



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

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

Date: **2 September 2022** Signature:

Case No: **74511/2018**

In the matter between:

BAYPORT MANAGEMENT LIMITED

Applicant / Defendant

and

KHUMOVEST ADVISORY (PTY) LIMITED

Respondent / Plaintiff

JUDGMENT

NEUKIRCHER J:

[1] *“Litigation is not a game where a party may seek tactical advantage by concealing facts from his opponents and thereby occasioning unnecessary costs,”*¹ and in fact *“(t)here seems to me unfortunately to be an increasing*

¹ Nieuwoudt v Joubert 1988 (3) SA 84 (SECLD) at 91B

tendency amongst litigants and practitioners to 'play one's cards close to one's chest', and not to be frank and open with an opposing party either prior to summons or during the course of pleadings. This is a practice which the courts should eliminate."

[2] What this entails is, ultimately, that *"[w]hen all is said and done, trials are about it establishing the truth; and our conception of the way to get there lies in the accusatorial system of litigation. But it can only work if the protagonists are fairly juxtaposed issue by issue."*²

[3] Of course, litigation at the end of the day, comprises the art of strategy where two opponents who are "fairly juxtaposed"³ each thrust and parry in a court until the court hands down judgment. Forming part and parcel of this litigation is the Request for Further Particulars for Trial (the RFP). Before me is an application to compel further and better particulars for trial, sought by the defendant (Bayport) where it complains that certain responses provided by the Plaintiff (Khumovest) are inadequate.

[4] Rule 21 provides as follows:

"(1) Subject to the provisions of subrules (2) to (4) further particulars shall not be requested.

(2) After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are

² Constantia Insurance Holdings (Pty) Ltd v Towsy and Others [2016] ZAGPJHC 267 (16/09/2016) at par 22.

³ Constantia Insurance

strictly necessary to enable him to prepare for trial. Such request shall be complied with within 10 days after receipt thereof.

(3) The request for further particulars for trial and the reply thereto shall, save where the party is litigating in person, be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney.

(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet.

(5) The court shall at the conclusion of the trial mero motu consider whether the further particulars were strictly necessary, and shall disallow all costs of and flowing from any unnecessary request or reply, or both, and may order either party to pay the costs thereby wasted, on an attorney and client basis or otherwise.”

[5] On 20 September 2021 the defendant served the RFP. This was met by a response from the plaintiff on 15 December 2021. Dissatisfied with many of the responses, the present application to compel was served on 4 February 2022. By the time that this application was heard it was common cause that several of the responses had been provided⁴. What was still sought were responses to paragraphs 4.5, 7.3, 7.4, 9.1, 9.5, 10, 12.2 and 14 of the RFP.

⁴ Specifically, in relation to paragraphs 2.3.1, 3.4.1 and 3.4.2 of the RFP

BACKGROUND

[6] The background to this matter is the following:

- 6.1 on 20 September 2016 the parties entered into a written agreement (the Mandate Agreement) the aim of which was to improve Bayport's B-BBEE status via a transaction called "Project Blaze";
- 6.2 in order to achieve this status, Khumovest provided financial advisory services to Bayport, and would then be entitled to payment of:
 - 6.2.1 an amount as a retainer; and
 - 6.2.2 a success fee, payable at certain milestones⁵. The success fees was calculated as a percentage of the total transaction price of "Project Blaze";
- 6.3 Khumovest pleads that it has complied with all of its obligations under the Mandate Agreement and according to it, Annexure A4 to the Intendit specifically sets out the work performed by it in the discharge of its obligations;
- 6.4 according to Khumovest, although Bayport paid the retainer, it has failed to pay the success fee.

[7] The calculation of the success fee payable to Khumovest is to be found at paragraphs 7.1 and 7.2 of the Mandate Agreement which read as follows:

"7.1 Khumovest shall charge Bayport an advisory fee of 1% (excluding VAT) of the Transaction Price, capped at a Transaction Price of USD250 million (two hundred and fifty million Dollars) (the "Advisory Fee").

