
**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO:** 21394/2019

In the matter between:

**CANCOM (PTY) LTD & 108 OTHERS** Applicant

and

**TMT SERVICES AND SUPPLIES (PTY) LTD**

**& 15 OTHERS** Respondents

Date of hearing: 22 October 2020

Date of Judgment: 19 January 2021 (delivered by email to the parties' legal representatives).

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**JUDGMENT DELIVERED ELECTRONICALLY ON 19 JANUARY 2021**

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**HOCKEY, AJ**

**Introduction**

[1] This is an interlocutory application brought by the first applicant ("Cancom") against the first and seventh respondents in the main application. Cancom seeks orders compelling the first and seventh respondents to produce copies of contracts between them and, in the case of the first respondent, between it and other respondents in the main application. The contracts, according to Cancom, concern the provision of physical and administrative infrastructure for, as well as the administration and imposition of motor vehicle infringement notices (ie traffic fines) on, amongst others, the various applicants.

[2] The first respondent ("TMT") initially filed a notice to oppose this interlocutory application, but later filed a notice indicating that it would abide the decision of this court. The seventh respondent ("Bitou") therefore stands alone in opposing this application.

[3] In these proceedings Cancom represents the second to eighth applicants (its clients), who are commercial car rental and fleet companies, as well as the ninth and further applicants, who are proxies nominated by the second to eighth applicants as required by the National Road Traffic Act 93 of 1996.

[4] Cancom's business includes the administration of infringement notices ("traffic fines") issued to its clients by various authorities throughout the country. Such

authorities include the second to eleventh respondents, who are various local authorities within the Province of the Western Cape ("the municipalities").

[5] The dispute in the main application concerns the issuing of traffic fines incurred by third-party drivers of rental and/or fleet companies' vehicles that are registered against the names of the proxies. The issuing of fines results in so-called 'admin blocks' being placed on the proxies nominated by the rental or fleet companies, which results in neither the proxies nor the companies themselves being able to license or re-license vehicles. In accordance with a version put up by some of the municipalities, all of this can be averted by the proxies or the companies providing information concerning the person/s actually driving the vehicles when the offences were committed, in which case the fines would be diverted to such drivers – this is the so-called 'redirection process'.

[6] Cancom alleges that TMT and the municipalities are two sides of the same coin, in that TMT administers the entire redirection process, including the issuing of court processes. TMT and the municipalities, on the other hand, allege that TMT's functions are limited to administrative support and the provision of technology, and that TMT is not involved in the enforcement process at all. Cancom's case is that the contracts it seeks in this application will clarify these issues.

**The applicable legal principles**

[7] Cancom initially sought the contracts under Rule 35(12) of the Uniform Rules of Court, by issuing a notice to that effect in terms of this subrule. Under this subrule, a party is obliged to produce a document referred to in its pleadings upon receipt of a notice calling upon it to do so, unless the document is irrelevant, privileged or cannot be produced. In relation to the subrule, it was held in **Contango Trading SA and Others v Central Energy Fund SOC Ltd and Others** 2020 (3) SA 58 (SCA), per Cachalia JA, at para 9:

'. . . In general, any reference to a document - even if not by name - triggers the entitlement to claim its production. A detailed or descriptive reference to the document is not required, but in the absence of any direct or indirect reference thereto, a document will not have to be produced under this subrule merely because its existence may be deducted by inferential reasoning. Reference must have been made to it.' (Internal footnote omitted.)

[8] Since there is no direct or indirect reference to the documents in question, Cancom relies on Rule 35(13) for the production of the documents it seeks. In general, Rule 35 regulates discovery in action proceedings, but subrule 35(13) provides that '[t]he provisions of this rule [rule 35] relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct to applications.'

[9] It is unquestionably so that discovery under Rule 35 was designed, in general, for action proceedings. In application proceedings, it has been held, 'discovery is a very, very rare and unusual procedure' (see **Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another** 1979 (2) SA 457 (W) at 470D-E and also **4 Africa Exchange (Pty) Ltd v Financial Sector**

**Conduct Authority and Others** 2020 (6) 428 (GJ) at paras 59 and 60). It is so that Rule 35 makes provision for discovery in application proceedings, where reference was made to a document in the affidavits filed in terms of subrule 12, or where 'the court may direct' in terms of subrule 13. The words 'as the court may direct' connotes that the court has a discretion whether to allow discovery under subrule 13, which, in terms of case law, should be ordered only in exceptional circumstances.

