REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 58093/13

21/9/2015

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

21/09/15
DATE

SIGNATURE

In the matter between:

ZWELENKOSI LENNOX MATSHAYA	Applicant
and	
TOLPLAN OPERATIONS (PTY) LTD	First Respondent
TOLPLAN INVESTMENTS (PTY) LTD	Second Respondent
WILLEM JOHANNES PIENAAR N.O	Third Respondent
WILLEM JOHANNES PIENAAR	Fourth Respondent
TOLPLAN (PTY) LTD	Fifth Respondent

AND

TPO CONSULTING (PTY) LTD previously known as **TOLPLAN OPERATIONS (PTY) LTD**	First Applicant
TOLPLAN INVESTMENTS (PTY) LTD	Second Applicant

WILLEM JOHANNES PIENAAR N.O	Third Applicant
WILLEM JOHANNES PIENAAR	Fourth Applicant
TOLPLAN (PTY) LTD	Fifth Applicant
and	
ZWELENKOSI LENNOX MATSHAYA	Respondent

In re:

CASE NO: 58093/13

In the matter between:

ZWELENKOSI LENNOX MATSHAYA	Plaintiff
and	
TOLPLAN OPERATIONS (PTY) LTD	First Defendant
TOLPLAN INVESTMENTS (PTY) LTD	Second Defendant
WILLEM JOHANNES PIENAAR N.O	Third Defendant
WILLEM JOHANNES PIENAAR	Fourth Defendant
TOLPLAN (PTY) LTD	Fifth Defendant

J U D G M E N T

TEFFO, J:

[1] Two applications came before me in the opposed motion. The plaintiff is the applicant in an application to compel the defendants (respondents) in terms of Rule 35(7) of the Uniform Rules of Court to make discovery and make documents available for inspection. On the other hand the defendants

are applicants in an application for separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. It will be convenient to refer to the parties as the plaintiff and the defendant respectively. The pleadings in the action have closed and the parties had set the matter down for trial.

BACKGROUND

[2] In his particulars of claim the plaintiff claims the following relief:

2.1 A declaration that the purported disposal of the first defendant's 50% shareholding in the fifth defendant on 1 March 2009 is null and void.

2.2 An order directing the fifth defendant to rectify its share register.

2.3 In the alternative to the above a declaration that the fourth defendant is liable to pay to the first defendant the amount of R60 999 500,00 (sixty million nine hundred and ninety nine thousand five hundred rand), together with interest thereon at the rate of 15,5% per annum, *a tempore morae*.

[3] It was alleged that on 1 March 2009 the first defendant purported to dispose of its shareholding as follows:

3.1 25,5% to the second defendant; and

3.2 24,5% to the third defendant;

3.3 against payment of R500,00 (five hundred rand)

("*the purported disposal*").

[4] The first, second and third defendants were represented by the fourth defendant in effecting the purported disposal.

[5] The purported disposal was not approved by special resolution as required by the provisions of sections 112 and 115 of Act 71 of 2008 ("*the Act*") and section 228 of Act 61 of 1973 ("*the previous Act*"). It was further averred that the purported disposal was not fairly valued as required by the provisions of section 112 of the Act and section 228 of the previous Act.

[6] As regards the alternative claim it was alleged that in the event and to the extent that it may be found that the purported disposal is not null and void, the plaintiff claims that at all relevant times (and as at 1 March 2009) the fourth defendant was the sole director of the first defendant; and represented the second and third defendants being shareholders in the first defendant. At all relevant times the fourth defendant owed the first defendant the duty to promote its best interest and to avoid a conflict between the interests of others (including the second and third defendants) and the interests of the first

defendant and to disclose his financial interest (and that of the second and third defendants) in the purported disposal to the first defendant and the shareholders of the first defendant, prior to the purported disposal; and not to cause the first defendant to suffer damages, owed the first defendant the duties prescribed and imposed in terms of sections 75(3), 5 and 6 of the Act and in terms of section 76(3) of the Act.