7.2 The Advisory Fee shall be split as follows:

⁵ Of which there are 17 pleaded components of those obligations

- 7.2.1 *A retainer fee of R150,000 (one hundred and fifty thousand Rand) (excluding VAT), payable monthly in arrears from the Commencement Date, within 7 Days of invoicing for the first three months following the signature of this Agreement, renewable at Bayport's sole election;*
- 7.2.2 *The remainder of the Advisory Fee shall be paid as a success fee on the following terms:*
- 7.2.2.1 *upon subscription of shares in Bayport by BBEE Investor, an amount equal to 20% of the Advisory Fee up to a maximum of USD500,000.00 less any amounts paid under clause 7.2.1;*
- 7.2.2.2 *upon subscription of shares in BFSSA by a suitable BBEE Investor, an amount equal to 32% of the Advisory Fee up to a maximum of USD800,000.00 less any amounts paid under clause 7.2.1 not already deducted under clause 7.2.2.1;*
- 7.2.2.3 *upon subscription of shares in ABIL by BFSSA or the conclusion of the New BBEE Transaction, an amount equal to 48% of the Advisory Fee up to a maximum of USD1,200,000.00 less any amounts paid under clause 7.2.1 not already deducted under clause 7.2.2.1 or clause 7.2.2.2;*
- 7.2.2.4 *payable within 20 Days of invoicing.*

It is thus clear from this, that the success fee was payable upon Khumovest meeting the milestones set out in clause 7.2.2 of the Mandate Agreement.

[8] Khumovest has also pleaded an alternative claim in which it relies on a written alternatively oral alternatively partly written and partly oral agreement which it calls the “New Agreement”.

[9] Whether in respect of the Mandate Agreement or the New Agreement, Khumovest pleads that it has complied with all the terms of its mandate – this is denied by Bayport.

[10] The main essence of the further particulars sought by Bayport is to elucidate on the manner in which Khumovest actually has complied with the terms of its mandate in terms of Project Blaze or any of the alternatives pleaded by Khumovest.

[11] Bearing in mind that Khumovest has provided a response to the RFP the question is: to what extent are its responses indeed unsatisfactory?

PARAGRAPH 4.5 OF THE REQUEST FOR FURTHER PARTICULARS

[12] This relates to paragraph 8 of the Intendit which states:

“8. Khumovest duly complied with its obligations under the Mandate Agreement. Annexed hereto and marked “A4” is a table setting out the work

performed by Khumovest in the discharge of its obligations in terms of the Mandate Agreement.”

- [13] The RFP aims at establishing the precise detail of the plaintiff's compliance with its obligations as well as the how and when of the alleged compliance.
- [14] In its answer to the RFP, the plaintiff alleges that a) it has complied with all of its obligations set out under clause 5 of the Mandate Agreement, b) that Annexure A4 to the Intendit sets out, inter alia, the work performed by Khumovest in discharge of its obligations under the Mandate Agreement and is pleaded with sufficient particularity and c) any further particularity is not strictly necessary to prepare for trial and/or constitutes evidence.⁶
- [15] In its answering affidavit, Khumovest states that Annexure A4 provides Bayport with all the information it has sought as it sets out the work performed in compliance with its obligations and the dates upon which the work was performed and thus *“the case that Bayport has to meet at trial is objectively apparent.”* Khumovest states that what Bayport seeks are the minutiae of details which may be elicited on cross-examination and that any documentary evidence arising from Annexure “A4” may be sought through the use of Rule 35(3).

ANNEXURE “A4”

⁶ The fact that the particulars sought constitute evidence does not disqualify it from disclosure, provided that they are “strictly necessary” to prepare for trial - *Annandale v Bates* 1956 (3) SA 549 (W) at 551

[16] Annexure A4 is a table consisting of 3 columns headed a) “clause as per mandate”, b) “description of clause” and c) “Work performed by Khumovest”.

