FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES**:**

EAST CAPE FOREST PRODUCTS CC
T/A HIGHBURY TREATED TIMBERS
(WITH REGISTRATION NO.1997/063430/23) **APPLICANT**

and

TERTIUS LEASK **RESPONDENT**

- Case Number**: 1285/07**
- High Court**: Eastern Cape Division**
- DATE HEARD: **26/09/08**

DATE DELIVERED: **02/10/08**

JUDGE(S): **PLASKET J**

LEGAL REPRESENTATIVES –

Appearances:

(a) For the Applicant(s): **Mr I. Smuts SC**
(b) for the Respondent(s): **Mr D. De La Harpe**

Instructing attorneys:

- Applicant(s): **Whitesides**
- Respondent(s): **Wheeldon, Rushmere and Cole**

CASE INFORMATION -

5 *Nature of proceedings* :
6 *Topic:*
7 *Key Words:*

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

GRAHAMSTOWN

CASE NO.: 1285/2007 **DATE: 20 AUGUST 2008**

In the matter between:

TERTUIS LEASK versus: EAST CAPE FOREST (PTY) LTD

JUDGMENT

PLASKET J:

This matter was set down for trial on 19 August 2008. Some time prior to that, on 10 July 2008, a request for particulars for trial was served on the defendant's attorneys by the plaintiff's attorneys. No reply to the request was forthcoming and so, on 25 July 2008, the plaintiff applied for an order to compel the defendant to furnish a reply by noon on 7 August 2008 and for an order for leave to apply on the same papers for an order striking out the defendant's defence with costs in the event of it failing to comply with this order.

The order as prayed was granted by me in Motion Court on 31 July 2008. Despite this, the defendant has not furnished the reply and the plaintiff has applied in terms of Rule 21(4) of the Uniform Rules for the defendant's defence to be struck out.

The plaintiff's attorney, Mr B Brody, has filed an affidavit in support of the application. The defendant has filed the affidavit of its attorney, Mr RM Mayekiso, in its endeavour to resist this application. Before I turn to them I shall say something of the dispute between the parties.

The plaintiff instituted an action against the defendant in which he claims an amount of R242 809-42 which he alleges is due to him in respect of pine timber that the defendant felled and removed from his farm in terms of a contract agreed to between them. As I understand the defendant's plea the contract in broad terms is admitted as is the fact that a significant amount of timber was felled and removed in terms thereof. For the rest, and particularly in relation to the calculation of the amount allegedly owed, the defendant has tended to content itself with bare denials and invitations to the plaintiff to prove its allegations. What stands out is a complete lack of any detail as to how the defendant met its contractual obligations. The "catch-me-if-you-can" nature of the plea is a factor of significance in what follows.

It is against this background that the request for particulars was made, the application to compel was brought, and the order to that effect was granted. In his affidavit, Mr Brody states that the order I granted was served on the defendant's

attorneys on 1 August 2008. Despite that the defendant remained in default. He states further that:

> "**the defendant's conduct is nothing short of contumacy, particularly in circumstances in which the defendant admits the agreement and admits having removed timber from the plaintiff's property**."

In this context of a plea that contains bare denials and no positive particulars of the defendant's version, the request for further particulars was, says Mr Brody, legitimate and the failure to comply "caused prejudice to the plaintiff in the preparation for trial and could only have been intended to bring about this result".

Mr Mayekiso, in opposing the application to strike out the defendant's defence, commenced his affidavit with what he termed "background facts". They are that:

(c) he was notified by his Grahamstown correspondent on 11 July 2008 of the plaintiff's request for particulars;

(d) he tried "there and then", as he put it, to consult with the defendant - he erroneously refers to the applicant in his affidavit - on the further particulars, but it had been exceedingly difficult to get hold of one O'Brien who had negotiated the contract with the plaintiff and attempts to consult with him telephonically "proved problematic as well";

(e) he consulted with O'Brien on 7 August 2008, but found that the answers given to him by O'Brien were inconsistent with the defendant's plea;

(f) he arranged a further consultation with counsel but O'Brien was unavailable;

(g) in panic he tried to consult with other members of the defendant and was instructed by its managing member to apply for a postponement.

