for damages against the defendants on 20 November 2015 for the alleged breach of fiduciary duties alternatively unlawful competition. By agreement between the parties the two matters were consolidated on 26 May 2016. The application and the action are being pursued together.

[4] The question that requires investigation with reference to the facts, according to the plaintiff is ascertaining how the fourth defendant went about developing its own products if not by making use of the applicant's confidential information. The plaintiffs contend that the answers to this issue lies in the contemporaneous

documentation. The plaintiff argues that from such material it would be in a better position to prepare for trial and evaluate the strength of its case rather than being taken by surprise if for instance the fourth defendant provides the court with a purchase of a licensing technology used in the development of its products.

[5] Rule 35(3) provides that-

'[i]f any party believes that there are, in addition to documents ... disclosed as aforesaid, other documents ... *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 him to make the same available for inspection ...or to state on oath ... that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.'

[6] The documents sought to be produced in terms of the plaintiffs' notice in terms of rule 35(3), are:

(2) The defendants are required to identify all or any documents which evidence/or the steps taken and/or process followed during the period 1 July 2012 to 1 July 2016 in the development of each of the fourth defendant's speciality products referred to in this paragraph ;

(3) the defendants are requested to furnish all documents demonstrating the analysis of the competitors product(s) used in the development of the fourth defendant's specialty chemicals during the period the period 1 July 2013 to 1 July 2016, including but not limited to the analytical results pertaining thereto;

(4) the defendants are required to produce the fourth defendant's laboratory notebook and/or other documentary equivalent evidencing all the stages of the development for each and every specialty product of the fourth defendant from the date on which the development of the specialty product of the fourth defendant from the date of development of the specialty products commenced to the date on which the plant batch in respect of such products was manufactured;

- (5) the defendants are required to produce any and all documents evidencing the procedures used in testing the efficacy of the fourth defendants speciality products;
- (6) the defendants are required to produce any and all documents evidencing the efficacy test results for each of the fourth defendant's speciality products;
- (7) the defendants are required to produce any and all documents evidencing the each piece of equipment used to test the efficacy of each of the fourth defendant's speciality products;
- (8) the defendants are required to produce an and all documents evidencing the purchase/acquisition of each piece of equipment used to test the efficacy of each of the fourth defendant's speciality products;
- (9) the defendants are required to produce any and all documents evidencing the procedures used in testing the stability of the fourth defendant's speciality products;
- (10) the defendants are required to produce any and all documents evidencing the stability test results for each of the fourth defendant's speciality products;
- (11) the defendants are required to produce any and all documents evidencing each piece of equipment used to test the stability of each of the fourth defendant's speciality products;
- (12) The defendants are required to produce any and all documents evidencing the purchase/ acquisition of each piece of equipment used to test the stability of each of the fourth defendant's speciality products; and
- (13) The defendants are requested to produce with reference to each customer to whom it sold its speciality products, the invoices pertaining thereto.

[7] The documents sought to be produced in terms of the plaintiffs' Request for Further Particulars dated 10 July 2017, are:

(6) The defendants are required to state which employees of the fourth defendant had the requisite knowledge and experience to attend to the development of its speciality products as aforesaid during the period 2 November 2011 to 1 July 2016;

(7) With reference to each speciality product so identified, the defendants are requested to state who on behalf of the fourth defendant actually developed such speciality product;

(8) The defendants are requested to disclose the qualifications of each person identified in terms of paragraphs 6 and 7 above. The defendants are required to identify all or any documents already discovered which evidences such persons qualifications with reference to the item number of the defendants' discovery affidavit, alternatively to produce copies of all the documentation in support thereof;

(9) if the speciality product was developed in conjunction with a tanning technician who developed each speciality product, whether the tanning technician was employed by the fourth defendant or another entity and, if by another entity, the name of the entity that employed the tanning technician;

(10) the defendants are requested to state the date on which the development of each speciality product identified as aforesaid began and the date on which the development of each speciality product identified as aforesaid was conducted;

