In the High Court of South Africa
(Western Cape Division, Cape Town)

Case number: 461/2021

In the matter between:

TRAGAR LOGISTICS CC Plaintiff

and

CONCARGO SUPPLY CHAIN (PTY) LTD Defendant

JUDGMENT DELIVERED ON 24 JULY 2023

VAN ZYL AJ:

Introduction

1. The plaintiff has launched an interlocutory application against the defendant to compel further and better discovery. The application is brought on two bases:

   1.1. First, the plaintiff seeks to compel the discovery of documents in terms of Rule 35(3), as it believes that there are, in addition to the documents already discovered, other documents which may be relevant to the matter.

   1.2. Second, the plaintiff seeks, in terms of Rule 35(12), to compel the discovery of documents which it alleges are referred to in the pleadings.

2. The defendant opposes the application on five grounds. First, it says that all of the documents that needed to be discovered have been discovered. Second, certain of the documents requested do not exist. Third, some of the requests are vague and amount to a fishing expedition, and some documents requested are privileged. Fourth, the documents which the plaintiff seeks to compel under Rule 35(12) are not documents referred to in the pleadings as contemplated in the Rule. Finally, the defendant submits that it has complied with the provisions of Rule 35(12) by stating under oath that some of the documents requested are not in its possession.

3. In the particulars of claim, the plaintiff seeks payment for delivery services rendered by the plaintiff to the defendant on the basis of an oral agreement concluded between them, coupled with a subcontracting agreement concluded between the defendant and an entity known as Libstar Holdings (Pty) Ltd ("Libstar"), as well as for a profit share in relation to the services rendered to Libstar. The plaintiff alleges that the subcontracting agreement was in writing; the defendant has denied this and has pleaded that such agreement was oral. The defendant denies any liability towards the plaintiff.

4. I proceed to discuss the situation under Rule 35(3), and deal thereafter with the ambit of Rule 35(12).

<u>Uniform Rule 35(3)</u>

5. The plaintiff seeks further discovery in terms of Rule 35(3) of remittances allegedly received by the defendant from Libstar, any agreements concluded between the defendant and Libstar, and all correspondence between the defendant and Libstar.

6. Rule 35(3) concerns the production of further documentation which has not been discovered, but which a party believes is relevant and in the other party's possession. It does not entitle that party to engage in a fishing expedition:[1]

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[1] *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515D.

"*[16] In The MV Urgup: Owners Of The MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others 1999 (3) SA 500 (C), at 515D, Thring J noted, with reference to requests for further discovery in terms of rule 35(3), that the subrule is not intended to 'afford a litigant a licence to fish in the hope of catching something useful'. That said, 'relevance' is given a generous meaning for the purposes of discovery, and in this regard mention is often made, with approval, of the dicta of Brett LJ in Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 that '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'*."[2] [Emphasis added.]

7. Courts have generally been reluctant to go behind a discovery affidavit except where it is satisfied from a consideration of the discovery affidavit itself, from the documents referred to in the discovery affidavit, from the pleadings in the action, from any admission made by the party making the discovery affidavit, or from the nature of the case or the documents in issue, that there are reasonable grounds to believe that there are further documents which should have been discovered.[3]

8. Turning to the matter at hand: The defendant indicates that the remittances requested are the ones that have already been discovered. The plaintiff bears the onus to prove the existence of such other remittances which it alleges exist,[4] and by extension, that the remittances which have been discovered are not those requested. On the papers before me, such onus has not been

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2 *Investec Bank Ltd v O'Shea NO* [2020] ZAWCHC 158 (16 November 2020) at para [16].

3 *Investec Bank Ltd v O'Shea NO supra* at para [20].

4 *Investec Bank Ltd v O'Shea NO supra* at para [18].

discharged.

9. In respect of the request for any agreement concluded between Libstar and the defendant, the defendant has pleaded, and has stated on oath, that no written agreement was concluded. The plaintiff has not provided evidence to the contrary. There is no reason on the pleadings not to accept, for the purposes of this application, that the agreement between the defendant and Libstar was an oral one.