[7] In causing the first defendant to effect the purported disposal, the fourth defendant breached the duties referred to *supra* in that he was aware at all material times of the requirement to obtain prior approval for any proposed disposal of the shareholding by way of special resolution and ensure that any proposed disposal of the shareholding would be for fair value. The fourth defendant caused the first defendant to effect the purported disposal in contravention of the provisions of sections 112 and 115 of the Act and section 228 of the previous Act specifically without the necessary approval by way of special resolution and other than for a fair value. He failed and neglected to disclose (prior to the purported disposal) to the first defendant and its shareholders his and the second and third defendants' financial interest in the purported disposal. The fourth defendant did not promote the best interest of the first defendant. He promoted his own interest and the interests of the second and third defendants above the interests of the first defendant and the purported disposal caused the first defendant to suffer damages.

[8] The plaintiff further pleaded that in the alternative and in the event of it being found that the purported disposal is not void for reasons set out above,

then in that event, the plaintiff pleads that: in accordance with the provisions of section 77(2) of the Act, the fourth defendant is liable for damages suffered by the first defendant. The first defendant suffered damages in the sum of R60 999 500,00 (sixty million nine hundred and ninety nine thousand five hundred rand) being the difference between R500,00 (five hundred rand) and the minimum fair value of the shareholding as at the date of the purported disposal.

[9] The defendants raised two special pleas one relating to prescription and the other to *locus standi.*

[10] It has been pleaded that the agreement relating to the disposal of the shareholding referred to in the plaintiff's claim was entered into on 1 March 2009 and was discussed between all relevant stakeholders including the plaintiff on 14 May 2009. At the latest on 14 May 2009 the plaintiff knew at all relevant times of the sale agreement and the effect thereof. He could and should therefore have reasonably become aware of the issues raised in his first claim between 1 March 2009 and 14 May 2009. It was further pleaded that the relief sought in both claims is regarded as a debt in terms of the Prescription Act, 68 of 1969 (the "*Prescription Act*"). The plaintiff has issued and served summons more than three years after the agreement had been entered into on 1 March 2009 and after the agreement and its effect had been discussed with all relevant stakeholders including him on 14 May 2009. In terms of section 12(1) read with section 11(b) of the Prescription Act, the claims of the plaintiff have become prescribed.

[11] As regards the second special plea the defendants pleaded that other than alleging that he is a shareholder of the first defendant, the plaintiff has not made any allegation relating to any right that he has to seek relief in respect of the relevant transaction entered into between the parties relating to the purported disposal of the first defendant's shares. He has no *locus standi* to seek the relief sought in the claims and in so far as plaintiff attempts to seek relief in favour of the first defendant by having it declared that the fourth defendant is liable to pay the first defendant the amount of R60 999 500,00. They further pleaded that the plaintiff has not instituted the action and does not profess to act in terms of section 165 of the Act for and on behalf of the first defendant. He has not made out any case for *locus standi* on that basis either.

[12] The disposal of the first defendant's shares in the fifth defendant is not disputed. What is disputed is that the purported disposal was not approved by special resolution as required by the provisions of sections 112 and 115 of the Act and section 228 of the previous Act and the fact that the purported disposal was not fairly valued. The defendants pleaded that a special resolution to approve the agreement and ratify the actions of the board of directors when they decided to enter into the agreement on behalf of the first defendant, was taken in terms of sections 112 and 115 of the Act on 19 August 2013. They therefore deny that the purported disposal of the shareholding was null and void.

[13] The allegations that the fourth defendant breached his fiduciary duties towards the first defendant are also denied.

[14] The defendants also deny that the plaintiff has *locus standi* to seek the relief sought.

[15] They also deny that the fourth defendant is liable for the damages suffered by the first defendant.

[16] The issues raised in the matter are whether or not the plaintiff has *locus standi* to seek the relief sought and whether or not the plaintiff was or could have been reasonably aware of the sale agreement concluded between the parties on 1 March 2009 and discussions that took place between the relevant stakeholders on 14 May 2009 to resolve the issue of prescription and the question as to whether the rights thereof as claimed can be regarded as a debt for the Prescription Act to apply.

[17] The plaintiff's claim was instituted on 21 October 2013 against the defendants. They filed their plea referred to *supra* which consisted of two special pleas and a plea on the merits on 12 December 2013 and an amendment thereof on 4 February 2014. Plaintiff's attorneys served the defendants' attorneys with a notice in terms of Rule 35(1), 3, 6, 8 and 10 on 4 February 2014. On 19 February 2014 the defendants' attorneys sent a letter to the plaintiff's attorneys requesting the plaintiff to consent to a separation of issues on the basis that the special plea of prescription can be adjudicated

separately from the special plea of *locus standi* on the one hand and the merits and quantum on the other hand.