(11) the defendants are requested to provide full particularity as to each and every step taken and/or the process followed in developing each and every speciality product identified as aforesaid;

(12) the defendants are required to identify all or any documents already discovered which evidences the steps taken and/or process followed as

aforesaid with reference to the item number of the defendants' discovery affidavit, alternatively to produce copies of all documentation in support thereof;

(13) the defendants are requested to state with reference to each speciality product identified as aforesaid, whether it is the defendants' case that the speciality product was developed by using one of the fourth defendant's existing products and if so, the name of the existing product must be stated as well as its chemical composition and the purpose for which the fourth defendant used such existing product;

(14) the defendants are requested to state with reference to each speciality product identified as aforesaid, whether it is the defendants case that the speciality chemical was developed by using a sample of one its competitors speciality products;

(15) if the forgoing paragraph is answered in the affirmative the defendants are requested to identify which of its speciality products it contends were developed by using a sample of its competitor's speciality products and the defendants are required to disclose the name of the competitor as well as the name of the competitors speciality product used in the development of the fourth defendant's speciality product(s);

(16) if paragraph 14 is answered in the affirmative, the defendants are also required to identify who on behalf of the fourth defendant analysed the competitor's product(s) and to provide full particularity as to the analytical results pertaining thereto. The defendants are also required to identify all or any documents demonstrating such analytical analysis with reference to its discovery affidavit (by identifying the item number of its discovery affidavit) alternatively to produce a copy thereof;

(17) if it is the defendants' case that the fourth defendants' speciality chemicals were developed with reference to information freely available in the public domain, then the full particularity is required as to the information that the defendants had regard to when developing each of the fourth defendant's speciality products;

- (18) the defendants are requested to state the date on which "scale-up" work commenced with reference to each and every of the fourth defendant's speciality products identified as aforesaid and the date when such "scale-up" work as concluded;
- (19) the defendants are requested to state the date on which a "plant batch" was manufactured with reference to each and every of the fourth defendant's speciality products identified as aforesaid;
- (20) the defendants are required to identify with reference to the item number of their discovery affidavit the fourth defendant's laboratory notebook and/ or othe documentary equivalent evidencing all the stages of development fo each and every speciality product of the fourth defendant from the date on which development of the speciality products commenced to the date on which the plant batch in respect of such products was manufactured, alternatively to produce copies thereof;
- (21) the defendants are requested to state what laboratory procedure(s) was/were used to test the efficacy of each and every of the fourth defendant's speciality products;
- (22) the defendants are required to identify with reference to the item number of their discovery affidavit, any and all documents evidencing the procedures used in the efficacy tests of the fourth defendant's speciality products, alternatively to produce copies thereof;
- (23) the defendants are required to identify with reference to the item number of their discovery affidavit, any and all documents evidencing the efficacy test results for each of the fourth defendant's speciality products, alternatively to produce copies thereof;
- (24) the defendants are required to identify each and every piece of equipment that was used to test the efficacy of each and every of the fourth defendant's speciality products;

(25) with reference to each such piece of equipment identified as aforesaid, the defendants are required to state when the fourth defendant purchased such equipment and to identify with reference to the item number of its discovery affidavit, any and all documentation evidencing such purchase/acquisition or to provide copies thereof;

(26) the defendants are requested to state the date on which stability testing was conducted with reference to each and every of the fourth defendant's speciality products identified as aforesaid and the date on which the stability testing concluded;

(27) the defendants are requested to state what laboratory procedure(s) was/were used in the stability testing of each and every of the fourth defendant's speciality products;

(28) the defendants are required to identify with reference to the item number of their discovery affidavit, any and all documents evidencing the procedures used in the stability testing of the fourth defendant's speciality products, alternatively to produce copies thereof;

(29) the defendants are requested to identify each and every piece of equipment that was used to test the stability of each and every of the fourth defendant's speciality products; and

(30) with reference to each piece of equipment identified as aforesaid, the defendants are required to state when the fourth defendant purchased such equipment and to identify with reference to the item number of its discovery affidavit, any and all documentation evidencing such purchase/acquisition or to provide copies thereof.