10. Lastly, in relation to "all correspondence" between the defendant and Libstar, the defendant has stated on oath that it has discovered the relevant correspondence. It has not discovered correspondence that is irrelevant. The plaintiff insists that "*there must have been correspondence, relevant to Applicant, between Respondent and Libstar in respect of Applicant's alleged failures*". The plaintiff cannot, however, provide evidence of anything more than its own suppositions. In this regard, the oath of the defendant alleging non-relevance is *prima facie* conclusive:[5]

"[19] The following statement of the position in Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd 1971 (4) SA 589 (W) at 598E – F is pertinent in the context of the current application:
'The test of discoverability or liability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still prima facie conclusive, unless it is shown on one or other of the bases referred to above that the court ought to go behind that oath; and the onus of proving relevance, where such is denied, still rests on the party seeking discovery or inspection.'"

11. To overcome this hurdle, the plaintiff needs to demonstrate why the Court should go behind the discovery affidavit. I do not think that any such reason has been shown. The plaintiff's reasoning is based squarely on its assessment of what "should be", or what could "*reasonably*" be expected from parties in a

[5] *Investec Bank Ltd v O'Shea NO supra* at para [19].

contractual relationship.

12. It cannot in the present matter be said (to use the words of *Investec Bank v O'Shea NO supra*) from the discovery affidavit itself, from the documents referred to in the discovery affidavit, from the pleadings in the action, from any admission made by the party making the discovery affidavit, or the nature of the case or the documents in issue, that there are reasonable grounds to believe that the documents requested are in the defendant's possession, contrary to what is stated in its answering affidavit in these proceedings, its Rule 35(12) affidavit, and supplementary discovery affidavit. There is no evidence that the documentation requested, save for the correspondence, exists and, if so, that it is in the possession of the defendant.[6]

13. The plaintiff's case is effectively that it is improbable that a business such as the defendant's is operating without written agreements, as well as the other documentation it seeks. This reasoning falls flat, however, when it is considered that on the plaintiff's own version in the particulars of claim the plaintiff and the defendant did not have a written agreement governing their contractual relationship.

14. The plaintiff has accordingly not made out a case to justify going behind the defendant's affidavits.

Rule 35(12)

15. In terms of Rule 35(12) a party may request the production of any documents which are referred to in another party's pleadings or affidavits. The Court retains a general discretion in this regard, and will not order a party to produce a document that cannot be produced, or that is privileged or irrelevant.[7]

16. "Reference" in terms of this Rule has a specific meaning, and reference by

[6] As was the case in *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd supra* at 515H-J.

[7] *Centre for Child Law v Hoerskool Fochville and another* 2016 (2) SA 121 (SCA) at 133D-E.

mere deduction or inference does not constitute a reference as contemplated. Where the existence of a document can be deduced only through a process of inferential reasoning, then such document does not fall to be produced in terms of Rule 35(12).[8] Reference must thus have been made the document in question.[9] Supposition is not enough.[10] The description of a process is insufficient to trigger Rule 35(12):[11] "…*where a document identifies a process by which documents can (or even probably or certainly will be or were) created, that by itself does not trigger the obligation under the rule*".

17. The plaintiff seeks to compel, in terms of Rule 35(12), the defendant to make available for inspection the documents categorised as having been referred to in paragraphs 20.3 and 22.3 of the plea, and paragraphs 6.12, 13, 30, and 34.2 of the counterclaim.

18. Paragraphs 22.3 of the plea simply states that because of the plaintiff's "*refusal/failure to take the necessary steps and sign the documentation required, the JV never became operational*". The defendant points out, at the outset, that the "*documents which the* [plaintiff] *was requested to sign to give effect to the JV"* were discovered in a supplementary discovery affidavit. The reason for these documents not having been discovered is explained: they could not be located at the time of delivery of the original discovery affidavit.