So, for example the first section of the table reads thus:

Clause as per mandate	Description of Clause	Work performed by plaintiff
5.1 ⁷	Assistance in preparation of presentations on behalf of Bayport to SARB	<p><u>Documents generated</u></p> <ul style="list-style-type: none"> • Project Blaze: Presentation to the South African Reserve Bank (May 2016) • Project Blaze: Presentation to the South African Reserve Bank (June 2016) • Project Blaze: Meeting with South African Reserve Bank (Preparatory questions) • Project Phoenix: Presentation to the South African Reserve Bank (May 2016) <p><u>Meetings attended</u></p> <p>13 May 2016 15 May 2016 19 May 2016 20 May 2016 24 May 2016 27 May 2016</p>

[17] But paragraph 5 of the Mandate Agreement asks for more than just “presentations” – it requires, for example:

“5. Based on the service requirements set out above, Khumovest hereby undertakes to provide the Services set out below to Bayport in relation to Project Blaze:

5.1 assistance with the preparation of presentations on behalf of Bayport to SARB which shall, inter alia:

5.1.1 profile Bayport and BFSSA;

⁷ i.e clause 5.1 of the Mandate Agreement

5.1.2 provide the motivation as to the value proposition for SARB to consider Project Blaze;

5.1.3 motivate as to why BFSSA is the best technical partner to manage ABHL; and

5.1.4 provide the motivation to SARB as to why the partnership of BFSSA and PIC is the best solution for ABIL, the South African banking system and the consumer;

5.1.5 in respect of the New BBBEE Transaction, provide the relevant additional details required therefor;

5.2 assistance with the preparation of presentations on behalf of Bayport to Telkom which shall, inter alia:

5.2.1 profile Bayport and BFSSA; and

5.2.2 provide the motivation as to the value proposition for Telkom to consider Project Blaze;

5.3 examine the internal valuation models in respect of:

5.3.1 Bayport; and

5.3.2 BFSSA,

And test the reasonableness of the assumptions set out therein;

5.4 advise Bayport as to the optimal structure of Project Blaze, including, without limitation:

5.4.1 advise Bayport on the optimal structure and an appropriate subscription price for the shares in Bayport by the BBBEE investor;

5.4.2 advise Bayport on the optimal structure and an appropriate subscription price for the shares in Bayport by the BBBEE investor;

5.4.3 advise Bayport and BFSSA on the structure of vendor financing to BBBEE Investor;

5.5 perform a full Fair Value valuation of ABHL, or the relevant back in respect of the New BBBEE Transaction, as the case may be and include, without limitation:

5.5.1 building an initial discounted cash flow model based on public information;

5.5.2 building a detailed discounted cash flow model breaking down revenue drivers, cost drivers, performance of book) post due diligence;

5.5.3 ...”

And thus, says Khumovest, it is entitled to know who made these presentations, what the content of these presentations is and how the terms of clause 5.1 of the Mandate Agreement were fulfilled.

[18] Furthermore, Annexure “A4” under clause 5.3 states:

5.3	Examine the internal valuation models of Bayport and BFSSA	<p>Documents generated</p> <ul style="list-style-type: none"> • BFSSA & BML – Comp Multiple + Price of Recent (Microsoft Excel) • BFSSA – Dividend Discount Model (Microsoft Excel) • BML Residual Income Model (Microsoft excel) • Pre-Post Money Analysis (Microsoft Excel) • BFSSA & BML Valuation Summary • Independent valuation report to Bayport Management Limited regarding the disposal of a 51% interest in the issued share capital of Bayport Financial Services 2010 Proprietary Limited (Generated by BDO with Khumovest Input)
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		<p>Meetings Attended</p> <ul style="list-style-type: none"> • 07 July 2016 • 20 January 2017
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[19] The questions posed by Bayport in regards of paragraph 5.1 of the Mandate Agreement, as read with Annexure A4, are specifically aimed at eliciting information pertaining to the content of the presentations as set out in paragraph 5.1 of the Mandate Agreement (supra). Annexure A4, whilst it details when and to whom these presentations were made, does not address the content of these and as clauses 5.1.1 to 5.1.5 of the Mandate Agreement particularise the methodology to be employed by Khumovest, it must provide the information sought.

