
# SUMMARY

**CASE NO. (P) I 997/2006**

**RÜDIGER POLZIN** **Plaintiff/Applicant**

and

**PETER WEDER t/a WEDER AND ASSOCIATES** **Defendant/Respondent**

*SILUNGWE, AJ*

*14/01/2009*

**DISCOVERY** - Discovery affidavit – Application to compel – Rule 35(7) of Rules of Court – Court order requiring respondent to furnish comprehensive affidavit – "Comprehensive" construed to be synonymous with term "all" in context of Rule 35(1) – Failure to file discovery affidavit does not mean failure to file comprehensive discovery affidavit (disputed) – It means non-discovery.

Discovery affidavit – If discovery incomplete or insufficient – Party requiring discovery may apply to Court for an order to compel further and/or better discovery in terms of Rule 35(3).

Discovery affidavit – Courts are reluctant to go behind discovery affidavit which is *prima facie* taken to be conclusive unless probability shown to exist that deponent is either mistaken or false in his assertion – Bases on which Court ought to go behind oath: *South African Sugar Association v Namibia Sugar Distributors* 1999 NR 241 at 244J-245A.

Discovery affidavit – Test for discoverability or liability is still that of relevance.

Discovery affidavit – Importance of – Discovery ranks with cross-examination as mighty engines for exposure of truth – Discovery properly employed can be, and often is, a devastating tool – Discovery should not be abused.

Discovery affidavit – Drawing up of – Duty of legal practitioners – Duty to ensure their clients fully appreciate significance of – Duty to impress upon clients the prerequisite of conducting investigations and searches to ensure that every client has made a full (complete) and honest discovery – No legal practitioner should allow client to make discovery affidavit unless satisfied that client understands what is required of him or her and appreciates that dire consequences may follow at trial in the event of an inaccurate discovery affidavit.


**CASE NO. (P) I 997/2006**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**RÜDIGER POLZIN** **Plaintiff/Applicant**

and

**PETER WEDER** **Defendant/Respondent**
**t/a WEDER AND ASSOCIATES**

***CORAM:*** **SILUNGWE, AJ.**

Heard on: 13/11/2007; 04/12/2007

Delivered on: 14/01/2009

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**JUDGMENT:**

**SILUNGWE, AJ:** [1] This is an interlocutory application in which the applicant (the plaintiff in the main action) seeks an order against the respondent (the defendant in the main action) in the following terms (paraphrased):

1. that the respondent's plea and counterclaim be dismissed with costs;

   Alternatively:

2. that the respondent's Discovery affidavit dated 19th September 2007, be set aside;

3. that the respondent be ordered to file a new discovery affidavit that complies with Rule 35 and discovers *all documents* required to be discovered in terms of Rule 35 *relating to any matter in question in this action* …

[2] The applicant and the respondent are represented by Mr A Vaatz of Andreas Vaatz and Partners and Mrs E Angula of LorentzAngula Incorporated, respectively.

[3] The history of this application may be sketched as follows. The respondent is a professional engineer, trading as a firm of civil engineers and the applicant too is a professional engineer. On March 26, 1999, the applicant and the respondent entered into a service agreement (in writing) in terms of which the applicant was employed as a project engineer entitling him, under clause 3.3 thereof, to receive ten per cent (10 %) of the profit of all projects he was to be involved in. The projects referred to above were essentially road building projects.

[4] In the main action instituted by the applicant (as plaintiff) against the respondent (as defendant), the former claims that the 10 % of the profit on all the projects that he executed, which allegedly amounted to N$859,003, has not been paid to him, hence the claim for the said sum. However, the respondent counters, *inter alia*, that he paid their 10% profit to the applicant and that the applicant was, in fact, overpaid on certain projects, as set out in his (the respondent's) plea and counterclaim.

