REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **25283/2013**

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

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

CONSTANTIA INSURANCE HOLDINGS (PTY) LTD Plaintiff

and

TOWSEY, JOHN WINGFIELD First Defendant

MILLBANK, PAMELA JEAN Second Defendant

MOGASHOA, RAYMOND SELLO Third Defendant

BRUGMAN, DEBBIE-LEE Fourth Defendant

JUDGMENT

Van der Linde, J

Introduction

[1] The trial of this matter has been enrolled for 9 November 2016. The plaintiff's case against the four defendants is that they breached their common law fiduciary duties, and their duties in terms of s.76(2) of the Companies Act 71 of 2008, and should be declared delinquent directors as contemplated in s.162 of the Act.[1] The plaintiff has, under rule 21(2), requested further particulars from the defendants, but they have refused some of these; hence this application.

[2] The rule concerned provides that *"…only such further particulars as are strictly necessary to enable … (the requester) to prepare for trial …"* may be requested. The defendants say that the plaintiff's request is overbroad, and so it is necessary first to understand more about the pleadings, and how the parties have squared up their respective positions. Thereafter the appropriate contents of the phrase *"strictly necessary"* should be identified and, finally, the particulars sought may then be considered.

The pleadings

[3] The plaintiff's claim is as follows. It was a 20% shareholder in Wheels Underwriting Managers (Pty) Ltd (in liquidation), referred to simply as "Wheels". The four defendants were, with the plaintiff, also shareholders of Wheels, and also at all material times directors.

[4] Its business was that of a short-term insurance underwriting manager of short-term insurance products. Wheels was finally wound up on a creditor's friendly application on 6 September 2013, although one does not know when winding up commenced.

[5] On 1 January 2013 New Wheels Underwriting Agency (Pty) Ltd, referred to a "New Wheels", commenced conducting business that was the same as (or similar to) the business that Wheels had conducted; all of the business of New Wheels fell within the line of business of Wheels.

[1] Para 27 of the POC refers to s.78(2) but that is an obvious error. The only relief sought is a declaration and costs; see prayers A and B.

[6] The plaintiff asserts that the four defendants, all shareholders of New Wheels, in breach of their directors' fiduciary duties to Wheels, and in breach of s.76(2)(a) of the Act, misappropriated benefits in relation to transactions that fell within the line of business of Wheels, and that this produced the commercial existence of New Wheels.

[7] Some five months later, on 23 May 2013, the defendants were party to deciding that Wheels should cease all of its major trading. The defendants then used the infrastructure, premises, goodwill and staff of Wheels to conduct the business of New Wheels. This conduct too, says the plaintiff, involved a breach by the defendants of s.76(2)(a) of the Act and of their fiduciary duties owed to Wheels. In short, in the Judeo-Christian tradition, the case is one of breaching the eighth commandment.

[8] The defendants, for their part, accept that New Wheels, like Wheels, is also a short-term insurance underwriting manager, but say the following. First, they say they disclosed New Wheels to the plaintiff on 20 September 2012. Second, they say Wheels' business was strictly limited to acting in terms of a written binder agreement with the plaintiff's associate company, Constantia Insurance Company Limited, and New Wheels' purpose was to pursue opportunities not available to Wheels; it did not use any corporate opportunity available to Wheels.

[9] Third, as directors of Wheels the defendants did resolve on 21 May 2013 that Wheels would stop trading, because otherwise wheels would have been unable to pay its debts. Fourth, they say that New Wheels took over most of the Wheels staff else they would be retrenched; that Wheels retained a small staff contingent to deal with run-off claims; that Wheels sub-let its offices to New Wheels for June 2013; and that Wheels sold its computer hardware and office equipment to New Wheels.

[10] Finally, the defendants say that ss.162(5) and (6) of the Act, if these were not interpreted to afford a court a discretion to declare a person a delinquent director (as distinct from being

obliged to do so) if the circumstances prevail, are inconsistent with s.22 and s.25 of the Constitution, and are invalid.[2]

[11]For the rest, the plaintiff's assertions are denied.

What does the phrase *"strictly necessary"* mean?