[10] The reason why discovery is limited in application proceedings is clear, as has been held in **Saunders Valve Co Ltd v Insamcor (Pty) Ltd** 1985 (1) SA 146 (T), at 149C: in motion proceedings, the affidavits constitute both the pleadings and the evidence. In **African Bank Ltd v Buffalo City Municipality** 2006 (2) SA 130 (CkH) para 6 it was held:

'. . . In the application proceedings the pleadings and trial stage of a matter all rolled up in one. A party pleads, so to speak, and adduces evidence in one process. Invariably the parties to application proceedings will attach all the documents that they seek to rely on in support of the application for relief that they seek. It is not surprising therefore that the Courts have insisted that discovery in application proceedings should be made only in exceptional circumstances.' (Internal footnotes omitted.)

(See also **Moulded Components** at 470D.)

[11] Usually, in action proceedings, discovery takes place once pleadings have closed and the legal issues between the parties are clear and the battle lines are drawn. Discovery of documents and the evidence given in court clarifies the factual

issues. In motion proceedings, on the other hand, both the legal and factual issues are dealt with in the affidavits.

[12] Referring to the **Moulded Components** case, where it was held that discovery in application proceedings is 'very, very rare', Thring J has this to say in **The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others** 1999 (3) SA 500 (C), at 513G-I:

'I respectfully agree. Discovery has been said to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for it can be, and often is, a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. It seems to me that, generally speaking, its employment should be confined to cases where parties are properly before the Court and are litigating at full stretch, so to speak. It is not intended to be used as a sniping weapon in preliminary skirmishes, such as the main application in this matter is, unless they are exceptional circumstances present.'

(See also **Firstrand Bank t/a Wesbank v Manhatten Operations (Pty) Ltd and Others** 2013 (5) SA 238 at paras 18 and 19.)

[13] Our courts are more inclined to exercise its discretion in favour of ordering discovery in motion proceedings, in cases where discovery is asked for by a respondent who requires documents to answer the case it has to meet. This is understandable, as it is the applicant who chose motion proceedings and the respondents would be prejudiced, without the opportunity to resort to the usual

discovery process provided for in Rule 35, to answer a case against it. In this regard see **Saunders Valve** *supra* at 149F; generally **Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd** 2003 (6) SA 190 (SE); and **Buffalo City** *supra*

**Application of the legal principles to the present matter**

[14] In the present matter it is the first applicant, who represents the other applicants in the main matter (who have chosen to bring that matter by way of motion proceedings), who now seeks discovery of certain documents. It does so after answering affidavits had been filed.

[15] In the main application, the applicants allege that TMT conducts business as a service provider to the various municipalities, and controls, operates and coordinates virtually the entire traffic enforcement procedure. They go further to state that TMT operates the speed cameras, issues fines, receives and adjudicates representations, attends to the redirection of traffic fines and causes warrants to be issued. It questions whether the performance of these functions by a service provider, and not the municipalities themselves, is legal.

[16] In response to these allegations, Bitou alleges as follows (at para 37 of its answering affidavit):

'TMT is merely a service provider which assists the Bitou Municipality by providing traffic law enforcement equipment, back office assistance and related services, together with operational support and the maintenance of a traffic contravention system and renting of speed cameras. It is not responsible for exercise administrative descriptions and I deny that prosecutorial or enforcement functions are outsourced to TMT. These functions are

performed by municipal traffic officers who oversee the administrative functions performed by TMT.'

[17] TMT too, in its answering affidavit, denies that it, as a service provider, plays the role as alleged by the applicants. It further states that the deponent of the founding affidavit completely misunderstands TMT's role and the service it provides. It is alleged that had the deponent of the founding affidavit understood TMT's role, relief would not have been sought against TMT. According to TMT, its role as a service provider is as follows (as set out in para 100 of its answering affidavit):

'100.1 Firstly, TMT does not control or operate or coordinate virtually "the entire enforcement procedure". It only provides the services I have referred to above (the administrative function off capturing and processing off traffic fines).

100.2 Secondly, and crucially, it is simply inexplicable that Ms Olinsky [the deponent of the founding affidavit] still persists with her misguided notion that TMT adjudicates representations from traffic offenders.

100.3 With respect, Ms Olinsky should know better. It was clearly spelled out in my affidavit in the previous application that TMT has no standing to adjudicate representations. This is within the exclusive purview of the prosecuting authorities, as regulated by law. No private service provider may perform such a function. [It needs to be mentioned that there was a previous application, the "2018 application", where the applicants sought similar relief as in the present matter.]

100.4 Similarly, TMT does not cause warrants to be issued as alleged. I have explained that it is the magistrate who decides, on application from the prosecuting authorities, whether to issue the warrant, and if so deciding, stamps and signs the warrant. TMT makes no prosecutorial decisions in this regard whatsoever.'

