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

NORTH WEST DIVISION – MAHIKENG

CASE NO: KP 309/2018

BONGANI ZISIWE **APPLICANT**

and

THEUNIS JOHANNES NAUDE N.O **FIRST RESPONDENT**

KHULEKILE JACOB MOGOROSI **SECOND RESPONDENT**

KEBOGILE SUZAN MOLETA **THIRD RESPONDENT**

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is ***23 JUNE 25*** *at* ***10h00.***

ORDER

The application is dismissed with costs on a party and party scale B.

JUDGMENT

REDDY J

Introduction

[1] This is an interlocutory application within the legal framework of rule 21 of the Uniform Rules of Court ('the rules'). The applicant (the plaintiff in the main action), seeks further particulars from the first, second and third respondents (the first, second and sixth defendants in the main action). For purposes of brevity, I propose to refer to the parties as cited in this application. This application is opposed by these respondents only.

[2] The applicant's request for further particulars for preparation for trial is framed as follows:

"1. The entire file contents of the first Defendant as executor, relating to the drawing of the last will and testament of the late: Kgope Rex Mogorosi ("the deceased") dated the 3rd of September 2015.

2. The first Defendant is required to furnish full particulars in respect of and emanating from his letter dated 11 January 2017:

2.1. The date, time and duration the deceased consulted the first defendant for the first time in his office regarding the last will and testament dated 3rd September 2015;

2.2. The location/address of the first defendant's office on the date required in paragraph 2.1 above;

2.3. The date, time, duration and exact hospital that the first defendant consulted the deceased for the second time regarding the last will and testament dated 3rd September 2015;

2.4. The date, time and duration the deceased consulted the first defendant at Zwartkopjes Farm regarding the last will and testament dated 3rd September 2015;

2.5. The date, time and duration of the deceased consulted the first defendant regarding the last will and testament dated the 3rd of September 2015 at the offices of Rinnie Benade Attorneys;

2.6. The full particulars, names and surname of the employees of Rinnie Benade Attorneys who signed as witnesses to the last will and testament dated 3rd September 2015.

2.7. The full particulars of the person that drew the last will and testament dated the 3rd September 2015 as it would appear on the first paragraph of the letter dated 11 January 2015 on page 3 thereof that the first defendant "did not play any part in drawing the will."

The Parties

[3] The applicant is Mr Bongani Zisiwe (born Mogorosi) an attorney practising as such under the name and style of Zisiwe Attorneys. The first respondent is Mr Theunis Johannes Naude NO, an attorney practising as such at a firm, Naude Steyn Inc. Attorneys. The second

respondent is Mr Khulekile Jacob Mogorosi a major male. The third respondent is Kebogile Moleta a major female.

Factual background

[4] The main action pertains to the legality of a will of the testator, Mr Kgope Rex Mogorosi who ultimately passed away on 28 September 2016. For present purposes the full kaleidoscope of the *facta probanda* are peremptory. The relief sought best abbreviates the action. The applicant seeks an order: (i) declaring the will of the testator dated 3 September 2015 ('the 2015 will') to be null and void, (ii) declaring the will of the testator dated 8 February 2012 ('the 2012 will') to be the last will and testament.

[5] The respondents aver that the 2015 will was valid and in force at the time of the testator's demise. The applicant disputes the validity of the 2015 will on the grounds that: (i) the testator was hospitalized and in a critical physical and mental state, (ii) the 2015 will was most likely executed when the he was not mentally and physically capable of executing a valid will, (iii) the testator was most likely under the undue influence of the second respondent at the time the 2015 will was purportedly executed, (iv) the first respondent allegedly had a questionable relationship with the testator in that the 2015 will was purportedly executed when the first respondent was the attorney of the second respondent and appears to have agreed to a fee structure regarding the executor fees under the 2015 will, with the second respondent; and (v) the 2015 will appears to have been executed pursuant to meetings taking place over several days and in which the first respondent was present and playing a leading role.

[6] On *litis contestatio* the applicant engaged the services of a professional handwriting expert whose report made two damaging findings. First, there is a strong probability that the testator was suffering from fatigue and an underlying neurological disorder when he signed the 2015 will. Second, there is a strong probability that the fatigue and the neurological disorders were the result of extrinsic influences and possible medication.

[7] The request for further particulars is allied to the collateral facts that encompass the circumstances under which the 2015 will was executed. Additionally, these facts are implicitly within the knowledge of the respondents and impact directly on the factual issues that would have to be ventilated at trial.

Applicants' submissions

[8] *Adv Tisani* for the applicant submitted that the information sought is necessary for preparation for trial in that: (i) the defendants defence in the main action is squarely founded on the objective validity of the 2015 will, (ii) the circumstances under which the will was concluded have not been pleaded nor have any particulars been set out in the plea, with the defence being a bare denial, and (iii) the particulars sought by the applicant are necessary to establish what the defendants intend to prove in their defence; otherwise stated, what their contentions are with respect to the circumstances under which the 2015 will was executed.

