Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **1876/2019**
Heard: **04/02/2022**
Delivered: **23/02/2022**

In the matter between:

PAULUS RETIEF DERKS Applicant

and

WILLEM VAN WYK DU PLESSIS First Respondent
BRUCE EDWARD HUNT Second Respondent
DEWLIN BK Third Respondent
LYNDON DE MEILLON N.O. Fourth Respondent
ELRI DE MEILLON N.O. Fifth Respondent

In re:

WILLEM VAN WYK DU PLESSIS First Plaintiff
BRUCE EDWARD HUNT Second Plaintiff
DEWLIN BK Third Plaintiff
LYNDON DE MEILLON N.O. Fourth Plaintiff
ELRI DE MEILLON N.O. Fifth Plaintiff

and

PAULUS RETIEF DERKS Defendant

JUDGMENT

Mamosebo J

[1] This is an interlocutory application by Mr Paulus Retief Derks, the defendant in the main action for damages, seeking relief in terms of Rule 35(7) of the Uniform Rules of Court for an order compelling the respondents to reply to his notice in terms of Rule 35(3). The application is opposed. For convenience, the parties will be referred to as they are cited in the main action.

[2] The defendant was the plaintiffs' attorney instructed to institute action on their behalf against SANRAL for damages occasioned by a veld fire on 10 December 2015. The defendant allegedly negligently allowed the claim to prescribe. The plaintiffs have now brought an action for damages against the defendant arising from his alleged professional negligence in the context of an attorney and client relationship. As stated in their particulars of claim all the plaintiffs farm in livestock and the damages claimed emanate from damages to their natural grazing and fencing.

[3] The defendant first served an electronic copy of the notice in terms of Rule 35(3) on the plaintiffs' erstwhile attorney on 05 May 2021, followed by the service of a hard copy on 12 May 2021 calling on the plaintiffs to produce the following documentation for inspection by the defendant within ten (10) court days:

3.1 The trust deed in respect of the Lyndon de Meillon Family Trust, registration number IT113/2002;

3.2 The letters of authority certifying that the fourth and fifth plaintiffs are authorised to act as trustees of the Lyndon de Meillon Family Trust:

3.3 The resolution authorising the fourth and fifth plaintiffs to institute a claim against the defendant on behalf of the Lyndon de Meillon Family Trust;

3.4 The resolution taken by the members of the third plaintiff authorising the Close Corporation to institute a claim against the defendant;

3.5 The title deed pertaining to the transfer of portion 7 of the farm Leeuwpoort No. 18, Division Kimberley, from its former owner to the third plaintiff;

3.6 The annual financial statements of the plaintiffs for the period 1 January 2014 to 31 December 2014, as well as the annual financial statements for the period 1 January 2015 to 31 December 2015;

3.7 The annual financial statements of the plaintiffs for the period 1 January 2016 to 31 December 2016, as well as the annual financial statements for the period 1 January 2017 to 31 December 2017;

3.8 All documentation indicating the alleged damages suffered by the plaintiffs, including any and/or all photographs in their possession evidencing the alleged damages sustained for their natural grazing and fencing;

3.9 All documentation indicating the number of livestock owned by the respective plaintiffs, both as at 10 December 2015 as well as for the financial year thereafter;

3.10 All financial documentation of all entities undertaking farming operations on all the plaintiffs' farms for the period 1 January 2014 to 31 December 2015, as well as for the period 1 January 2016 to 31 December 2017.

[4] Despite numerous telephone calls, exchange of correspondence and undertakings by the erstwhile attorney that the required documents will be availed they were not honoured nor was the requested discovery made. The defendant enrolled the application to compel on the unopposed motion roll on 13 August 2021. The plaintiffs delivered a reply to the defendant's Rule 35(3) notice on 12 August

2021. The application was then removed from the roll on 13 August 2021. This reply, however, partially complied with what was sought. The plaintiffs refused to furnish information set out at paras 3.6 to 3.10 at para 3 (above) which they describe as quantum documents. In their answering affidavit deposed to by their instructing attorney, Ms Riana Gagiano, the plaintiffs contend that the outstanding requested information is irrelevant and that relevance is determined from the pleadings.

