

22/9/2009

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE **CASE NO. 31769/2008**

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

In the matter between:

22/9/09

DATE

[Signature]

SIGNATURE

DE BEER, HENDRICK JOHANNES

Applicant

and

S A TAXI SECURITISATION (PTY) LTD

Respondent

(Registration Number: 2005/021851/07)

in re:

S A TAXI SECURITISATION (PTY) LTD

Plaintiff

(Registration Number: 2005/021851/07)

and

DE BEER, HENDRICK JOHANNES

Defendant

JUDGMENT

MOTHLE A J

1. This is an interlocutory application in which the Applicant seeks relief to have set aside, *alternatively* uplift the Respondent's notice of bar, delivered on 17 September 2008, ordering and directing that the Respondent comply with the Applicant/Defendant's notice in terms of Rule 35(14) delivered

on 15 September 2008 within 5 days from date of service of the order and the cost order.

2. On the 3rd July 2008 the Respondent as Plaintiff issued summons against the Applicant as Defendant in this Court for alleged damages in trade reputation and a loss of profits based on defamation allegedly committed by the Applicant. The Applicant, in the main case, delivered a notice of intention to defend and on the eve of the last day to file a plea, issued a notice in terms of Rule 35(14) wherein he demanded inspection of certain documents in order to plead to the summons.
3. The Respondent declined to make available those documents and issued a notice of bar. The Applicant then brought this application before this Court, seeking the relief referred to in paragraph 1 above.
4. The Applicant, in terms of Rule 35(14), requires the Respondent to make available for inspection, within 5 days, the following documents:

"1. All finance transactions entered into between a customer and either the Plaintiff or S A Taxi Finance

(Pty) Ltd "S A Taxi Finance" between 1 June 2006 and 8 June 2008.

2. *In respect of each finance transaction:*
 - 2.1 *The invoice from the motor dealer to either the Plaintiff or S A Taxi Finance;*
 - 2.2 *All invoices from S A Taxi Finance to the Plaintiff;*
 - 2.3 *The insurance proposal form presented to the customer; and*
 - 2.4 *Any quotation reflecting the breakdown of the rates applicable to the calculation of the insurance premium in respect of the motor vehicle.*
3. *In respect of each vehicle repossessed by the Plaintiff between 1 June 2006 and 8 June 2008;*
 - 3.1 *The credit application of the customer to the Plaintiff or S A Taxi Finance;*
 - 3.2 *The documentation setting forth the personal details of the customer accompanying or supporting the credit application;*

3.3 *The relevant Court order permitting the repossession of the motor vehicle or agreement by the customer to surrender possession of the motor vehicle, where applicable;*

3.4 *Where applicable, any valuation given in terms of Section 127 (2)(b) of the National Credit Act; and*

3.5 *The invoice or other documentation reflecting the sale of the motor vehicle in satisfaction, whether partial or otherwise, of the customer's liability to the Plaintiff or S A Taxi Finance.*

4. *For purposes of this request:*

4.1 **"Customer"** *means any purchaser, lessee or debtor undertaking an obligation to the Plaintiff or S A Taxi Finance; and*

4.2 **"Finance Transaction"** *means any instalment sale agreement, lease agreement or rental agreement between a customer and either the Plaintiff or S A Taxi Finance for the financing of the acquisition of a motor vehicle"*

5. The reasons advanced by the Applicant in requesting these documents is that:

“7.1 The Plaintiff has made allegations relevant as to the manner in which it conducts business and alleged defamatory allegations in connection therewith;

7.2 The documents requested have a direct bearing on these issues and are relevant to any debate and defence that could be pleaded in relation thereto – by way of example, if I were to plead truth and public benefit in relation to the National Credit Act, (“the Act”) as raised in paragraph 10.1 of the particular of claim, particulars would be required to be given with reference to the Plaintiff’s agreements and whether or not same comply with the Act and if not, in what respects; and

7.3 Without inspection of these documents, I will not be able to properly plead to the particulars.”

6. On the other hand the Respondent contends that the statements complained of, which are attributed to the Applicant, relate to the Respondent’s conduct subsequent to it repossessing a leased vehicle from one of its customers and the Applicant’s allegation that the Respondent had breached the provisions of the National

Credit Act by not having these vehicles “*parked at a secure place for 30 days before it is auctioned*”.