[20] As to paragraph 5.3 of the Mandate Agreement, that information must also be provided – it is not sufficient to refer to the “Documents generated” (see paragraph 18) and provided a cryptic indecipherable reference to these documents, without explaining what they are. The aforementioned table provides no elucidation and cannot be deciphered with reference to Annexure A4. Khumovest must therefore provide a proper response.

PARAGRAPH 7.3 AND 7.4 OF THE RFP

[21] Paragraph 10.2 of the Intendit states:

“10. By latest November 2017:

10.1 ...

10.2 BEE Investor had effectively acquired a 10% interest in Bayport Mauritius (by virtue of an instrument convertible to a 10% equity interest upon the listing of Bayport Mauritius (step 1);

10.3 ...”

- [22] The thrust of these questions is aimed at who, when and how the BEE Investor had acquired the 10% interest. But Khumovest’s stance is that the particularity sought is not strictly necessary to enable Bayport to prepare for trial as the information falls within Bayport’s own knowledge, that Bayport has inadequately discovered and the particularity constitutes a matter of evidence.
- [23] This response must however be seen in the following context: “... *there is no hard and fast rule as to the class of cases in which the parties should precede discovery or discovery precede parties, but that the court must exercise a reasonable discretion in every case after looking at all the facts and taking into account any special circumstances.*”⁸
- [24] Whilst Khumovest has complained about Bayport’s inadequate discovery in order to avoid responding to several paragraphs of the RFP, it turns out that Bayport filed its R35(3) answering affidavit on 28 July 2022 and its Rule 35(5) affidavit on 1 July 2022. There was no suggestion that these responses are inadequate or that Bayport failed to address Khumovest’s Rule 35(3) notice.
- [25] In any event, the information sought is all tied up with whether or not Khumovest fulfilled the terms of its mandate so as to be entitled to its claimed advisory fee this is, after all, what it must prove at trial. One of the

⁸ Goldsmid v SA Amalgamated Jewish Press Ltd 1929 WLD 184 at 191

components of this is whether or not a BBEE Investor acquired a 10% equity interest in Bayport. Thus this particularity is necessary for a preparation for trial as it is central to the issue that is to be adjudicated upon and must be provided.

PARAGRAPH 9.1 OF THE RFP

[26] Paragraph 11 of the Intendit states:

“11. In the circumstances, the first two of the three steps comprising Project Blaze have been fulfilled and Khumovest is entitled to 52% of the Advisory Fee (plus V.A.T) which percentage is made up as follows:

11.1 in terms of clause 7.2.2.1 of the Mandate Agreement, upon the conclusion of step 1, Khumovest became entitled to 20% of the Advisory Fee; and

11.2 in terms of clause 7.2.2.2 of the Mandate Agreement, upon the conclusion of step 2, Khumovest became entitled to 32% of the advisory fee.”

[27] The questions posed are targeted at the share subscription and the alleged fulfilment by Khumovest of its mandate. As with the previous paragraphs, Khumovest is refusing to provide the particularity sought on the same grounds. For the same reasons I am of the view that the information must be provided.

[28] It is also inadequate to state that the “information is within the defendant’s knowledge” as it is for the plaintiff to prove its claim.

PARAGRAPH 10 OF THE RFP

[29] These questions are directed to paragraph 11.2 of the Intendit and similarly at whether or not the BBBEE Investor contemplated in clause 7.2.2.1 of the Mandate Agreement subscribed for shares in the BFSSA, when it subscribed and how many shares were issued to it.