[5] For the plaintiffs' claim to succeed against the defendant they must, *inter alia*, prove that they suffered damages as a result of the alleged professional negligence of the defendant. This means that they must demonstrate that they had an actionable claim against SANRAL that would have been successfully prosecuted by the defendant. Each plaintiff's claim against the defendant comprise two heads of damages, namely, (i) the loss of natural grazing and (ii) the replacement costs of the damaged and/or destroyed fencing. The plaintiffs' expert, Mr Pieter JJPC Swanepoel of Agri Assessors, has filed a report dated 25 October 2017, which was attached to their amended particulars of claim, which they rely on to prove quantum.

[6] Mr Van Niekerk SC, for the plaintiffs, argued that they are not claiming for loss of income because had that been the case, the plaintiffs' financial statements would have been relevant. Counsel invoked this Court's judgment in *Vermeulen and Others v Minister of Defence*[1] where the plaintiffs' claims were divided into three main groups, (i) the infrastructure claims relating to fencing, pipes, dams and the like; (ii) production claims structured according to a formula used by the defendant's expert, Prof Dube; and (iii) claims for general damages. The loss of production claims were based on the

[1] [2018] JOL 39561 (NCK)

three-year withdrawal period of the livestock from the areas affected or devastated by the fire. The formula used in *Vermeulen* was reckoned by the affected area in hectares divided by the hectares per large livestock unit, which would give the number of cows having been kept on the affected areas. The number of cows are multiplied by the percentage calving rate to give the projected number of calves. The number of calves for a particular year would then be multiplied by the average selling weight of a particular plaintiff multiplied by the average price obtained per kilogram for a particular year.

[7] The formula applied by the plaintiffs' expert in calculating the plaintiffs' claims as gleaned from the report is the following:

7.1 the loss of natural grazing:

(a) it is calculated in terms of large livestock units;
(b) determined the surface area that the respective plaintiffs were unable to exploit as a result of the veld fire;
(c) determined the carrying capacity of the veld in the plaintiffs' farms;
(d) calculated that a single large livestock unit will consume 11kg of grazing per day;
(e) determined the nutritional value per kilogram of the natural grazing;
(f) determined the minimum number of large livestock units that the unusable surface area would have been able to accommodate;
(g) estimated that the veld would take about 3 years, or 1080 days, to recover; and

(h) the plaintiffs' expert then took the minimum number of large livestock units, multiplied by the consumption of grazing per day, multiplied by the nutritional value of grazing, multiplied by the period needed for recovery of the veld, to arrive at the monetary value of the loss of natural grazing suffered by the plaintiffs.

7.2 the replacement costs of damaged and/or destroyed fencing. The plaintiffs' expert ascertained the types of fencing that were damaged by the veld fire, the extent to which the fencing was damaged, the length of the fencing that needed to be replaced, the actual cost of fencing and the cost of labour to replace the fencing.

[8] Referring me to the defendant's heads of argument to make a point that the premise from which the defendant is attempting to motivate the provision of the financial statements because they relate to income before and after the event, Mr Van Niekerk highlighted the averments argued on behalf of the defendant and I quote only some of them:

8.1 *They are required to prove the financial impact which the alleged damages to their natural grazing had on their operations and income. This, inter alia, includes an analysis and comparison of their respective financial statements in respect of the farming operations conducted by them before as well as after the damage causing event in question. It also requires proof of the number of livestock owned by the plaintiffs at the respective periods.*[2]

[2] Para 25 of heads

8.2 The financial statements and documents in support of livestock numbers are thus directly relevant to the damages suffered by the plaintiffs and ought to be discovered.[3]