[8] The defendants objects to the disclosure of the documents on the following grounds: Firstly, that they contend that the documents constitute confidential information. Secondly, the defendant's argument is that the documents sought in discovery are an attempt to elicit evidence of the defendants' denial that it utilised the plaintiffs' confidential information in order to enable the plaintiff to determine whether or not it still has a case against the defendants. It avers that such a determination is

the function of the court in dealing with the main issue at the trial and not that of the plaintiff. Thirdly that the documents sought are irrelevant in that they either do not support the plaintiffs' claim or undermine the defendant's defence. Lastly the defendants object to the discovery of certain of the requested documents on the basis that they do not exist. This objection is raised to the discovery of the documents referred to in terms of the plaintiffs' notices in terms of rule 35(3) and to the discovery of the documents referred to in the plaintiff's request for further particulars.

[9] The defendant's objection that some of the documents constitute confidential business must fail. Confidentiality is no basis to avoid discovery. It is settled that the fact that documents contain information of a confidential nature does not *per se* confer on them any privilege against disclosure (see ***Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *S v Naicker and Another* 1965 (2) SA 919 (N); *Crown Cork and Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W) at 1099). If a court is minded to do so (although this is not required in the present matter), it may put in place a confidentiality regime for the disclosure of documentation. The Court is mindful that the defendants in the discovery affidavit proposed such a regime for the disclosure of the documentation. (See ***Crown Cork* (supra) and *Bridon International GmbH v International Trade Administration Commission* 2013 (3) SA 197 (SCA), para [35].)****

[10] The defendant's main objection is that the documents sought to be discovered are not relevant. As was said by **Van Heerden J in *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560F-G:**

'It is generally speaking, no doubt true that, whilst the Court should not and would not go behind a party's affidavit that the contents of a document are not relevant, such affidavit is nevertheless as far as the Court is concerned not conclusive. After an examination and consideration 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 disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit. ***Herbstein and***

Van Winsen (supra at 410) and Lenz Township Co (Pty) Ltd v Munnick 1959 (4) SA 567 (T).'

[11] In **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T)**, at 317E-I, Joffe J said the following:

'It is well established law that Courts are reluctant to go behind a discovery affidavit, which is prima facie taken to be conclusive. In **Marais v Lombard 1958 (4) SA 224 (E)** at 227G it was held that

"when a party making discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion".

This approach was held in **Richardson's Woolwasheries Ltd v Minister of Agriculture 1971 (4) SA 62 (E)** at 67C-F to be also applicable when possession, as opposed to the relevance of a document, is in issue. In **Continental Ore v Highveld Steel & Vanadium Ltd (supra)** the following was held at 597E-H:

"It has further been held in a series of cases before the enactment of the present Rules that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect. **Caravan Cinemas (Pty) Ltd v London Film Productions 1951 (3) SA 671 (W)**, per Murray AJP, at 675-7. The affidavit denying relevance is generally taken as conclusive, and the Court will not reject it unless a probability is shown to exist that the deponent is either mistaken or false in his assertion. **Marais v Lombard 1958 (4) SA 224 (E)**, per O'Hagan J, at 227G; **Lenz Township Co (Pty) Ltd v Munnick and Others 1959 (4) SA 567 (T)**, per Williamson J, at 572-3. See also the authorities collected in **Federal Wine and Brandy Co Ltd v Kantor 1958 (4) SA 735 (E)** at 745-8, a judgment of Wynne J, which was described in the *Lenz* case (at 573) as a veritable thesaurus of the decisions on discovery.'

And, at 320F-H, that-

'... the Court, in determining whether to go behind the discovery affidavit, will only have regard to the following:

- (i) the discovery affidavit itself; or
- (ii) the documents referred to in the discovery affidavit; or
- (iii) the pleadings in the action; or
- (iv) any admissions made by the party making the discovery affidavit; or
- (v) the nature of the case or the documents in issue.