[18] The request was refused as per the plaintiff's attorneys' letter dated 20 February 2014. In the same letter the plaintiff's attorneys reminded the defendants' attorneys to file a discovery affidavit which was due on 6 March 2014 and also stated that should they fail to discover by 6 March 2014, they would bring an application to compel discovery.

[19] No discovery affidavit was delivered on 6 March 2014 and on 11 March 2014 the plaintiff's attorneys served the defendants' attorneys with a notice to compel discovery. The application is opposed.

[20] On 20 March 2014 the plaintiff's attorneys were served with a notice in terms of Rule 33(4) by the defendants' attorneys.

APPLICATION IN TERMS OF RULE 35(7)

[21] The plaintiff does not seek an order compelling further and better discovery as contemplated in Rule 35(3). A reference to subrule 3 was therefore erroneous.

[22] The plaintiff delivered a notice of set down for trial on 21 February 2014 for 25 May 2015.

[23] The defendants contend that the discovery application should be postponed, alternatively be held in abeyance until the finalisation of the separation application. They contend that it will not serve any purpose for them to make discovery at this stage, as it is impossible to determine what should be discovered or what documents are relevant, until finalisation of the separation application. It will only be possible to determine which issues are relevant in respect of which discovery should be made, once the separation application has been finalised and not before that time. Furthermore they contend that in determining the issues raised in the pleadings, regard should be had to the pleaded issues, which cannot be determined at present or, at least, until such time as the separation application has been adjudicated upon. In the unlikely event that it is found that the issues should not be separated as pleaded in the two special pleas, the discovery application should only be re-enrolled for hearing.

APPLICATION IN TERMS OF RULE 33(4)

[24] According to the defendants before one has to deal with any of the causes of action, the issues raised in the special pleas would probably resolve the whole matter, without the necessity of costs pertaining to valuations of companies and assets, substantive discovery of documentation and a long trial. They contend that the second plea of *locus standi* can be disposed of with a simple legal argument that does not require evidence and consideration of documents.

[25] It was submitted that it is in the best interest of all the parties and the court that the two special pleas should be separated and be dealt with first before the rest of the hearing should continue.

[26] In opposition to the separation application, the plaintiff denies the allegations and contends that the application is not convenient, if granted will multiply costs, will result in a piece-meal determination of the issues and a delay in bringing the disputes between the parties to a final determination.

[27] The plaintiff denies the allegations made by the defendants in their special plea of prescription to the effect that he knew of the purported disposal of the first defendant's 50% shares in the fifth defendant to the second and third defendants against payment of R500,00 as long ago as at 14 May 2009 ostensibly on the basis of an alleged discussion that had taken place between all the shareholders of the first defendant at the time.

[28] He contends that the issue of prescription is not determinable only by means of a consideration of the admitted or common cause facts and the application of relevant legal principles but that evidence would be required which will include that of the first defendant and a consideration of all the documents. Further that the special plea of prescription can only resolve the damages claim as the Prescription Act does not apply to the remaining claims.

[29] As regards the special plea contesting to his *locus standi*, the plaintiff contends that it requires evidence and a consideration of relevant documents, and further that it will only resolve the damages claim. It was also contended that the issues in respect of the declaratory relief sought, the merits as well as the quantum of damages claim are intricately interwoven and interlinked, evidence will be required to be led in respect of both special pleas and issues pertaining to special pleas, in particular, the special plea pertaining to prescription, are inextricably linked to the merits of the matter.

[30] The plaintiff also contends that the relief sought by the defendant in this application will result in two trials on the same facts and issues, a consideration of the same documents, the inevitable duplication of costs and the real risk of conflicting factual findings by different courts, relating to identical factual issues and will in all the circumstances undermine the convenient and expeditious disposal of litigation. Further that a separate determination of any of the issues in the action cannot be conveniently decided and will not have the desired effect contemplated by Rule 33(4). It is also contended that the quantum issue relates to the fair value of the first defendant's shareholder in the fifth defendant which is and remains inextricably linked to the declaratory relief sought. He denies that the separation will curtail the issues and maintains that there is no basis upon which the applicants can allege that his claims do not have merit.

