IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)

CASE NO: 3245/2009
DATE HEARD: 22/04/10
DATE DELIVERED: 21/6/10
NOT REPORTABLE

In the matter between:

FRIKTON CC **APPLICANT**

and

CHRIS HANI DISTRICT MUNICIPALITY **RESPONDENT**

The applicant sought inspection of a wide range of documents in terms of rule 35(3) of the uniform rules. The respondent argued that the description of the documents was too vague to allow them to be identified and that, with a few exceptions, they were not relevant. It tendered inspection of certain of the documents. The court held that the description of the documents was not vague but that most were not relevant to the issues in dispute on the pleadings. The respondent was ordered to make certain of the documents available for inspection.

JUDGMENT

PLASKET J

[1] The applicant seeks orders against the respondent in the following terms:

‘(a) Directing the respondent to deliver a reply to the plaintiff’s rule 35(3) notice served and filed on behalf of applicant on 3 February 2010 by noon on 19 March 2010.

(b) For leave to apply on the same papers, as supplemented, for an order striking out the defendant’s defence, with costs, in the event of the respondent failing to comply with rule 35, on oath, within the time ordered.

(c) Costs of this application.’

[2] This application relates to an action in which the applicant, as plaintiff, sues the respondent, as defendant, for an amount of R488 600.58. The circumstances in which this amount is said to have been due to the applicant are the following.

[3] The respondent had awarded a tender to a firm by the name of Ikamva Construction in respect of the construction of a road. The applicant and Ikamva Construction then entered into an oral agreement in terms of which the applicant undertook to do the earthworks ‘in respect of the access roads for wards 3, 7, 12 and 14’. In other words, the applicant undertook to do part of the work that Ikamva Construction had undertaken to do. Rates for this work were agreed to between the applicant and Ikamva Construction.

[4] Thereafter Ikamva Construction ceded its right to claim payment from the respondent to the applicant, the amount being limited to R627 000.00. The respondent had knowledge of the cession and approved it.

[5] The applicant alleges that it completed the work and that the total amount due to it by the respondent was R604 234.20. Of this amount, only R115 633.62 was paid to the applicant by the respondent. This means that, according to the applicant, a balance of R488 600.58 is due, owing and payable. It is that amount that the applicant claims in its summons.

[6] In its plea the respondent admitted knowledge of the cession but denied knowledge of the agreement between the applicant and Ikamva Construction.

It stated that the rate of remuneration for the services rendered by the applicant was set out 'in the specifications which formed part of the tender that the defendant had awarded to Ikamva'.

[7] It is pleaded further that the respondent measured the work done by the applicant and determined its value to be R190 559.37. It paid the applicant R115 633.62. The difference between these two figures – R74 925.75 – was held back as retention money which will be paid in due course in terms of the contract. The respondent accordingly denied that it was liable to pay the applicant R488 658.00. (This defence was first raised when the respondent successfully opposed the applicant's application for summary judgment.)

[8] In a rule 35(3) notice, the applicant, in the belief that in addition to the documents already discovered, there were other documents in the respondent's possession which 'may be relevant to any matter in question' in the trial, requested inspection of a number of documents. It identified the following documents:

'1. All tender documents between the defendant and Ikamva Construction.
2. All invoices and receipts relevant to transactions between the defendant and Ikamva Construction.
3. All contracts and written agreements between the defendant and Ikamva Construction.
4. All certificates by the engineers in regard to the project in the possession of the defendant.
5. All measurements by Richard Miles relevant to the plaintiff's work; and
6. All Bills of Quantities relevant to the project.'

[9] The present application was launched when the respondent's attorneys failed to respond to the rule 35(3) notice. Instead, they chose to oppose the application and, after an initial skirmish before Hartle AJ, they filed a document styled, 'Reply to Notice in Terms of Rule 35(3)' and an affidavit in answer to the founding affidavit. The focus of this application shifted to

whether the applicant was entitled to inspection of the documents listed in its rule 35(3) notice.