7. Therefore, in light of that which is alleged of and concerning the Applicant in the Respondent's particulars of claim, none of the documents reflected in the Applicant's notice in terms of Rule 35(14) are necessary for the purpose of the Applicant pleading.
8. The Respondent further contends that the documents required are not relevant to the issues raised in the particulars of claim and none of them relate to the allegations made of and concerning the Applicant therein. It is further contended, that the said documents have no bearing upon the Respondent's conduct after dispossession by it of any vehicle and its alleged breaches of the provisions of the National Credit Act. Further, if one of the defences to be raised by the Applicant is truth and public interest, the Applicant must have had a belief in that truth and public interest at the time that the statements as recorded in the Respondent's particulars of claim, were made by him. The documents sought would therefore in any event constitute evidence in support of what the Applicant might plead. The Applicant is not required to plead evidence.

9. Rule 35(14) of the Rules of Court states thus:

“(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within 5 days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.”

10. The Applicant advances as his reasons for requesting the documents, that it does so in order to plead to the particulars of claim of the Respondent. In response thereof, as pointed out above, the Respondent claims that the allegation of defamation purportedly made by the Applicant refers to repossessed vehicles. In this regard, the Respondent quotes the article containing the allegations by the Applicant as published in the City Press of 7 June 2008 and 8 June 2008, under paragraph 8 of the particulars of claim. Due to their importance in determining the dispute between the Applicant the Respondent, I take liberty to quote the words as they stand in paragraph 8 of the particulars of claim and they read thus:

“Hennie De Beer, general manager for taxi financing at ABSA said that according to the Act a repossessed vehicle should be parked at a secure place for 30 days before it is auctioned, giving the customer time to settle their debt.

De Beer said “This is how the law works, every commercial bank does this. But SATF has found a loop-hole in the system and are cheating these taxi operators.”

“What they are doing may not be illegal, as they put it, but its criminal”.

11. The Respondent goes on to state in paragraph 10 of the particulars of claim, the following:

“11. The information conveyed by the defendant to Mapiloko as reflected in the aforementioned passages is wrongful and defamatory of the plaintiff in that these statements were intended by the defendant and understood by readers of the City Press Newspaper to mean that the plaintiff conducted and conducts its business referred to in paragraph 3.2 above in a manner which is:

11.1 In conflict with the provisions and requirements of the National Credit Act, No. 34 of 2005, and/or

11.2 *Illegal and/or*

11.3 *Unscrupulous and/or*

11.4 *Criminal and/or*

11.5 *Misleading to purchasers and lessees of taxis, and/or*

11.6 *Unfair and which deliberately and unlawfully has
caused and causes hardship to receivers; and*

*that taxi operators intending to purchase or lease taxis ought
to avoid, or be circumspect about, concluding transactions
with the plaintiff.”*

12. Paragraph 3.2 referred to in the above quote describes the plaintiff as “at all material times, and to the knowledge of the defendant, conducted and continues to conduct the business of providing financial assistance to purchasers and lessees of taxis, in the form of credit agreements concluded with regard to such taxis between the plaintiff and licensed taxi operators in accordance with the provisions of the NCA”.

13. It seems to me that by comparing what the Respondent alleges were words attributed to the Applicant in the article published in the City Press to paragraph 10 read with paragraph 3.2 of the particulars of claim by the Respondent, there is an apparent difference. While it can be said as the Respondent submits that the Applicant was referring to conduct of the Respondent in regard to repossessed vehicles, the Respondent in paragraph 10 read with paragraph 3.2 of the particulars of claim, it seems, in interpreting the *ipssissima verba*, took a wide or expansive interpretation and included an allegation covering the conduct of his whole business and not only the part on repossession.
14. The party delivering a notice in terms of Rule 35(14) must discharge the onus of proving that the required documents are necessary for the purposes of pleading. In this regard I refer to **Cullinan Holdings Ltd v Mamelodi Stadsraad 1992 (1) SA 645 (T)**.
15. The Cape High Court expanded on the principle established in the **Cullinan Holdings Ltd v Mamelodi Stadsraad supra**, by stating in **Queyside Fish Suppliers CC v Irvin and Johnson Ltd 2000 (2) SA 529 (C)** that in seeking an order from Court

authorising a party to invoke the provisions of Rule 35(14), the onus lies on that party to prove the following:

- 15.1 The documents are required for the purposes of pleading;
 - 15.2 The documents are clearly defined; and
 - 15.3 The documents are relevant to a reasonably anticipated issue in the action.
16. The Respondent couched its cause of action in wider terms to create an impression that the words attributed to the Respondent, which appeared in the article quoted in the City Press, are an attack on the business of the Respondent as a whole and not on that part which has to do with dispossessed cars. Clause 10 of the particulars of claim define the attack as being on the business of the Respondent, while in his answering affidavit in this application, it is contended for the Respondent that the request for documents by the Applicant in terms of Rule 35(14), went beyond the issue of dispossessed vehicles. It appears that in formulating its cause of action, the Respondent expanded from the narrow ambit of the words used, namely in regard to dispossessed vehicles, to interpret the words as

referring to the whole business. It seems to me that the Respondent must make a choice. If it wants to limit the extent of the documents as requested by the Applicant, it would be advisable to amend clause 10 of the particulars of claim to be consistent with the contentions now raised in the answering affidavit. In this event, the Applicant will likewise have to review the scope and extent of the documents required for purposes of pleading. This brings me to the next question, which is whether the documents sought by the Applicants are necessary for the purposes of pleading.

17. The Respondent contends, on the basis of the decision in **Quayside Fish Suppliers CC v Irvin and Johnson** supra that what the Applicant is requesting the Court to do, is to permit it to search amongst the documents of the Respondent to find out whether, through that inspection, is able to locate documents or information which justify the statements made by him in the City Press article and which provides him with the defence to the action. I agree with the Respondent that as at the time the Applicant published the article, if ever he did, there must have been a basis of information from which he formulated that view. Anything beyond that, is requesting evidence to back-up those

views which, in my opinion, falls outside the purview of Rule 35(14).

18. The Applicant on the other hand contends that he is constrained by the provisions of Rule 18(4), Rule 18(5) and Rule 22(2), all of which require a Defendant in an action to state its plea with sufficient peculiarity so as to have its defence clear and ambiguous. To simply deny the allegations on the one hand would be to come up with a bare denial as a defence, on the other hand in elaborating in its defence, the Defendant will have to state this with sufficient particularity so as to convey a clear and unambiguous defence. The details required in Rule 18 for the purposes of particulars of claim and plea, is in my view, to obviate the need for the other party to request for further particulars as this rule has since been abolished.

19. The question however remains, does the Applicant need to have access to the documents in order to formulate such a defence? In this instance, I am of the view that the request for access to documents is relevant and necessary. The documents requested however should be relevant and necessary to

formulate a response to the cause of action as outlined in the particulars of claim.

20. The documents requested may be voluminous, but if clearly specified, and relevant to formulating a defence, the request thereof would fall within the ambit of the rule. The rule does not put a limit on the documents which may be requested. However, the voluminous documents requested by the Applicant, are clearly triggered by the expansive interpretation of the words uttered by the applicant, in the course of the Respondent formulating a cause of action. The Applicant, in my view had every right to request such documents, in response to the allegations as they appear in paragraph 10 of the particulars of claim.
21. I am of the view that the application should succeed. However, I am also of the opinion that the Respondent be given an opportunity to amend its particulars of claim if it so wishes.
22. Should the Respondent not amend its particulars of claim, in particular paragraph 10 and confine it to dispossess vehicles, it will have to make available for inspection, the documents required by the Applicant. However, should Respondent choose

to amend the paragraph 10 of the particulars of claim, the Applicant will only be entitled to the documents sought in terms of paragraph 3 of its notice in terms of Rule 35(14).

In the premises I make the following order:

- (i) The notice of bar issued by the Respondent is set aside;
- (ii) The Respondent is granted 10 days within which to file a notice of intention to amend, and amend its particulars of claim, failing which, it is ordered grant within 7 days thereafter, access to inspection of documents as requested by the Applicant in the notice in terms of Rule 35 (14);
- (iii) Respondent is ordered to pay the costs of this application.

MOTHLE A J
8 September 2009