[31] Rule 33(4) of the Uniform Rules of Court reads –

> *"If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."*

[32] The function of the court in an application in terms of Rule 33(4) such as the present, was stated in *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364 D-E as follows:

> *"... the function of the court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantage. If overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages would outweigh the disadvantages; it would normally grant the application."* (*S v Malinde and Others* 1990 (1) SA 57 (A) at p 68C-D.)

[33] In *Tudoric-Ghemo v Tudoric Ghemo* 1997 (2) SA 246 (WLD) it was held that the word '*convenient*' in the context of Rule 33(4) was used to convey not only the notion of facility or ease or expedience but also the notion of appropriateness: The procedure as contemplated in Rule 33(4) would be '*convenient*' if, in all the circumstances, it appeared to be fitting and fair to the parties concerned.

[34] In *African Bank v Soodhoo* 2008 (6) SA 46 (D) at 51 B-D the following was said:

> *"The general principle in law would appear to be that notwithstanding the wide powers conferred on a court under Rule 33(4) of the Uniform Rules of Court it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all the issues are canvassed so that the court, at the conclusion of the case, may dispose of the entire matter (Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D) at 362G-H, and Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA). In some instances, however, the interests of the parties and the ends of justice are better served by disposing of a particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away. (Minister of Agriculture (supra) at 362H)."*

[35] In *Denel* referred to *supra* at 484 para [3], the following principle was articulated –

> *"... Rule 33(4) of the Uniform Rules – which entitled a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though at first sight, they might appear to be discrete. And even when the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately."* (*Consolidated News Agencies (Pty) Limited (in liquidation) v Mobile Telephone Networks (Pty) Limited and Another* 2010 (3) SA 382 (SCA) at para [90].)

[36] In *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SEC) at p 411 Horn AJ stated the following:

"... the court must be given sufficient information to enable it to decide this procedural step meaningfully. The relief is not a mere formality. The convenience must be demonstrated ...

... A court will not grant a separation where it is apparent that the evidence required to prove any of the issues on the merits will also be required to be led when it comes to proving quantum. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about ..."

[37] The court in *SA Transport and Allied Workers Union v Garvis and Others* 2011 (6) SA 382 (SCA) at para [45], warned that –

"... piecemeal litigation is not to be encouraged."

[38] In the case of *Molotlegi and Another v Mokwalase* [2010] 4 All SA 258 (SCA) at para [20] the following was stated –

"... Where there is the likelihood that such a separation might cause the other party some prejudice, the court may, in the exercise of the discretion, refuse to order separation."

[39] Rule 35 of the Uniform Rules of Court reads:

"35(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matters in question in such action (whether such matter is one arising between the party requiring discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

35(2) The party required to make discovery shall within 20 days or within the time stated in any order of a judge make discovery of such

documents on affidavit as near as may be in accordance with Form II of the First Schedule, specifying separately –

(a) such documents and tape recordings in his possession or that of his agent other than the documents and tape recordings mentioned in paragraph (b);

(b) such documents and tape recordings in respect of which he has a valid objection to produce;

(c) such documents and tape recordings which he and his agent had but no longer has in his possession at the date of the affidavit.

A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

35(7) If any party fails to give discovery as aforesaid or having been served with a notice under sub-rule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that sub-rule, the party desiring discovery or inspection may apply to court, which may order compliance with this rule and failing such compliance, may dismiss the claim or strike out the defence."

[40] Rule 37(1) reads –

"A party who receives notice of the trial date of an action shall, if he has not yet made discovery in terms of Rule 35, within 15 days deliver a sworn statement which complies with Rule 35(2)."

[41] In *Associated Musical Distributors (Pty) Ltd v Big Time Cycle House* 1982 (1) SA 616 at 619 B-D Erasmus J said –

"A notice in terms of Rule 35(1) of the Uniform Rules of Court to make discovery of all documents relating to any matter in question in the

action must, if possible, be promptly answered in terms of the Rules of Court and, if not so answered, convincing reasons must be given for the delay, should the other side by circumstances be forced to approach the court in order to put the matter right and escape the prejudice he may suffer in not being able to prepare properly for trial."