[30] Khumovest's response is the following:

"10. AD PARAGRAPH 11.2 OF THE POC:

10.1 AD PARAGRAPH 10 (and its concomitant subparagraphs)

10.1.1 Clause 7.2.2.1 of the Mandate Agreement does not refer to BFSSA. It refers to the Defendant.

10.1.2 The particularity sought accordingly cannot be provided, as it is not understood."

[31] Clause 7.2.2.1 of the Mandate Agreement states:

"7.2.1 A retainer fee of R150,000 (one hundred and fifty thousand Rand) (excluding VAT), payable monthly in arrears from the Commencement Date, within 7 Days of invoicing for the first three months following the signature of this agreement, renewable at Bayport's sole election;

7.2.2.1 upon subscription of shares in Bayport by BBBEE Investor, an amount equal to 20% of the Advisory Fee up to a maximum of USD500,000.00 less any amounts paid under clause 7.2.1;

[32] However clause 7.2.2 inter alia states

“7.2.2 The remainder of the Advisory Fee shall be paid as a success fee on the following terms:

7.2.2.1 ...

7.2.2.2 upon subscription of shares in BFSSA by a suitable BBEE Investor, an amount equal to 32% of the Advisory Fee up to a maximum of USD800,000.00 less any amounts paid under clause 7.2.1 not already deducted under clause 7.2.2.1;”

[33] It is thus apparent that Bayport referenced an incorrect paragraph – Bayport argues that it is very clear which paragraph is referred to and that Khumovest’s avoidance of the question is not bona fide. It may be so that the incorrect paragraph in the Mandate Agreement is referenced, but Bayport is obliged to consider only that which is sought. In my view Bayport was entitled to respond as it did and these particulars are thus refused.

PARAGRAPH 12.2 OF THE RFP

[34] Paragraphs 18 and 19 of the Intendit state:

*“18. Bayport Mauritius is in the process of seeking to implement a transaction resulting in Bayport SA acquiring a controlling interest in Mercantile Bank Limited, being a bank located in the Republic of South Africa (“**the Mercantile Bank Transaction**”).*

19. The Mercantile Bank Transaction accords with the definition of New BEE Transaction in clause 2.1.17 of the Mandate Agreement (step 3).”

[35] The information sought in paragraph 12.2 pertains to the Mercantile Bank Transaction and includes a) the identity of the members of the proposed consortium, b) whether and when the Minister of Finance approved the transaction⁹, c) whether and when the Prudential Authority approved the transaction¹⁰.

[36] Khumovest's response is the following:

“12.1.1 Paragraph 19 of the plea does not contain an allegation that “the ‘Mercantile Bank Transaction’ accords with that definition”.

12.1.2 The particularity sought accordingly cannot be provided, as it is not understood.”

[37] But the response from Khumovest is incorrect: firstly, it specifically alleges in paragraph 19 of the Intendit that the Mercantile Bank Transaction accords with the definition of New BEE Transaction in clause 2.1.17 of the Mandate Agreement and, secondly, clause 2.1.17 of the Mandate Agreement defines a “New BBEE Transaction” as

“2.1.17 “New BBEE Transaction” means a transaction in terms of which a consortium satisfying the requirements of BBEE, consisting of:

2.1.17.1 BFSSA;

2.1.17.2 Telkom; and/or

2.1.17.3 a BBEE Investor,

⁹ Section 54 (1) of the Banks Act 94 of 1990

¹⁰ Section 32 of the Financial Sector Regulation Act 9 of 2017

acquires a controlling interest in a bank located in the Republic of South Africa.”

[38] In my view the particularity sought as regards the members of the consortium¹¹ must be provided to Bayport. These are indeed necessary for preparation for trial. As regards the remainder¹², Bayport has other avenues open to it to explore the information sought and must utilise those. Given this, Bayport can avoid surprise or embarrassment at trial by the utilisation of these other avenues.