[12]The defendants referred to the Supreme Court of Appeal judgment of Heher, JA in Ruslyn Mining and Plant Hire (Pty) Ltd v Alexkor Ltd[3] to underscore the general propositions that further particulars are not pleadings; that they do not set up a cause of action or defence; and that they do not limit or extend the scope of the case of the party supplying them.

[13]The cases through the years have also laid down the following principles that assist. First, a party is not entitled to request particulars about its own case. Put differently, a party may not request particulars without which that party will not be able to prove its own case. This is really self-evident, and derives probably from the notion, trite in the context of onus discussions, that the person who asserts must prove that assertion, implicitly without the help of the other person.[4]

[14]But it must not be viewed as restricted to matters in respect of which the requester has the onus in the strict sense. A party who intends to advance a particular conception at the hearing, whether or not in the discharge of an onus or even a rebuttal onus, is not entitled to compel the other party to provide it with particulars without which the requester's conception will not succeed; or which stand in the way of the requester's conception succeeding.

[2] They actually say that the offending sections are "in conflict with" those sections of the Constitution, and "fall to be set aside". There is no claim for a declaration of invalidity under s.172 of the Constitution.
[3] [2012]1 All SA 317 (SCA) at [18].
[4] Compare Pillay v Krishna, 1946 AD 946 at 951 – 952.

[15]Second, the mere fact that the particulars sought constitute evidence does not disqualify it from disclosure, provided only they are strictly necessary to enable the requester to prepare for trial.[5]

[16]Third, and as an important qualifier to the first proposition, the requester is entitled to know what positive case the other party will advance at the trial.[6] This is justified, so as to prevent the requester from being caught unawares at the trial. It must be appreciated, as alluded to above, that what positive case the particular respondent (plaintiff or defendant) will advance at the trial is not limited to issues in respect of which the respondent has the onus, such as elements of the claim in convention, or special defences, or claims in reconvention, or a rebuttal onus.

[17]The particular respondent, depending on the pleadings, may also intend advancing a positive case,[7] on the facts, in respect of which it bears no onus, to counter the case which the requester will be advancing, and in respect of which the requester has the onus. In such a case the requester is nonetheless entitled to know what the respondent will advance at the hearing.

[18]Fourth, it is of course possible that the particulars requested concern not only the positive case that the particular respondent will be advancing, but at the same time, by virtue of overlap or contrary assertion, also the case of the requester. In that event the respondent may argue that the particulars may be declined, because they will advance the requester's case. But that would be wrong. The respondent cannot decline to tell the requester what the former will be advancing, merely because that information will assist the requester in advancing its own case.

[19]Finally, where the respondent has not advanced a positive case, but has instead simply denied an assertion of the requester, the requester is not entitled to ask the respondent for

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[5] Annandale v Bates, 1956(3)SA 549 at 551.
[6] Thompson v Barclays Bank, DCO, 1965 (1) SA 365 (WLD) at 369 D.
[7] Of course, if the defendant intends advancing a positive case, then it is obliged to plead that case.

particulars of that denial.[8] This proposition does not apply where what presents as a denial is in truth not that. Ambiguity in this context often arises where the denial responds to more than one positive averment, and it is not clear whether the denial was intended to cover each averment independently, or where it could be read as covering only the ultimate conclusion of the composite averment.

[20]This is usually the case where the denial is of say an assertion that the defendant attended a meeting on a certain date at which three others were present. Unless the denial makes it clear, a blanket denial could be understood to be a denial only of the presence of other people (or some of them) at the meeting; or only of the date of the meeting; and so on.

[21]As a footnote to these propositions, it is worthwhile adding that in deciding whether or not particulars should be furnished, the endeavour does not view each formulated request ring-fenced in isolation with the paragraph in the opposing pleading at which it is directed. The respective parties' cases as a whole are considered; substance over form.

[22]When all is said and done, trials are about 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.

[23]The temptation might, in the light of these observations, be freely to allow all requests. But the constraining cap lies in the words of the rule, and for good reason. The rule-maker will have been aware that trial preparation involves increasingly greater refinement the nearer the trial. (S)he will have been aware that parties ought not to be tied down unfairly to particularity furnished for trial.