[42] A party may only be called upon to discover documents *"relating to any matter in question"* in the action. The phrase is given a wide interpretation and introduces the requirement of relevance. The principle was articulated as follows in *Compagnie Financieré et Commerciale du Pacifique v Peruvian Guano Co* 1882 11 QBD 55 –

> *"It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."*

[43] The matter in question is determined from the pleadings. This means that the document must be relevant or lead to a train of enquiry in relation to a matter raised by the pleadings *(Caravan Cinemas (Pty) v London Film Productions* 1951(3) SA 671 W, *Lenz Township Co (Pty) Ltd v Munnik* 1959(4) SA 567 (T)).

[44] Courts have consistently held that a party is only obliged to discover documents which damage one's own case or advance the case of the

opponent. Documents which tend only to advance the case of the party making discovery, need not be discovered, provided that such party does not intend using them at the trial. (*Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999(2) SA 279 (T).

[45] In *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971(4) SA (W), Margo J held that the court has a discretion whether or not to enforce discovery and may, in exceptional circumstances on considerations of logic and justice, order deferment of discovery of documents relative to a contingent issue.

[46] Spilg J in *Makate v Vodacom (Pty) Ltd* 2014(1)SA 191 (GSJ) held that the *Continental Ore* decision referred to *supra* does not contemplate a deferment of discovery in every case where a contingent and severable issue may arise for later determination. He further held that the question of deferment of discovery is manifestly case specific. The question of deferment of discovery in exceptional circumstances has regard to broader considerations "*such as those that may impact on the possibility of settlement and what best serves the interests of justice in a particular case*" as "*it would be wrong for court procedures to encourage settlement if one of the parties is entitled to withhold material information for an informed decision to be made on the advisibility of settling or not and on what basis*".

[47] Spilg J also held that it is open to the court to scrutinise a document in order to determine relevance and impose suitable safeguards against unnecessary public disclosure where issues of confidentiality arise.

EVALUATION AND APPLICATION OF THE LAW

[48] I find it prudent to first deal with the separation application. While the defendants contend that the plaintiff is not a shareholder of the first defendant and that no averments have been made in his particulars of claim in terms of section 165 of the Act entitling him to institute an action on behalf of the first defendant, the plaintiff contends that there is a proposed amendment to that effect. Amendments can be made at any time before judgment. Although the issue of *locus standi* has been raised in the special plea, the allegation by the plaintiff that he is a shareholder of the first defendant, was not disputed in the plea. After counsel for the defendants was made aware of this fact, he indicated that they will also have to amend the plea to dispute that the plaintiff is a shareholder of the first defendant. Other issues were raised which related to the fact that if indeed the plaintiff was a shareholder, he got his shareholding by virtue of him having been an employee of the first defendant and his shareholding was terminated in terms of the shareholders agreement. On the other hand while the plaintiff denies the allegations, he contends that should the defendants be correct with regard to the issue of *locus standi*, separation of this issue will only resolve the damages claim and the other disputed issues will remain. On this aspect alone both parties are talking

about the proposed amendments to their pleadings. Counsel for the defendants even urged me as I was hearing argument that I should consider postponing the application to allow them to amend their plea before I decide the issue. Borrowing from the words of Horn AJ in *Internatio (Pty) Ltd* referred to *supra* it is my view that I do not have sufficient information to enable me to decide this procedural step meaningfully. The application to separate the issue of *locus standi* from the other issues in the action is therefore bound to fail under the circumstances.

[49] I now turn to the issue of prescription. From the submissions by both parties it is clear that this issue will be resolved not only through legal arguments but will also involve a factual enquiry as to whether the plaintiff was aware of the allegations made by the defendants with regard to an agreement allegedly concluded on 1 March 2009 relating to the disposal of the shareholding and the discussions that took place allegedly on 14 May 2009 between all stakeholders including the plaintiff. Evidence will have to be heard which will include a consideration of documents. Separation of this issue from other issues will result in hearing the matter piecemeal. While the plaintiff contends that the special plea of prescription can only resolve the damages claim as the Prescription Act does not apply to the remaining claims, the defendants contend that the relief sought in both claims is regarded as a debt in terms of the Prescription Act. It appears from the papers that the contention of the plaintiff has merit. I am of the view having looked at the pleadings in this matter that the evidence that could be required to prove the special plea of prescription could also have to be led when the

merits have to be proved. Further that same documents could be used. It would therefore not be appropriate and fair to the parties to hear the matter piecemeal and call same witnesses more than once to give evidence in different hearings which could be heard by different courts (judges). I agree that this could be more time consuming and raising unnecessary costs. It is therefore desirable in the interest of expedition and finality of litigation to have one hearing only at which all the issues are ventilated, particularly where there is more than one issue that might be readily dispositive of the matter. It is therefore not in the interest of both parties and the court that the two special pleas be heard separately. I am not persuaded that the defendants have demonstrated convenience as required by Rule 33(4) for the special pleas to be heard separately from the merits and quantum in this matter and the application falls to be dismissed.