[10] In the reply to the rule 35(3) notice, the respondent stated:

> '1. AD ITEMS 1, 2 AND 3
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> (a) The Defendant is in possession of the requested documents, but objects making them available for inspection in accordance with the provisions of Rule 35(6) as they have been widely described.
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> (b) The required documents are not relevant to the issues raised in the pleadings in the matter between Frikton CC and Chris Hani District Municipality, as they are between the Defendant and the third party.
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> (c) The relevance of the documents according to Rule 35(3) can only be determined from the pleadings and not extraneously therefrom.
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> 2. AD ITEMS 4 AND 5
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> Attached herewith are the copies of the certificate by the Engineers relevant to the Plaintiff's work and a copy of the measurements by Richard Miles as referred to in item number 5, marked as Annexure "CH1".
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> 3. AD ITEM 6
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> This item has also been widely described. The bill of quantities relevant to the project will be subject to the agreement between Ikamva Construction and the Defendant, and the Plaintiff will be considered a third party to those agreements and as such, they are not relevant to the issues raised in the proceedings, unless as sought by way of Request for Further Particulars for the purposes of trial, having been proven to be relevant.'

[11] In essence, then, the respondents place in issue the breadth of the description of the documents and their relevance. The same points are made in the answering affidavit: the respondent says that as the dispute is one

between it and the applicant, the tender documents, invoices, receipts and contracts between the respondent and Ikamva Construction are not.

[12] The respondent, in its reply to the rule 35(3) notice, tendered 'copies of the certificate by the engineers relevant to the plaintiff's work and a copy of the measurements by Richard Miles as referred to in item number 5'. The deponent to the answering affidavit, Mr Mpilo Mbambisa, the respondent's municipal manager, summarised the respondent's response thus:

'5.1.6 The Plaintiff intends to make available for inspection items number 4, 5 and 6 insofar as they are relevant to the issues raised in the pleadings, due to the fact that the Plaintiff widely described the documents required in item 4 and 6.

5.1.7 The Defendant does not object to making item 5 available for inspection in its entirety, as it has been accurately described and it is relevant to the issues in the pleadings.

5.1.8 Thus, the Defendant objects to items number 1, 2, 3, 4 and 6 which have been widely described which tend to be irrelevant to the issues raised in the pleadings, and only documents relevant to the Plaintiff's work will be supplied for inspection.'

[13] The replying affidavit is deposed to by Mr Brin Brody, the applicant's attorney. He takes issue with the assertion made by the respondent that the documents sought are too widely described and are irrelevant.

[14] As far as items 1, 2 and 3 are concerned, he simply states that the documents were not too widely described, are identifiable and are 'relevant to the issues between the parties as they are specifically referred to in the pleadings, in the opposing affidavit, and are discoverable'.

[15] In respect of items 4 and 5 – all certificates by the engineers in regard to the project in the possession of the respondent and all measurements by Richard Miles relevant to the plaintiff's claim – he states:

'27.3.1.5.1 The Respondent has, unilaterally, and in violation of Rule 35, supplied only one certificate when all the certificates

have been called for. Having regard to the pleaded case for the Applicant and the Respondent, the Applicant is clearly entitled to all certificates to determine whether payment has been made to Ikamva for work done by the Respondent, or not. Further legal argument will be addressed to the above Honourable Court in regard to this issue having regard to the pleadings and Opposing Affidavits.

27.3.1.5.2 It is noted that the Respondent has furnished the document as referred to in item 5 and for this reason alone the Applicant is entitled to its costs of the application.'

[16] Finally, when dealing with item 6 – all bills of quantities relevant to the project – he insists that the documents have not been too widely described, that '[t]he bill of quantities is a document specifically referred to by the deponents in the opposing affidavit' to the application for summary judgment and that it is relevant as it 'will indicate what work was done, at which rate, and whether the applicant is entitled to the amounts it claims and the quantum thereof'.

[17] In his response to the affidavit of Mbambisa, Brody takes the matter no further except when he deals with items 1, 2 and 3. He makes the point that 'the tender documents, the invoices, receipts and contracts are specifically referred to in various pleadings' and states that they are 'highly relevant to the issues between the parties'.

[18] Rule 35(3) provides that if a party believes that there are, in addition to documents or tape recordings that have been discovered, others '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 in accordance with sub-rule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him'.

[19] Rule 35(6) provides that a party may by notice require the other party to 'make available for inspection any documents or tape recordings disclosed in terms of sub-rules (2) and (3)'. The latter shall then, within five days, deliver a notice in which he or she will state a time within five days of the date of delivery of the notice when the documents or tape recordings may be inspected. The party wishing to inspect 'shall be entitled at the time therein stated and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof'.

[20] Rule 35(7) provides that if a party fails to discover or, having been served with a rule 35(6) notice, omits to give notice of a time for inspection or does not allow inspection, 'the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence'.