[24]And (s)he will have wished to prevent the request for trial particulars becoming an interrogation or a dry run at cross-examination. These two endeavours are not per se verboten; indeed, they are the very means by which the credibility of witnesses are made or

[8] Swart v De Beer, 1989(3) SA 622 (ECD) at 625 D ff.

destroyed. But they are designed to function in open court, where the judge too is party to observing them in action, because factual findings may very well involve credibility findings.[9]

The specific questions

[25]Applying these principles to the specific questions posed, chronologically, the result is the following. Question 6 is not being persisted in, since the documents (the MOI and Articles of New Wheels) were made available as part of the discovery process. Question 20 asks the defendants to tell the plaintiff what they disclosed to the plaintiff, with specific reference to ten identified aspects of the New Wheels business. A response is furnished at paragraphs 8.1 to 8.5, the last sub-paragraph being the usual residual denial.

[26]But the first four paragraphs provided the form of disclosure, the dates of disclosure, the extent of the disclosure, and the person on behalf of the plaintiff to whom the disclosure was made. In my view this furnishes sufficient particulars of the case to be advanced by the defendants; beyond that the questions cross the line to being interrogatories.

[27]Questions 22 to 26 go to the same topic. The defendants' response is the same. In my view, for the same reason advanced above, the particulars that have been furnished are sufficient to enable the plaintiff to prepare for trial.

[28]Question 32 requires a copy of the binder agreement that New Wheels has concluded with Zurich. This has been supplied, but redacted. No legitimate justification has been put for the protection of the redacted information, and I believe the plaintiff is entitled to the entire document in unredacted form.

[29]Questions 38 and 39 go to the business conducted by New Wheels. The particularity requested concern the case which the defendants advance in their plea, namely that New Wheels' purpose was to pursue opportunities not available to Wheels. The plaintiff is, in

[9] Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others, 2003(1) SA 11 SCA at [5], per Nienaber, JA.

principle, entitled to particularity of the business which New Wheels in fact conducted. Proper responses should be furnished to these two paragraphs.

[30] Question 48 asks what debts Wheels would not be able to pay. But the assertion was a general one, and should be so understood. Specific debts were not intended; rather, the solvency of Wheels generally was intended. Balance sheets and management accounts would be relevant here, not specific debts. The particulars were correctly refused.

[31] Questions 67 to 71 concern the assets of Wheels that were taken over by New Wheels. The defendants' responses do not address the plaintiff's questions. The defendants intend to advance a positive, exculpatory case for the take-over of the Wheels assets; the plaintiff is entitled to know what the form and contents of that case will be.

[32] Questions 74 to 76 go to the goodwill of Wheels that was subsumed in New Wheels. Otherwise than in the case of the tangibles that were taken over, the defendants do not advance any positive, exculpatory case concerning goodwill. They do not say that they took over the goodwill. They deny that they took over the goodwill. In my view further particularity is not required to prepare for trial.

[33] Questions 77 to 80 go to the take-over of clients and employees of Wheels by New Wheels. The questions are cast in a form intended to illustrate that New Wheels had few if any clients and employees that were not derived from Wheels; all to show in turn the complete gutting by New Wheels of Wheels. The particulars assist both sides' cases. I believe therefore, on balance, that the particulars should be furnished, but only those in Questions 77 and 78.

[34] Questions 81, 82 and 83 go to the constitutional point. The defendants are here advancing a positive case of renowned complexity and the plaintiff is entitled to be informed of its extent. The particulars are required to be furnished.

[35] Question 94 goes to what property is at issue in the context of the constitutional point. The response has been given as being the defendants' use, enjoyment or exploitation of the right

of ownership of companies. In my view that goes far enough to enable the plaintiff to prepare for the trial, and no further particularity is strictly necessary.

Conclusion and costs

[36]The particulars that ought to be furnished have been identified above and are included in the order below. The plaintiff has been substantially successful. Both sides instructed two counsel, and I believe this was a reasonable precaution.

[37]In the result I make the following order:

(a) The defendants are directed to furnish the particulars sought in paragraphs 32, 38, 39, 67 to 71, 77, 78, 81, 82 and 83 of the plaintiff's request for further particulars dated 11 March 2016, within ten days of service of this order on them.

(b) If the particulars are not so furnished, the plaintiff is entitled to apply, on these papers duly supplemented, for an order striking out the defendants' defence and granting judgment for the plaintiff.

(c) The defendants are to pay the costs of this application jointly and severally, such costs to include the costs occasioned by the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

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