[9] *Adv Tisani* contended that the further particulars sought would additionally invariably be the bulwark for any neurological, pharmacological or pharmaceutical report that would need to be secured relating to the physical and mental state of the testator at the time the 2015 was executed. Aligned thereto is what the likely effect that the medicinal drugs may have had on the testator's physical and mental state when the first respondent consulted with the testator no less than four times before the first respondent presented the final "product" to the testator for signature. Ultimately the expert reports intended to be obtained by the applicant depends on the further particulars requested from the respondents, and relate mainly to dates, times, duration, locations and persons present.

[10] Moreover, *Adv Tisani* contended as follows with respect to the expert evidence. That, it is trite that direct evidence of the facts is of great value when determining an issue and should generally carry greater weight than the opinion of the expert seeking to reconstruct events from his experience and scientific training. Reliance for this contention is placed on *Motor Vehicle Assurance Fund v Kenny* 1984 (4) ECD at 436 H. Furthermore, he submitted that the prime function of an expert is to guide the Court on correct decisions on questions found within their specialized field. The expertise of the witness does not displace the facts and the conclusions of the Court which must determine the issue, as adumbrated in *S v Gouws* 1967 (4) SA 527 (EC) at 528D.

[11] The issue of the expert *Adv Tisani* continued is neatly connected to the facts before this Court in that the factual occurrences of what

took place when the 2015 will was purportedly executed would be foundational to the consideration of what value can be attached to any expert opinion about the physical and mental state of the testator when the 2015 will was executed. To this end, *Adv Tisani* opined that the plaintiff would undoubtedly be prejudiced if these particulars were only to emerge during cross-examination of the defendants' witnesses. This logically would occur when the plaintiff had already closed its case. This would be inimical to the import of rule 21.

Submissions of respondents

Misjoinder

[12] *Adv May* for the second and third respondents submitted that the request for further particulars seeks information apposite to legal consultations, medical records, and other documents that the second and third respondents have no access to and are unable to provide. It bears mentioning *Adv May* submitted that the second and third respondents are not the custodians of the documents or information being sought.

[13] *Adv May* asserted, that a primary principle in our law finds application; namely the absence of a no direct and substantial interest in the information required. The second and third respondents contends *Adv May*, were consequently not obliged to provide further particulars, and there has therefore been a misjoinder. Consequently, no relief against them is permissible. *Adv May* therefore postulated that the application is fatally defective as

far as it relates to the second and third respondents and should be dismissed on the principle of misjoinder.

[14] In so far as the first respondent is concerned *Adv May* posited that the request for further particulars is incorrectly framed, as it refers to the first respondent as "*executor*". This role of the first respondent he submitted is irrelevant as there is no averment of maladministration of the estate or any relief against the first respondent in his capacity as executor. Instead, the allegations connect to the first respondent's role as attorney in drafting the 2015 will, and the assumed undue influence exerted over the deceased.

[15] Importantly, *Adv May* opined, ~~that~~ the further particulars sought pertain to privileged legal communications. Consequently, these communications are protected from disclosure. *Adv May* additionally bemoaned whether the communications sought has a direct bearing on whether the requested information is strictly necessary for trial preparation as demonstrated by rule 21(2). Reliance for this contention is placed on *Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 (A), *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W). Adv May advanced further that the applicant did not state that it was incapable of presenting its case effectively as pronounced in *Absa Bank Ltd v Janse van Rensburg* 2002 (3) SA 701 (C).

[16] *Adv May* with reference to *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W), Van Zyl v Government of the Republic of South 2008(3) SA 294, (SCA), and *Fisher v Body Corporate Misty Bay* 2023 (4) SA 69

(GJ) put forward that the incorrect reference to "*executor*" renders the request for further particulars defective as it mischaracterises the nature of the claim, seeks information not relevant to the dispute and exceeds what is strictly necessary for trial preparation.

[17] *Adv May* as a result contended that if the applicant seeks information regarding the drafting of the will, the request should be correctly framed and should not rely on an erroneous description of the first respondent's role. He submitted that the appropriate procedural mechanism that should have been employed was rule 35, the import of which speaks to the discovery process and not rule 21(2). *Adv May* averred that the request for further particulars is based on a fundamental mischaracterisation of the cause of action. On the strength of these contentions, he argued that the application ought to be dismissed with costs on an attorney and client scale.

Legal framework

[18] A request for trial particulars is ensconced in rule 21(2), which provides that "*After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within ten days after receipt thereof.*"

(1) ....