[21] In this matter it is not in dispute that the documents listed in the rule 35(3) notice are in the possession of the respondent. As for the respondent's contention that they are too broadly specified, it appears to me that the case law is against the respondent. In *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others*,[1] Joffe J set out the requirement for describing documents sought as follows:

> 'A notice in terms of rule 35(3) is accordingly not limited to a specific document. The notice may require production of any number of documents. Whilst a document need not be described specifically within the notice, it must be described with sufficient accuracy to enable it to be identified. This will occur where the document is described within a *genus* enabling it to be identified'.

[22] In my view, the descriptions of the documents listed in the rule 35(3) notice are clear. The respondent knows what documents are sought. The

[1] 1999 (2) SA 274 (T), 323B-C.

problem is not that they have been too 'widely described' but rather the broad range of documents that are sought.

[23] That leaves only the question of their relevance, but before dealing with that, there are two issues to deal with. The first is that the mere fact that the documents are mentioned in the pleadings or in affidavits (in the summary judgment application) does not, on its own, mean that they must be made available for inspection: it is only if they are relevant that they must be.

[24] Rule 35(3) makes that clear in express terms, referring to documents or tape recordings that 'may be relevant to any matter in question'. And, in the context of rule 35(12), which contains no such express provision, Friedman J, in *Gorfinkel v Gross, Hendler and Frank*[2] held that while '*prima facie* there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so', that obligation is subject to three exceptions: it will not arise if the document is not in the possession of the party who referred to it, or if the document is privileged, or if it is irrelevant.

[25] The second issue is that the respondent has tendered inspection of certain documents. In the first place, it has tendered, without qualification, item 5. It has tendered items 4 and 6 insofar as they are relevant. I shall make orders in regard to these documents below, when I have determined the question of relevance in general and whether the applicant is entitled to inspection of any other documents.

[26] The following principles apply: first, a document will be relevant if it contains information that may, directly or indirectly, enable the party requiring it to either advance his or her own case or damage the case of his or her opponent;[3] secondly, as the document must be relevant to 'any matter in question' relevance must be determined with reference to the pleadings;[4]

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[2] 1987 (3) SA 766 (C), 774G-I.
[3] *Swissborough Diamond Mines*, 316E-H, quoting with approval *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N), 564A and *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.
[4] *Swissborough Diamond Mines*, 316J-317B.

thirdly, while a court will be reluctant to go behind a respondent's affidavit when he or she asserts that a document is not relevant, such an assertion is not necessarily conclusive[5] and a court will go behind the affidavit if 'a probability is shown to exist that the deponent is either mistaken or false in his assertion';[6] and fourthly, the onus rests on the party seeking further discovery to establish that the documents sought are relevant.[7]

[27] I shall turn now to the founding affidavit. It is short and says no more than that the documents sought in the rule 35(3) notice 'are of the nature and for the purposes contemplated by rule 35'. When the respondent placed the relevance of the documents in issue, the applicant's replying affidavit is to the effect that when regard is had to the pleadings, the documents are relevant. For instance, in dealing with the tender documents, invoices, receipts and contracts – items 1, 2 and 3 -- Brody simply says that these are referred to specifically in various pleadings, 'are highly relevant to the issues between the parties, and the applicant is entitled to these documents for the reasons given above'.

[28] When the pleadings are analysed it is clear that the dispute between the parties is limited in the sense that it concerns a defined part of the larger tender awarded to Ikamva Construction. Indeed, in the particulars of claim a distinction is drawn between what was termed 'the project' – the tender awarded to Ikamva Construction 'in respect of the Intsika Yethu access roads under tender number 62/2005/MD (TS)' – and what was termed 'the works' – the earthworks 'in respect of the project and in respect of the access roads for wards 3, 7, 12 and 14'. It was this later work that the applicant undertook to complete for Ikamva Construction and in respect of which Ikamva Construction ceded its right to claim payment from the respondent to the applicant. The terms of the agreement between the applicant and Ikamva in respect of the works are set out in detail in the particulars of claim. So too are the details of the work completed by the applicant and the amounts claimed in

[5] *Rellams (Pty) Ltd v James Brown and Hamer Ltd* (note 3), 560G-H.
[6] *Swissborough Diamond Mines*, 317E-F; *Marais v Lombard* 1958 (4) SA 224 (E), 227G.
[7] *Swissborough Diamond Mines*, 320B-E; *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd* 1971 (4) SA 589 (W), 597H.

respect of each aspect of the work. It is further alleged that the consulting engineers were aware of the agreement and the cession and that, after the work was completed, they issued a payment certificate in which they certified that work had been completed to the total value of R664 588.31.