[50] I now turn to deal with the application in terms of Rule 35(7). The defendants have not complied with the notices by the plaintiff in terms of Rule 35(1), (6), (8) and (10). They do not dispute that they were served with the aforesaid notices. After they were served with the aforesaid notices by the plaintiff, they also delivered a notice for separation of issues in terms of Rule 33(4). The reasons for their refusal to respond to the Rule 35(1), (6), (8) and (10) notices were that the application in terms of Rule 35(7) was premature as they were always of the view that until such time as the separation application has been decided, it will not serve any purpose for them to discover as it was impossible to determine what should be discovered or what documents are relevant.

[51] A submission was made on behalf of the defendants that even if they are unsuccessful in the Rule 33(4) application, the issues that stand to be decided at the anticipated trial of this matter, would only be crystallised after the adjudication of the Rule 33(4) application. Further to the above it was argued that it would serve no purpose to discover or attempt to enforce discovery if the issues to be decided at the trial have not yet been crystallised. I do not agree with this submission for the following reasons:

A party may only be called upon to discover documents "*relating to any matter in question*" in the action. The phrase is given a wide interpretation and introduces the requirement of '*relevance*'. The matter in question is determined from the pleadings. Courts have consistently held that a party is only obliged to discover documents which damage one's case or advance the case of the opponent. Documents which tend only to advance the case of the party making discovery, need not be discovered, provided that party does not intend using them at the trial (*Swissborough Diamond Mines* case referred to *supra*). The defendants have not even indicated to the plaintiff what documents are in their possession. The matter in question and relevance thereof is determined from the pleadings. They know their case better and from the pleadings they are aware of what case are they going to meet from their opponent. It cannot be impossible or difficult for them to make discovery of documents which are in their possession which are relevant to the pleadings. The plaintiff has discovered. They should also discover. Rule 37(1) obliges them to discover once they receive a notice of set down if they

had not made discovery within fifteen (15) days after receipt of a notice of set down.

[52] The purpose of discovery is to provide the parties to litigation with the relevant documentary or recorded material before the hearing to ensure a fair disposal of the proceedings before or at the hearing (*Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974 (2) SA 324 (NC) at 328).

[53] The issues raised by the defendants with regard to what relevant documentation they could discover, can only be entertained after they shall have responded to the notices in terms of Rule 35(1), (6), (8) and (10) and a notice in terms of Rule 35(3) for better and further discovery has been delivered.

[54] In terms of Rule 35(1), (2) and Rule 37(1) and taking into account that the defendant's application in terms of Rule 33(4) has not been successful, the defendants have to respond and make discovery as requested. I cannot find any reason as to why discovery should be deferred under the circumstances.

[55] Issues were raised that certain information is confidential and that the plaintiff has an ulterior motive for requesting discovery of all the documentation. As of now the court has not been told what documents are in the possession of the defendants and until such time that it is told what documents the defendants have in their possession, the issue of what

documents are confidential or not cannot be entertained. The plaintiff does not know what documents are in the possession of the defendants. I cannot find any reason why the plaintiff could have an ulterior motive if he does not know what documents are in the possession of the defendants. I therefore under the circumstances do not find any reasons why the defendants should not comply with the notices as required of them.

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

53.1 The application in terms of Rule 33(4) is dismissed with costs.

53.2 The defendants are compelled to respond to the plaintiff's notice in terms of Rule 35(1), (6), (8) and (10) within 10 (ten) days from the date of this order.

53.3 The defendants shall pay the costs of this application jointly and severally, the one paying the other to be absolved.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

COUNSEL FOR THE PLAINTIFF JASPER DANIELS

INSTRUCTED BY SALTZMAN ATTORNEYS

COUNSEL FOR THE DEFENDANTS	ROELOF DU PLESSIS SC
INSTRUCTED BY	ADAMS & ADAMS
DATE HEARD	4 DECEMBER 2014
DATE OF JUDGMENT	21 SEPTEMBER 2015