Against this background Mr Mayekiso proceeded to state that neither he nor the defendant were aware of the order I issued on 31 July 2008 until the day of the trial, 19 August 2008, as his local correspondent, on whom the order was served, "did not notify us with the application until 31 August 2008". I presume that the date he wished to refer to is either 31 July 2008 or 1 August 2008. He then claims that a copy of the "faxed application bearing date we received by the fax being 1 August 2008" (sic) is attached to his affidavit. It is not. He admits - or as he put it, does not deny - that the defendant has failed to furnish the particulars and remains in default. He states, however, that the defendant is "not in blatant disregard of the Honourable Court's order but is unable to file a reply" for the reasons that he then gives. These are set out in paragraphs 5.1 to 5.5 of his affidavit and read as follows:

"**5.1 The plaintiff's request for further particulars is in**

/...

response to the defendant's plea dated 19 September 2007.

7.2 The defendant still wishes to apply for the amendment of its plea in order to find consistency on the answers intended to reply to plaintiff's request for further particulars.

7.3 Providing a reply at this stage has been considered to be inappropriate.

7.4 The defendant's view is that the particulars sought at this stage may have to change once the defendant's plea is amended.

7.5 **It is not the intention of the defendant to disobey the Honourable Court's orders.**"

I turn now to the law that applies to the facts that I have set out. The starting point is Rule 21(4) of the Uniform Rules. It states:

"**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.**"

Three points warrant mention. The first is that the Rule applies not only where there has been a complete failure to furnish particulars, but also in the ostensibly less serious instances of failing to comply timeously or sufficiently.

Secondly, it is clear that the ultimate remedy, the dismissal of an action or the striking out of a defence, is a drastic remedy. Thirdly, it is clear that the power to grant such a remedy is discretionary and that discretion must, no doubt, be exercised judicially.

In **THE WANSON COMPANY OF SOUTH AFRICA (PTY) LTD v ESTABLISSEMENTS WANSON CONTRUCTION DE MATERIAL THERMIEQUE SOCIETE ANONYME** 1976(1) SA 275 (T) a central issue for decision was whether the striking out of a defence could only be ordered in cases of contumacy - that is, in cases of wilful refusals to comply. The court held that a dictum in an earlier case to the effect that contumacy was required "puts an erroneous restriction on the discretion which the Rule confers on the court" stating that "[c]ontumacy is a good reason for ordering the dismissal of an action or the striking out of a defence, but it is not the only reason" (at 280C-D).

I turn now to an application of the law to the facts. What stands out starkly from Mr Mayekiso's affidavit is the complete and utter absence of an apology, or of contrition. This is an attitude that ill-behoves a party who has ignored its obligations under the rules and then ignored an order of this Court. His attitude also displays an arrogant disdain for the plaintiff who,

after all, has acted in accordance with the rules.

Secondly, Mr Mayekiso's affidavit is more noteworthy for what it does not say, than for what it does say. Apart from the absence of apology or contrition there is a deafening silence when it comes to the local correspondent's failure which I suppose must be inferred, as it is not expressly stated, to refer the order to him. The absence of this explanation is telling.

Thirdly, Mr Mayekiso knew of the request for further particulars on 11 July 2008. He has given no proper explanation as to why he did not try to comply. From the vague terms of his affidavit, it is clear that he consulted with O'Brien and with counsel thereafter. Apart from saying that he paniced after this, he does not say why, having consulted with his witness, he could not furnish the particulars, as he knew he had to, and amend his plea, if he needed to. He must surely have had the facts at hand to do so, having consulted with the witness.