[5] After a pre-trial conference had taken place, Mrs B Greyvenstein, the respondent's legal practitioner, addressed a letter to Mr A Vaatz on August 1, 2007, stating, *inter alia*, that having consulted counsel in relation to discovery, it was going to take a considerable amount of time to extract all the required Documentation but that a discovery affidavit would be filed as soon as possible. It is not in dispute that thousands of documents were to be discovered. In his reply of August 2, Mr Vaatz demanded that the respondent's discovery affidavit be filed by August 8, 2007. The very next day, Mrs Greyvenstein responded that it would not be possible for the respondent to file his discovery affidavit by August 8, but she undertook to have the affidavit filed by the end of that month. Mr Vaatz granted the respondent an extension of time up to August 20 only. As the job could not be done within the time frame provided, notwithstanding the deployment of full time personnel, Mrs Greyvenstein addressed another

letter to Mr Vaatz on August 23 in which the latter's indulgence was sought to grant a further extension. Mr Vaatz wrote back on the same date indicating that enough extension of time had already been given and that he would proceed with an application to compel discovery, which had in fact been filed on August 22, 2007.

[6] The application to compel discovery, pursuant to Rule 35(7) of the Rules of the Court, was heard on August 31, 2007, before Damaseb, JP, who granted the application in terms of which the respondent was ordered to furnish the plaintiff with a "comprehensive discovery affidavit" by not later than September 19, 2007. Further, the applicant was given leave to apply to the Court on the same papers, duly amplified, for an order to strike off the respondent's defence in the event of his failure "to furnish the discovery" affidavit by September 19.

[7] On September 19, 2007, the respondent filed the discovery affidavit which, according to my reckoning, comprises about 10,859 documents. Such is the affidavit which Mr Vaatz not only alleges consists of more than 11,000 documents but also challenges.

[8] In his written and oral argument, Mr Vaatz contends that the discovery affidavit gives rise to two issues, namely:

1. whether the respondent has complied with the Order of the Court in filing comprehensive Discovery by the 19th of September 2007; and

2. whether the respondent's affidavit of 11000 documents covering 323 pages complies with the rules and practice of discovery or constitutes an irregular

proceeding in terms of Rule 30 of the Rules of the Court which may be set aside by the Court.

[9] With regard to the first issue, it is contended, on behalf of the applicant, that the ground for alleging that the respondent did not comply with the order of the Court to file a comprehensive discovery affidavit by the specified date is briefly that, although the discovery affidavit is very voluminous, it fails to make discovery of 55 out of 78 projects (contracts). Such failure, Mr Vaatz continues, includes the non-discovery pertaining to project number (No.) 0004 which is allegedly one of the most important projects in issue. Mr Vaatz acknowledges in his Answering affidavit filed on October 31, 2007, that at least 150 documents relating to project No. 0004 have since been discovered through the respondent's supplementary affidavit filed on October 25, 2007. I pose here to observe that, besides the discovered documents concerning project No. 0004, the supplementary affidavit also shows that eleven documents relating to project No. 01085 have equally been discovered. As it will shortly become apparent, the respondent takes issue with the applicant regarding the allegation that the said discovery affidavit fails to make discovery of 55 projects.

[10] It is further contended, on behalf of the applicant, that the fact that at least 150 documents in respect of project No. 0004 had not been discovered initially shows that the respondent's previous discovery affidavit was not comprehensive and, therefore, not in compliance with the Order of the Court.

[11] According to Mr Vaatz's averment and submissions, about 90 % of the discovered documents in the matter are irrelevant. But Mrs Greyvenstein's averment and Mrs Angula's submissions on the issue are quite the contrary.

[12] The Court order that the applicant seeks to enforce consists of two parts the first of which requires the respondent to furnish the applicant with a "comprehensive discovery affidavit" by not later than September 19, 2007. The second part grants the applicant leave to approach the Court, on the same papers duly amplified, for an order to strike off the respondent's defence in the event of his failure to furnish the discovery by the due date.

[13] It follows that the only basis upon which the applicant could have brought these proceedings is the respondent's failure to furnish him with the discovery affidavit by the appointed date. The respondent ardently claims that he duly rendered the discovery affidavit and that he thus complied with the Court order. According to my understanding, it is not the applicant's case that no discovery was ever furnished by the respondent; his case, as forcefully contended by Mr Vaatz, is firstly, that about 90% of 11,000 documents discovered are irrelevant; and secondly, that relevant documents in respect of 55 out of 78 projects have not been discovered. Consequently, argues Mr Vaatz, the respondent has failed to comply with the order to provide a comprehensive discovery affidavit.