8.3 But it is not evident from his report what impact the alleged damages to the plaintiffs' natural grazing had on the plaintiffs' actual income and farming operations...."[4]

[9] Counsel for the defendant, Mr JG Van der Merwe, on the other hand, maintained that the financial statements and proof of the number of livestock owned by the plaintiffs during the affected period is an alternative method to be used by the defendant's expert, an agricultural economist, to analyse and compare the documents in order to quantify the damages suffered. Mr Van der Merwe emphasised the phrase in Rule 35(3) *"which may be relevant to any matter in question...."*

[10] Mr Van der Merwe relied on *Rellams (Pty) Ltd v James Brown & Hamer Ltd*[5] where Van Heerden J made the following pronouncements:

"The question remains whether the documents called to be produced are relevant to any matter in the action. The test for determining this, as laid down in Compagnie Financiére et Commerciale du Pacifique v Pervian Guano Co (1882) 11 QBD 55, has often been accepted and applied in our Courts. After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", Brett LJ stated the principle as follows:

"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

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[3] Para 26 of heads
[4] Para 32 of heads
[5] 1983 (1) SA 556 (NPD) at 563H - 564B

his own case or to damage the case of his adversary. I have to 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 the adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.'"

[11] Relevance is determined by the pleadings. The plaintiffs are not claiming for loss of income and it therefore remains inexplicable how the financial statements will assist the defendant to calculate the damage to the fence or the loss of natural grazing. Mr Van der Merwe submitted that natural grazing is a consumable type of asset which can occur, disappear and re-occur, affecting its value. The financial statements and the number of plaintiffs' livestock will assist in determining loss in value or increase in the necessary expenses. This argument does not find merit for present purposes.

[12] I align with the remarks by Greenberg J in *Schlesinger v Donaldson and Another*[6] that:

"In order to decide the question of relevancy, the issues raised by the pleadings must be considered...."

[13] It is trite that our Courts are reluctant to go behind a discovery affidavit, which is *prima facie* regarded as conclusive.[7] In my view, the defendant has not made out a case on the relevance of the documents sought to be discovered.

[14] The defendant's expert can apply his method of quantification and should not be forced nor the perception should not be created of being forced to accept the methodology followed by the plaintiffs'

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[6] 1929 WLD 54 at 57

[7] Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (TPD)

expert. At the risk of repetition, the claim relates to damages relating to the plaintiffs' natural grazing and fencing and has nothing to do with their income. There is no substance to this application because the defendant has not informed the court on the method his expert proposes to apply and how the financial statements bear relevance to the grazing and the fence. There is nothing in the plaintiffs' expert report addressing loss of production and loss of income because those are unrelated to the plaintiffs' claim for purposes of trial. It therefore follows that the defendant's application must fail in as far as the production for inspection of financial statements set out in paras 3.6, 3.7 and 3.10 above.

[15] Having applied my mind carefully to whether there may be some merit in the request for documentation indicating the number of livestock owned by the respective plaintiffs as at 10 December 2015, and regard being had to the plaintiffs' Amended Particulars of Claim and the plaintiffs' expert report (Annexure "E") attached to the amended particulars of claim, against the backdrop of calculating the patrimony before and after the occurrence of the veld fire, I am not persuaded by the application to compel discovery in this regard. In my view, it is the grazing and the fencing that has diminished in value as a result of the veld fire that forms the subject of the action proceedings.

It therefore follows that this part of the application also stands to be dismissed.

[16] **On the question of costs**. In *Kruger Bros & Wasserman v Ruskin*[8] Innes CJ held:

"The rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be

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[8] 1918 AD 63

judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission."

There is therefore no reason why costs should not follow the result.

[17] In the result, the following order is made:

The application is dismissed with costs.

[redacted]

M.C.MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant/defendant:	Adv. J.G van der Merwe
Instructed by:	Elliot Maris Inc
For the respondents/plaintiffs	Adv. J.G van Niekerk SC
Instructed by:	PGMO Attorneys