Fourthly, it stands out that Mr Mayekiso made no proper *bona fide* attempt to deal with the plaintiff's attorney when he discovered that he had a problem. Instead, he went on the offensive, replacing the diffidence one would expect of a practitioner seeking an indulgence with a misplaced belligerence and an erroneous assertion that the pleadings had

not closed and the matter was not ripe for hearing. From this it can be inferred, on its own, that Mr Mayekiso was prepared to try anything in order to delay the trial. This inference is at odds with the *bona fides* that this Court is entitled to expect from those who practice law in it. The inference I have drawn is strengthened by the duplicity on Mr Mayekiso's part that becomes clear when what he says in paragraphs 3.2 and 3.3 of his affidavit is compared to what he said in a letter to the plaintiff's attorney that he attached to his affidavit. In the affidavit, he said that when he consulted with O'Brien on 7 August 2008 it became clear that O'Brien's version was at odds with the plea. On the same day, in a letter to the plaintiff's attorneys, he stated:

> "**During consultation with the clients in preparation for response to your request for further particulars, it has just transpired that our key witness is not available for urgent consultation and during trial date.**"

Fifthly, Mr Mayekiso's affidavit is wanting on what exactly he did, from 11 July 2008 when he was told of the request for particulars, until 7 August 2008 when he consulted with O'Brien. He refers to trying to secure consultations but does not explain why it took him nearly a month to achieve this. His affidavit is silent on how he tried to consult with O'Brien, how often he tried, why he was unable to succeed and what steps

he took to obtain O'Brien's cooperation. I am baffled by what is meant by telephonic conversations with O'Brien proving problematic.

Sixthly, Mr Mayekiso knew that an application to compel the furnishing of the particulars had been brought, even if he only knew this at a relatively late stage. As he knew of the request on 11 July 2008 and had done nothing to comply, he must have known that the application was bound to succeed. Yet, his affidavit is silent on whether he took any steps to find out from his correspondent what had become of the application.

Seventh, he relies on an erroneous assumption for his apparent belief that he was free to ignore the order. That assumption is that he did not have to furnish the particulars because O'Brien had furnished him with facts that were at odds with the plea. In his affidavit - and it was deposed to when he knew of the order - he stated with reference to his intention to amend the plea: "Providing a reply at this stage has been considered to be inappropriate." From this statement, made as I have said in full knowledge of the existence of the order and with the availability of his counsel's advice if he wanted it, the defendant's contumacy is established on its own.

Eight, even if the difficulties that I have outlined are wished

away for the moment, Mr Mayekiso has not tried to furnish the particulars on the morning of the trial or explained why this could not be done. The matter only commenced at about 14:30 yesterday so the entire morning was available to him to furnish the particulars and comply with the order to that extend. I was informed from the Bar that O'Brien was present in court. This failure is also indicative of a wilful refusal to even attempt to comply with the order and displays a total disdain for the authority of the Court and the orders that it issues.

Ninth, while the factors that I have considered thus far have tendered to be specific to how Mr Mayekiso has conducted his client's case, there is a broader interest at stake too. The Rules of Court exist so that judiciable disputes may be channelled through the courts in a fair, rational and predictable way. The public interest in the functioning of the courts of the land is undermined when parties simply ignore the Rules. In circumstances like this the administration of justice would be brought into disrepute if the defendant's conduct in flagrantly ignoring the Rules were not to be visited with the court's displeasure. On the other side of the coin, it is self-evidently unfair to the innocent plaintiff who has complied with the Rules if he was to be prejudiced by such conduct on the part of the defendant.

In the circumstances, I am of the view that when the factors that I have set out are taken together, contumacy on the part of the defendant has been established and that as a result an order ought to be granted striking out the defendant's defence. Even if I am wrong on my finding that contumacy exists the conduct of the defendant is of such an egregious nature that the striking out of the defendant's defence is warranted nonetheless.

I turn now to costs. I considered very seriously ordering Mr Mayekiso to pay costs *de bonis propriis* on an attorney and client scale. I decided against that, but I am of the view that costs on that scale must be awarded in favour of the plaintiff.

I make the following order:

(a) The defendant's defence is struck out.

(b) The defendant is ordered to pay the plaintiff's costs of this application on the scale of attorney and client.

C PLASKET

JUDGE OF THE HIGH COURT