[14] It seems to me that the second part of the order relates to the effect of the respondent's failure to file the discovery affidavit by the prescribed date. In my view, there was no such failure as the affidavit was filed timeously. Whether the affidavit was comprehensive or contained some irrelevant documents is a bone of contention between the parties and, therefore, constitutes a separate issue.

[15] It is averred and argued on behalf of the respondent that some of the projects in respect of which non-disclosure of relevant documents is alleged have in fact been disclosed; that some projects were not put in dispute by the applicant; that no projects listed below Luderitz in Annexure "A" to the applicant's founding affidavit (at page 9 of the record) were concluded

and that calculations of expenses incurred in connection with those projects "were never disputed", apart from the applicant's liability which was put in dispute. But Mr Vaatz maintains that projects 00014, 01029, 02038, as well as the projects listed below Luderitz in Annexure "A", plus all projects on the second page of that annexure (see pages 29 and 30 of the record) are in dispute and that relevant documents thereof need to be discovered; he adds that the only documents that are not in dispute (and hence no discovery thereof is necessary) are those agreed to between the parties' legal representatives at the pre-trial conference which, seemingly, relate to projects: 96012, 96100A, 96097, 97059, 00043, 01070, 05010, 05022, 05026 and 05322.

[16] It is apparent that Rule 35(7), under which the order of the Court was made, applies only where there has been failure to comply with subrules (1) to (6) (Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed. at 613). The term "comprehensive" which appears in the order of the Court aforesaid is, in my view, synonymous with the word "all" contained in Rule 35(1) which requires discovery of "all documents and tape recordings relating to any matter in question in such action …" Hence, the term "comprehensive" in the order could only have been used in the context of Rule 35(1).

[17] If the discovery made is incomplete or insufficient, the party requiring discovery may apply to the Court in terms of Rule 35(3) for an order to compel further discovery (See: Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, op. cit., at 602-603). Rule 35(3) provides better machinery for applications for further (and, in some cases, better) discovery and inspection in respect thereof. The rule stipulates that –

> "35(3) If any party believes that there are in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him or her to make the same available for inspection in accordance with subrule (6) or to state on oath within 10 days that such documents are not in his or her possession, in which event he or she shall state their whereabouts, if known to him or her."

[18] In any event, it is well established that Courts are reluctant to go behind a discovery affidavit, which is *prima facie* taken to be conclusive as to discoverability of documents or tape recordings as well as the relevance of their contents. Hence, the Court will not reject such affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his or her assertion (*Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 [W.L.D] at 598B-C; *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa* 1999 (2) SA 279 [T.P.D] at 317E-F; *South African Sugar Association v Namibia Sugar Distributors* 1999 NR 241 at 244J-245A). It is apparent from these cases that they had to do with Rule 35(3) applications. In the last case cited above, it was observed, at 245B-C (quoting from *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd*, *supra*) that -

> "The bases on which the Court ought to go behind the oath were set out as follows at 597H-598A:
>
> 'The Court will go behind the affidavit if it is satisfied (i) from the discovery affidavit itself; or (ii) from the documents referred to in the discovery affidavit; or (iii) from the pleadings in the action; or (iv) from any admissions made by the party making the discovery affidavit or (v) from the nature of the case or the documents in issue, that there is a probability that the party making the affidavit has or has had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made'."

[19] It suffices to say that in the present case, I find one specific technical aspect disquieting in the affidavit of the respondent's legal practitioner of record. That aspect relates to Mrs Greyvenstein's avowal that, due to time constraints, she was unable to "peruse" the respondent's discovered documents before the discovery affidavit could be filed. Paragraphs 3.1.12 and 3.1.15 of her affidavit read in part:

> "3.1.12 … I however never had time to peruse the documents so listed by client and forwarded to our offices under cover of e-mails and compact discs from defendant … In order to comply with the order of the Court timeously we could only attach the lists of documents provided by client as attachments to his discovery affidavit …
>
> 3.1.15 … As stated above, I did not, due to time constraints, have time to consider the items discovered before filing the discovery affidavit …"