19. Paragraph 20.3 of the plea sets out the procedure which would be followed if the plaintiff failed to provide original PODs as agreed between the plaintiff and the defendant in terms of the sub-contracting agreement. On a consideration of the plea and counterclaim, respectively, it is clear that the paragraphs cited by the plaintiff to do not refer to specific documents, but rather set out the process to be followed in terms of the agreement between the plaintiff and defendant if the plaintiff failed to provide proof of deliveries ("PODs") timeously.

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[8] *Contango Trading SA and others v Central Energy Fund SOC Ltd and others* 2020 (3) SA 58 (SCA) at 65A-C.

[9] *Contango supra* at 65C.

[10] *Democratic Alliance and others v Mkhwebane and another* 2021 (3) SA 403 (SCA) at 416B.

[11] *Potch Boudienste* CC *v FirstRand Bank Ltd* [2016] ZAGPPHC 335 (25 April 2016) at para [23].

20. Paragraph 6.12 of the counterclaim contains essentially the same terms, but in the context of the defendant's counterclaim. These are pleaded terms of the oral agreements on which the defendant relies. They are not references to actual documents in fact generated in the process. Nowhere in the defendant's plea or counterclaim is reference made to any documents such as those requested in relation to these paragraphs, namely credit statements, contested or validated statements, formal or written claims, and invoices. The question which needs to be answered is whether, for example, a reference is made to a "*credit statement to Concargo that includes a missing (original) POD report"* anywhere in the defendant's pleadings or affidavits. Is it alleged anywhere that such a statement was sent or generated? I can find no such reference.

21. Paragraphs 30 and 34.2 of the counterclaim refer to the conclusion and termination of a contract, respectively. The defendant states under oath that the conclusion of the agreements and the termination thereof were both oral. The plaintiff therefore misconstrues the reference to a contract as being a written document, when on the defendant's version it was an oral contract. The plaintiff argues that "*the probabilities are overwhelming*" that a termination would have been recorded in emails or other correspondence. The plaintiff's assessment of the probabilities is, however, not sufficient to constitute a reference (or indirect reference) to any such document into the counterclaim. This amounts to inferential reasoning: "*…a document will not have to be produced under this subrule merely because its existence may be deduced from inferential reasoning*".[12]

22. Even if I were to find that there is a reference to documents as contemplated in Rule 35(12), the Rule contemplates three possible responses. First, the receiving party can produce the document in terms of Rule 35(12)(a)(i). Second, an objection can be raised against production, and the basis thereof set out (Rule 35(12)(a)(ii). Third, a statement can be made under oath to the effect that the document is not in the party's possession, in which case such party is to state the whereabouts of the document, if known (Rule 35(12)(a)(iii)).

[12] *Contango supra* at para [9].

23. In the present matter the defendant delivered an affidavit in which it states that, apart from the documents already discovered in the original and supplementary discovery affidavits, there are no further documents in the its possession, and the defendant does not know the whereabouts of any such documents. In the premises the defendant has responded as contemplated in the Rule in respect of the documents requested in terms of Uniform Rule 35(12). The plaintiff argues that, "*at least from a logical perspective*", the documentation requested should be within the defendant's control. This does not go far enough to sway the Court to go behind the defendant's affidavit.

Conclusion

24. It follows that the interlocutory application falls to be dismissed. Its requests are based upon supposition and inferential reasoning, and amount to a "*fishing expedition*", as referred to in *MV Urgup supra*.

Costs

25. There is no reason to depart from the general rule that costs follow the event.

Order

26. It is therefore ordered as follows:

The application is dismissed, with costs.

P. S. VAN ZYL

Acting judge of the High Court

Appearances

For the plaintiff: Mr E. R. Mentoor (instructed by Karla Strydom Attorneys)

For the defendant: Mr D. G. Whitcomb (instructed by BDP Attorneys)