[18] Facing the explanations in the answering affidavits, and the realisation that these explanations will most likely be accepted in terms of the rule espoused in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A), Cancom is now seeking the contracts between TMT and the various respondent municipalities. In its endeavour to make the rules of discovery applicable in the present matter, Cancom faces an arduous task requiring it to show the existence of exceptional circumstances. As held in the **Premier Freight** matter (paras 12 and 13):

'[12] The notion of exceptional circumstances appears to encompass two aspects: the first is that, by the very nature of applications and the discovery procedures, as a matter of practice, it is only rarely that a party seeks an order directing the Rules of discovery to apply; secondly, even then, a case in which a party seeks an order to make the Rules of discovering applicable must have special features that render the making of such a direction necessary …

[13] Apart from this, however, the notion of exceptional circumstances does not exist in a vacuum: it is to be gauged within the broader context of the foundational values upon which the rules themselves are based, namely ideas of fairness and equity - and the constitutional values of openness and transparency.'

[19] In the present matter, the applicants in the main application seek declaratory relief as well as mandatory interdicts against TMT and the respondent municipalities, relating to the administration of the National Road Traffic Regulations. With the filing of TMT's and Bitou's answering affidavits, Cancom argues that the division of tasks in relation hereto has become an issue. Cancom applies for the documents concerned on the basis that the division of tasks would be spelled out therein.

[20] Mr Hathorn, who appeared on behalf of Bitou, argues that the division of labour between TMT and Bitou in terms of their contractual relationship is not a material issue, or even an issue at all, in the dispute in the main proceedings. Having had regard to the Notice of Motion in the main matter, I agree with Mr Hathorn. This issue has also been dealt with in the affidavits, both in the present matter as well as the 2018 application, which I deal with below.

[21] Mr Hathorn pointed out that in the 2018 application, which Cancom launched for the same relief as it now seeks in the principle application (which application was not proceeded with after the claim for interim relief was dismissed for lack of urgency), Cancom, in response to a statement that it is not within TMT's power to place or lift 'admin blocks', pointed out that as the relief had been sought against all the relevant role players, it was largely irrelevant whether TMT had the power to place or lift 'admin blocks'.

[22] Furthermore, in its founding affidavit in the present main application, Cancom states, at para 95 thereof, that it is questionable whether the outsourcing of a

prosecutorial/enforcement function is legal, but that 'that question need not be determined in this application'.

[23] It seems, therefore, that the position the applicants adopted in the 2018 application, as well as in the founding papers in the present main application, is that TMT's role in relation to the placement or lifting of 'admin blocks' is irrelevant for purposes of the relief it seeks. Any order granted against the relevant parties will be binding on all of them and, as pointed out by Mr Hathorn, it is at most a peripheral concern for Cancom whether Bitou (or the other relevant respondent municipalities) performs the necessary action.

[24] What I find compelling for the conclusion I come to, is that Cancom was aware of what Bitou's and TMT's stances would be regarding their roles in the traffic enforcement process, these issues having been dealt with in affidavits in the 2018 application. Yet Cancom and the other applicants chose to take the path of application proceedings whilst they had the option of proceeding by way of action, in which case they would have had the discovery process at their full disposal.

[25] Furthermore, as we have been reminded by Lamont J in **STT Sales (Pty) Ltd v Fourie and Others** 2010 (6) SA 272 (GSJ):

'[16] The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established.'

[26] If I allow discovery at this stage of the proceedings in the main matter, which Cancom seeks in order to deal with allegations raised by TMT and Bitou in their answering affidavits, relating to the former's role in the traffic fines enforcement process, it is likely that further affidavits will have to be filed to deal with new issues, as in the case of the **STT Sales** matter, where it was held, at para 17:

'. . . The parties are likely to file further affidavits, embrace new issues, and will need to respond to each other. The formula by which evidence is produced in motion proceedings will surely mutate. This is undesirable.'

[27] I am of the view that despite TMT filing a notice to abide this court's decision, no order for discovery should be made against it, as such an order would subvert the conclusions I reach in this judgment.

[28] What remains is the issue of costs. There is no reason why costs should not follow the result. I have no doubt that the main matter is one of considerable complexity, wherein the costs of two counsel would be justified, such justification to be extended to the present matter. It has been held in several cases in this division that if the main matter justifies the costs of two counsel, the costs of two counsel must also be allowed in all interlocutory applications (see **Grancy Property Ltd and Another v Law Society of the Cape of Good Hope and Others** (3698/2014) [2014] ZAWCHC 164 (5 November 2014) para 58).

[29] In the result, the application for discovery is dismissed with costs, including the costs of two counsel.

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**S. HOCKEY**
**ACTING JUDGE OF THE HIGH COURT**

Appearances

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| For Applicant: | Adv. W Shapiro |
| Instructed by: | MacGregor Erasmus Attorneys |
| For Respondent: | Adv. P Hathorn SC |
| | Adv. C Carolissen |
| Instructed by: | Regan Brown Inc. |