(2)The court shall at the conclusion of the trial mero motu consider whether the further particulars were strictly necessary and shall disallow all costs of and flowing from any unnecessary request or reply, or both, and may order either

party to pay the costs thereby wasted, on an attorney and client basis or otherwise."

[19] Rule 21(4) provides, *inter alia*, that "*If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery..., whereupon the court may make such order as to it seems meet.*" The court has a discretion to grant any such order as may seem appropriate in the circumstances. See: *Van der Walt v Van der Walt* 2000 (4) SA 147 (E, at 150E-F; *Bester NO v Target Brand Orchards (Pty) Ltd* (unreported, WCC case no 22593/2019, dated 21 December 2020) at paragraph 46.

[20] The purpose of allowing a party to request further particulars for trial is to circumvent a trial by ambush and promoting and enhancing transparency in litigation. Germane to the objects and purposes of the rule 21 is to warrant fairness. See: *Samuels v William Dunn & Company South Africa (Pty) Ltd* 1949 (1) SA 1149 (T) at 1158. These principles have been adopted consistently in subsequent cases. See: *Thompson v Barclays Bank DCO* 1969 (2) SA 160 (W), at 165; *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 402; and *EH Hassim Hardware (Pty) Ltd v Segabokeng Building Construction CC* (unreported, GP case no 69167/2017, dated 27 September 2021) at paragraph 16.

Misjoinder of the second and third respondents

[21] Cilliers *et al Herbstein & van Winsen The Civil Practice of the High Courts of South Africa*, Juta, 5th Ed, p215-217 provides legal insight into joinder of necessity as follows:

> "A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined.
>
> ...
>
> Joinder can be dispensed with only if the interested party has unequivocally waived the right to be joined and undertaken to be bound by any decision that the court may make.
>
> ...
>
> A 'direct and substantial interest' has been held to be 'an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation'. It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only'..."

[22] Rule 10 provides for the joinder of parties and causes of action. In *Judicial Services Commission and another v Cape Bar Council and another (Centre for Constitutional Rights as amicus curiae)* 2012 (11) BCLR 1239 (SCA) the SCA held that:

> "[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para [21]. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a

joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one." (my emphasis)

[23] In our law, a party may only be joined in proceedings if they have a direct and substantial interest in the subject matter of the litigation. See: *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). Critically, in instances where a party cannot provide the relief or has no material involvement in the dispute their joinder is considered improper. See: *Minister of Environment and Tourism v George* 2007 (3) SA 62 (SCA).

[24] To make short of this point, the applicant has failed to establish a nexus between the relief sought relevant to the second and third respondents. It follows that the joinder of the second and third respondents is improper. On the application of *Minister of Environment and Tourism*, no relief can be obtained against the second and third respondents as they have no direct or substantial interest in the information sought. It follows that the relief sought against the second and third respondents must fail.

The relief sought against the first respondent

[25] In addressing the relief sought against the first respondent, I do not intend to embark on an exposition of the citation of the first respondent as the "*executor*" the effect of same, and whether this results in a mischaracterisation of the cause of action.

[26] In my view the proposed relief against the first respondent is on a basic legal premise, whether the request for further particulars is strictly necessary for trial preparation. Further particulars serve to enable a party to prepare properly for trial; they do not constitute a mechanism for obtaining evidence which should be sought through discovery or trial procedures. *See: Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR), *Government of the Republic of South Africa v Midkon (Pty) Ltd* 1984(3) SA 522 (T).

[27] In my view the applicant's request for further particulars is an exercise to repair deficiencies in his own case, predicated on conjecture and speculation. The application loses sight of where the onus in the main action lies, in having to prove the *facta probanda* asserted in the particulars of claim. The applicant has not demonstrated that in the absence of the further particulars as requested that he would be unable to present his case at trial effectively and efficiently.

[28] Given the aforesaid finding it would be superfluous to determine the issue of the legal privilege of the first respondent regarding confidential communications between the first respondent and the testator, including legal advice and attorney client correspondence which as a rule remains confidential and immune from disclosure.

Conclusion

[29] In the circumstances, the applicant has not made out a case for the relief sought against the respondents who have opposed the application.

Costs

[30] There is no basis to deviate from the usual rule that costs follow the result.

Order

[31] In the result:

The application is dismissed with costs on a party and party scale B.

[redacted]

A REDDY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION MAHIKENG

APPEARANCES

For the Applicant	Advocate SM Tisani
Instructed By	Zisiwe Attorneys Office No. 5 Shasons Centre 43 Shippard Street Mahikeng
For the First to Third Respondents:	Advocate JAH May
Instructed By	C/O CJP Oelofse Attorneys 09 Aerodrome Crescent Mahikeng
Date of hearing:	26 March 2025
Date of judgment:	20 June 2025