PARAGRAPH 14 OF THE RFP

[39] Paragraphs 27.1 and 29 of the Intendit relate to the alternative claim, ie the “New Agreement”, and state:

“27.1 Bayport Mauritius intended to implement a BEE Transaction (“BEE Transaction 2.0”) resulting in BEE Investor acquiring:

27.1.1 A 10% equity interest in Bayport Mauritius upon listing;

and

27.1.2 A controlling interest in Bayport SA.

27.2 ...

27.3 ...

27.4 ...

27.5 ...

28. ...

¹¹ Paragraph 12.2.1 of the RFP

¹² ie paragraph 12.2.2 of the RFP

29. *By latest December 2017, BEE Transaction 2.0 had been implemented.*

[40] The request seeks to elicit information pertaining to the identity of the BEE Investor and the manner in which “BEE Transaction 2.0” was implemented.

[41] Khumovest’s response was to state a) that the particularity is not strictly necessary to enable Bayport to prepare for trial, b) that Bayport’s discovery was inadequate, c) that the information fell within Bayport’s knowledge and d) that the particulars constitute a matter for evidence.

[42] However, as with the previous responses, this response is simply an obfuscation. It is Khumovest which relies on this “New Agreement” and the fulfilment of its terms to justify its claim – it must provide the sought particularity to enable Bayport to meet its case without surprise.

[43] Furthermore, and in respect of Khumovest’s contention regarding Bayport’s discovery where Khumovest makes positive assertions in its Intendit regarding the fulfilment of terms of its agreement, whether in regards of the main or the alternative claims, and it bears the onus of proving its claim. It cannot argue that it is waiting for Bayport to discover so that it can prove its claim. It must also be borne in mind that a Rule 35(3) and its response is not a pleading – a RFP is. The RFP serves to shorten the unnecessary issues and evidence, depending on the responses provided, and thus it also serves to put a defendant in the position that it knows which averments must be met

and which are not contentious or admitted. As it was stated in **Ruslyn Mining and Plant Hire (Pty) Ltd v Alexkor Ltd**¹³

“The purpose of particulars for trials is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case.”

[44] And in **Thompson v Barclays Bank DCO**¹⁴ it was stated:

“In examining the above contentions one should not overlook the purpose of further parties for trials, these are a) to present surprise; b) that the parties should be told with great precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations¹⁵..... c) having regard to the above nevertheless not to tie the other party down and limit his case unfairly at the trial.” (my emphasis)

[45] The fact that the particulars requested may involve the disclosure of evidence does not disentitle an applicant from obtaining the particulars if it can demonstrate embarrassment or prejudice in its preparation, as it is entitled to know what case it must meet.¹⁶ Thus this is not on its own a ground to refuse an order to compel further particulars.¹⁷

THE COSTS

¹³ [2012] 1 All SA 317 (SCA) at paragraph 18

¹⁴ 1965 (1) SA 365 (W) at 369 D - E

¹⁵ Authorities omitted

¹⁶ Annandale v Bates supra

¹⁷ Brett v Schultz 1982 (3) SA 286 (SE) at 292H – 293B.

[46] In my view Bayport has been substantially successful and is entitled to its costs. The matter is one of some complexity and therefore the costs of senior counsel are warranted.

THE ORDER

[47] The order I make is the following:

1. The plaintiff is ordered to provide further and better particulars to the defendant's request contained in paragraphs 4.5, 7.3, 7.4, 9.1, 9.5, 10, 12.2 and 14 of the defendant's request for further particulars for trial dated 20 September 2021 but excluding the request in paragraphs 10 and 12.2.2 of the request for further particulars for trial.
2. The plaintiff is ordered to deliver its further and better particulars within 10 days from the date of this order.
3. The plaintiff is ordered to pay the costs of this application, including the costs of senior counsel.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 September 2022.

Appearances:

For the applicant / defendant : Adv ARG Mundell SC
Instructed by : Marie-Lou Bester Inc

For the respondent / plaintiff : Adv Ross Bosman
Instructed by : Leslie Cohen & Associates

Date of hearing : 10 August 2022