See *Continental Ore v Highveld Steel and Vanadium* (supra at 597H-598A); *Schlesinger v Donaldson* (supra at 56); *Lenz Township Co (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T) at 573D-F; *Federal Wine and Brandy Co Limited v Kantor* (supra at 749G-H).’

[12] The plaintiffs argue that the documents sought in the first notice in terms of rule 35(3) and rule 21(4) would establish the capacity in which the defendant developed the relevant products; whether the defendant engaged in developing the product of another company, an entirely new product or emulated an existing product. They argue that “the plaintiff is entitled to be told with greater precision what the defendants are going to prove to enable the plaintiff to prepare its case and combat counter-allegations.” They further argued that “The documentation sought will demonstrate whether the defendants developed their products through lawful methods.”

[13] The defendant’s objection is that the documents sought to be discovered are not relevant, however, is premised thereon that they will only serve to advance its own case and do not support or undermine the plaintiffs’ claim. It went on to further state that the Plaintiff’s case is based on the allegation that the defendants utilised its confidential information and formulae, it was never the plaintiff’s allegation that it was unaware of how the defendants went about the process developing its own products. The defendants also object to the discovery of the documents on the premise that such documents are not based on any allegation pleaded by the defendants in paragraph 23(b) of its plea as the defendants have never made any statement regarding analysing competitors’ products or being in possession of any results thereto. The test for relevance was thus stated in ***Swissborough*, at p 316E-317B**: ‘The requirement of relevance, embodied in both Rule 35(1) and 35(3), has been considered by the Courts on various occasions. The test for relevance, as laid down by **Brett LJ in *Compagnie Financiere et Commerciale du E Pacifique v Peruvian Guano Co* (1882) 11 QBD 55**, has often been accepted and applied. See, for example, the Full Bench judgment in ***Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A**, where it was held that: After remarking that it was desirable to give a wide interpretation to the words “a document relating to any matter in question in the action”, Brett LJ stated the principle as follows: “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 these two consequences." See also ***Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 596H and *Carpede v Choene NO and Another* 1986 (3) SA 445 (O) at 452C-J.**

Counsel for the plaintiffs laid special emphasis on the indirect relevance a document may have, that is a document which may fairly lead him to a chain of enquiry which may advance the plaintiffs' case or damage the case of the first defendant. Reference was made hereto as "indirect relevance" or "secondary relevance".

The broad meaning ascribed to relevance is circumscribed by the requirement in both subrules (1) and (3) of Rule 35 that the document or tape recording relates to (35(1)) or may be relevant to (35(3)) "any matter in question". The "matter in question" is determined from the pleadings. See in this regard ***SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385A-C; *Schlesinger v Donaldson and Another* 1929 WLD 54 at 57**, where Greenberg J held

"In order to decide the question of relevancy, the issues raised by the pleadings must be considered . . .",

and ***Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 753D-G.**

[14] In his opposing affidavit, the fourth defendant states:

'14

- (a) it is admitted that the first, second and third respondents are employed by the fifth respondent.
- (b) It is further admitted that the fifth respondent has had business dealings with and continues to have business dealings with a company described as MK Quimica ("MK").
- (c) It is denied that the conduct referred by the applicant constitutes a breach of any undertakings or any lawful limitation of the commercial activities which first, second, third or fifth respondents are entitled to pursue.'

[15] And the defendant continues to state the following:

"35

- (f) Towards the end of 2012 however there was a shortage in the leather industry of chrome tanning liquid. Applicant contacted fifth respondent and enquired whether it could be supplied with chrome tanning liquid. The fifth respondent had the necessary raw materials on the site and the first respondent blended tanning salts into the commodity required by applicant which fifth respondent then in turn sold to applicant.
- (g) it was apparent at that stage to the fifth respondent that a marketing opportunity exists in the supply of similar products to the tanning industry and it has since actively pursued those markets as it is lawfully entitled to do so.
- (h) because fifth respondent did not at the time have a range of speciality products available, and because the requirement of a full service as opposed to only selling commodities was identified, the second and third respondents were recruited.
- (i) since then the first respondent and later together with the second respondent and the assistance of the third respondent, have been busy developing the fifth respondent's range of products. In January 2012 the first trials with fifth respondent's products commenced. At that stage the second and third respondents had not yet joined the fifth respondent.
- (j) these trials have been on-going and were completed during June 2013.
- (k) the very first sales of fifth respondent's blended speciality products according to its own recipe occurred in mid July 2013.
- (l) as part of the process aimed at developing fifth respondent's products raw materials were sourced which included raw materials bought by MK. This was a straightforward transaction in terms of which MK was e-mailed and an order placed which was fulfilled by MK. At no stage was there even mention by MK of exclusivity of contract.
- (m) the development and trials over a seven-month period clearly indicates that fifth respondent is not making use of any confidential information or using underhand tactics to gain any unfair advantage.
- (n) if the applicant's recipes were used by the fifth respondent, no necessity would have existed for extensive trials over an extensive period at substantial costs.
- (o) what make apparent to the fifth respondent in the market place is a dissatisfaction with applicant and the service rendered by applicant. This has opened doors for suppliers such as the fifth respondent.

- (p) if there was in decline in the applicant's business the decline was not caused by the conduct complained of in this application but rather by the applicant failing to render the service which was required.
- (q) annexed hereto in support of the above, marked "R10" are emails authored by Stan Blumberg the tannery manager of Pelts Products. The confirmatory affidavit of Blumberg accompanies this affidavit"

[16] The plaintiffs did not depose to their founding and replying affidavits in this interlocutory application. The affidavit evidence of the defendant is not and could not be refuted by the deponent to the plaintiffs' founding affidavit, Mr Sean Perry, who is a Managing Director of the applicant. It is correct, as the applicants contend that the basis of their interlocutory application is an analysis of the pleadings to determine what the issues are between the parties, an analysis of the type of documents sought, and 'the likelihood of whether such documents will speak to the issues'. But Mr Sean Perry is in no position to dispute the defendant's evidence relating to the non-existence of such documents, and that it would not in any event that support the applicants' claim or undermine the defendant's defence.

[17] I am not reasonably satisfied that the defendant's denial of relevancy is incorrect and I am unable to hold that it is reasonable to suppose that the required documents contain information which may either directly or indirectly enable the plaintiff's to advance their own case or damage the defendant's case. A probability has not been shown to exist that the fourth defendant is either mistaken or false in his assertion of irrelevance.

[18] An affidavit of discovery is generally taken as conclusive against the party seeking further discovery in respect of the possession of documents. In ***Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) at 67D-F, Kannemeyer J** said the following:

'After a review of the authorities, O'HAGAN, J., said in ***Marais v. Lombard*, 1958 (4) SA 224 at p. 227 –**

"What these cases establish, in my view, is that when a party making discovery has sworn on affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion . . . The sources from which the Court may infer that a discovery affidavit is

wanting in the respects mentioned, has been referred to in ***Schlesinger v Donaldson and Another*, 1929 W.L.D. 54**, as being the pleadings in the action, the discovery affidavit itself, the documents referred to in such affidavit as well as admissions of the party evidenced elsewhere.”

In my view this approach is also applicable when the possession as opposed to the relevance of a document is in issue.’

[19] Having regard to the admissible sources, I am not persuaded that a probability has been shown to exist that the defendants are either mistaken or false in their assertions that the category of documents that underlie the analysing of competitors and the analysis results are in the possession of the defendants. The defendant’s discovery affidavit must, therefore, be taken as conclusive as to the possession of these documents.

[20] In the result the following order is made:

(a) The plaintiff’s’ interlocutory application dated 12 March 2018, is dismissed with costs on the scale as between attorney and own client, including the costs of two counsel.



C.M. SARDIWALLA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCE

Date of hearing	:	25 January 2019
Date of judgment	:	28 February 2019
Counsel for plaintiffs	:	C Whitcutt SC (assisted by C De Witt)
Instructed by	:	Mervyn Taback Inc
Counsel for defendant:		Adv A Troskie SC (assisted by Adv C van Eetveldt
Instructed by	:	VDT attorneys Inc