[20] I pose here to underscore the fact that discovery affidavits are indeed very important documents in any trial (*Ferreira v Endley* 1966 (3) SA 618 at 621C). Discovery has been said to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed, where its use is called, it can be, and often is, a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed, otherwise it will lose its edge and become debased (*The MV Urgup Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 [C.P.D] at 513G-H). The test for discoverability or liability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance. As legal practitioners are responsible for the technical side of litigation, it is their clear duty to ensure that their clients fully appreciate the significance of a discovery affidavit before it is drawn up and to impress upon every deponent the prerequisite of conducting such investigations and searches as are necessary to ensure that the deponent has made a full (complete) and honest discovery, not only of documents which are in his possession or power, but also of documents which were, but no longer are, in his possession or power, relating to the matter in issue. No legal practitioner, needless to say, should allow a client to make such an affidavit unless he or she is satisfied that the client understands what is required of him or her and appreciates that dire consequences may follow at the trial if an inaccurate affidavit is made (*Natal Vermiculite (Pty) Ltd v Clark* 1957 (2) SA 431 at 431H-432A).

[21] In the case of complicated business transactions, it is desirable that the information should, where this is practicable, be compiled by an official or person who is cognizant of the matters in dispute, who knows what is, or is not, relevant. In any event, the deponent's legal representative is expected to ascertain that relevant documents are discovered.

[22] With regard to the case under consideration, it is clear from the contents of paras. [18] and [19], *supra*, that Mrs Greyvenstein did not satisfy herself that the respondent's discovery affidavit was properly drawn up in the sense that she was unable, due to "time constraints", to peruse the discovered documents. Inescapably, the respondent's legal practitioner of record will be required to ensure that the respondent has made a full discovery of documents relevant to the issue in the matter by perusal thereof. This exercise will obviously entail making appropriate amendments to the respondent's principal discovery affidavit, not only by the inclusion of relevant undiscovered documents, if any, relating to any projects in dispute that may be outstanding, but also by the incorporation of the contents of the supplementary affidavit for the purpose of making available one composite discovery affidavit only.

[23] It is most likely that, had the respondent's legal practitioner perused the discovered documents and detected some anomalies therein, she would and could have taken appropriate steps to dislodge such anomalies and to ensure that a full and proper discovery affidavit was drawn up and filed. In such circumstances, if the applicant needed further and/or better discovery to be made, it would have been appropriate for him to approach the Court for relief in conformity with the provisions of Rule 35(3).

[24] The second question posed by Mr Vaatz (see: para. 8, *supra*) is: whether the respondent's affidavit comprising 11,000 documents and covering 323 pages complies with the rules of the Court and the practice of discovery, or constitutes an irregular proceeding in terms of Rule 30, which may be set aside by the Court.

[25] In a case involving multiple business transactions (as *in casu*: road construction projects) carried out over a period of approximately six years, and covering many parts of the

country, it would hardly be surprising to see a large volume of documentation in a discovery affidavit. Indeed, it is apparent from the pleadings that both parties anticipated that thousands of documents would be discovered. If a full discovery entails thousands upon thousands of documents, then, so be it. In such circumstances, the question of irregular proceedings pursuant to Rule 30 would not arise. Such is the situation in the present matter.

[26] In my view, the application should succeed but only to the extent of the order that follows.

[27] For the reasons given, the following order is made:

1. The respondent is directed to appropriately amend his discovery affidavit of September 19, 2007, by, *inter alia*, incorporating therein all relevant documents in respect of the projects that may not have been fully discovered, or those that may still be outstanding, as well as the contents of the supplementary discovery affidavit.

2. The respondent is directed to comply with the provisions of paragraph 1 of this order within fifteen days of the commencement of the forthcoming term, namely, January 16, 2009.

3. The respondent is directed to pay the costs of this application.

**SILUNGWE, AJ**

**COUNSEL ON BEHALF OF THE PLAINTIFF/APPLICANT:**

Mr A Vaatz

**Instructed by:** Andreas Vaatz and Partners

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