[29] In answer to the allegation that the tender was awarded to Ikamva Construction, the respondent did two things. First, it admitted the allegations made by the applicant. Secondly, it pleaded that the 'rate at which the [plaintiff] would be remunerated for services rendered was set out in the specifications which formed part of the tender that the defendant had awarded to Ikamva'.[8] For the rest, the respondent pleaded that it was not party to the agreement between the applicant and Ikamva and did not know its terms, but that it was aware of the cession; that it measured the work on an interim basis and valued it at R190 559.37; and that it paid R115 633.62, holding back retention money that it was entitled to do.

[30] That, in brief, is the dispute between the parties. It is limited to what the applicant referred to as 'the works'. The documents listed in items 1, 2 and 3 of the applicant's rule 35(3) notice are not relevant to the dispute on the pleadings save in one respect: the respondent concedes that the rate at which the applicant is entitled to be paid for services rendered in respect of the works is set out in 'the specifications which formed part of the tender that the defendant had awarded to Ikamva'. The applicant is accordingly entitled to the tender document in which these rates appear, but not '[a]ll tender documents between the defendant and Ikamva Construction'.

[31] Similarly, in respect of items 4 and 6, the applicant is not entitled to all of the engineers' certificates and all bills of quantities concerning the project. It is only entitled to these insofar as they relate to the works. That is what the respondent has tendered. The applicant is entitled to the measurements by Richard Miles relevant to its work, and that too has been tendered by the respondent.

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[8] It would appear that the drafter of the pleader intended to refer to the plaintiff when dealing with the rate of remuneration but mistakenly referred to the defendant instead.

[32] Before formulating the order, it is necessary for me to consider two issues relating to costs. The first is the costs that were reserved by Hartle AJ in her judgment dated 18 March 2010, relating to a hearing on 11 March 2010. The second is the costs of the application in general.

[33] As to the first issue, it is clear from a reading of Hartle AJ's judgment that the points taken by the respondent were not good points, its conduct of the matter was not above reproach and the conduct of the applicant could not be criticised.[9] I am accordingly of the view that the respondent is liable for the costs of 11 March 2010.

[34] I turn now to the costs of the application in general, including the costs of the hearing before me. The applicant succeeded to the extent that it is entitled to inspection of some of the documents sought by it. It originally sought a host of documents that were not relevant. It can be said that it engaged in a fishing expedition. It ought to have contented itself with the tender made by the respondent. Even though I will order that it be allowed inspection of the tender document in which the rate of pay at which it is entitled to be paid is set out, I do not consider that this makes any difference to the costs order that I intend to make. It is that the respondent shall be liable for the applicant's costs up to and including 19 March 2010, the date on which the tender embodied in the affidavit of Mbambisa was made.

[35] Given that the respondent has, in its answering papers, responded to the applicant's rule 35(3) notice by refusing to allow inspection of most of the documents sought on the basis of their irrelevancy and tendering inspection of those that it says are relevant, it is necessary to frame the relief to which the applicant is entitled in terms slightly different to the relief sought in the notice of motion.

[36] The following order is made.

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[9] See paras 41 and 49 of Hartle AJ's judgment.

(a) The respondent is ordered to make available for inspection by the applicant in accordance with rule 35(6) of the uniform rules, and within five days of the date of this order, the following documents that are in its possession:

(i) the document containing specifications which are part of tender number 62/2005/MD (TS) awarded by the respondent to Ikamva Construction and which contain the rates of remuneration for work contemplated by the tender, as referred to in paragraph 3.2 of the respondent's plea;

(ii) all certificates by the engineers in regard to the works contemplated in the oral agreement entered into by the applicant and Ikamva Construction on 7 February 2008 (the agreement);

(iii) all measurements by Richard Miles relevant to the applicant's work in terms of the agreement; and

(iv) all bills of quantities relevant to the works contemplated in the agreement.

(b) The respondent is ordered to pay the applicant's costs up to and including 19 March 2010. For the rest, each party is to pay its own costs.

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C. PLASKET
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Mr R Brooks instructed by Wheeldon, Rushmere and Cole
For the respondent: Mr G Dugmore instructed by Netteltons