REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

In the matter between:

Case no. I 3762/2013

GAMIKAUB (PTY) LTD PLAINTIFF

And

HEINRICH SCHWEIGER DEFENDANT

Neutral citation: Gamikaub (Pty) Ltd v Schweiger (I 3762/2013) [2015] NAHCMD 88 (15 April 2015)

CORAM: MASUKU A.J.

Heard: 5 February 2015

Delivered: 15 April 2015

Flynote: The plaintiff sued the defendant and sought for him to account by producing vouchers and other documents livestock between June 1998 and debatement June 2003; of the accounts and ancillary relief. During the trial when the

plaintiff's first witness was on the witness stand, it transpired that the plaintiff had not discovered all the documents in its possession and an application was made to compel discovery of those documents. The court allowed the application and held that discovery was a serious procedure to be undertaken carefully and conscientiously. The court further held that in the circumstances, it was unnecessary to file a written application on notice as doing so might defeat the overriding objectives of the High Court Rules. The court further held parties ought to disclose documents which were but are no longer in their possession when they make discovery. The court further considered the proper procedure to be followed in the introduction of discovered documents to enable same to form part of the proceedings. The court further considered the issue of costs and held that although the general rule is that costs should be in cause, in the peculiar circumstances, the ought to pay the wasted costs occasioned as the plaintiff negligently failed to fully discover documents in its possession resulting in the postponement of the trial.

ORDER

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1. The plaintiff is ordered to discover, in terms of the provisions of Rule 28, the following documents in its possession or in the possession of its directors or shareholders, or in the possession of its current auditors, bookkeepers or accountants, or in the possession of entities which previously served as its auditors, bookkeepers or accountants on behalf of the plaintiff, namely:

   (a) All vouchers, documents, written calculations, informal notes and similar documents, whether or not same were used in the preparation of the financial statements of the plaintiff, relating in whatsoever manner to the cattle-farming business of the plaintiff between January 1997 to July, 2005;

   (b) All correspondence, of whatsoever nature, exchanged, received or dispatched between the plaintiff or any party, for the period January 1997 to

July 2005, relating in whatsoever manner, to the cattle-farming business of the plaintiff;

(c) All documents, of whatever nature, memoranda, notes, instructions and/or mandates given by or on behalf of the plaintiff to any of its auditors, bookkeepers or accountants during the period January 1997 to July, 2005, relating in whatsoever manner to the plaintiff's cattle-farming business.

2. That PW1 Mr. Walter Keise remains a witness under oath and shall not in the interregnum discuss or in any way consult any person in relation to his evidence, save for the limited purpose of consulting with the plaintiff's legal representatives in relation to the new documents to be discovered as stipulated in paragraph 1 above, until he has finished adducing evidence and has been duly excused by the court.

3. The plaintiff is ordered to pay the wasted costs occasioned by the postponement of the trial to enable further discovery on the ordinary scale.

RULING ON APPLICATION FOR FURTHER DISCOVERY

MASUKU, AJ.:

[1] Two principal questions fall for determination in this ruling. The first is the propriety of calling a party to a cause to make further discovery in the course of a trial. The second relates to the proper order to be handed down in the event the court orders the said party to make further discovery. The second issue arises because the party's witness sought to be ordered to make further discovery is on the witness' stand, under cross-examination from the plaintiff's counsel.

[2] The setting in which the ruling arises may be briefly summarized as follows: The plaintiff, a company duly incorporated in terms of the laws of Namibia, sued the defendant for an order in the following terms:

> 2.1 'That the defendant within 30 days of judgment render a full account supported by vouchers and other necessary documentation, of all plaintiff's livestock and their progeny from June 1998 to June 2003.
>
> 2.2 Debatement of the said account.
>
> 2.3 Payment of whatever appears to the Honourable Court due to the plaintiff upon debatement of the account.
>
> 2.4 Interest on such amount referred to in 3 above *a tempore morae* at the rate of 20% per annum from the date of judgment to the date of payment.
>
> 2.5 Costs of the suit.
>
> 2.6 Further and/alternative relief.'

[3] The plaintiff, amongst its other businesses also owns a farm called Goas in Karibib. It is involved in a cattle-farming venture in that farm. The defendant and one Klaus-Dieter Schacht (hereinafter called 'Mr. Schacht') were duly appointed directors of the plaintiff. It is alleged and admitted that the defendant, who was and continues to be ordinarily resident in Namibia, was appointed the plaintiff's General Manager. Mr. Schacht, it is common cause, resided in Germany for the most part and would visit Namibia to check on the plaintiff's business from time to time.

[4] In its particulars of claim, the plaintiff alleges that the defendant was responsible for managing its farming activities, particularly its livestock at the Goas farm. In this regard, it is alleged further that the number of the plaintiff's cattle dwindled from a

staggering 983 in or about June 1998 to 361 in or about June 2003. It is alleged that the defendant, by virtue of his fiduciary duties owed to the plaintiff, ought to account fully to the plaintiff for the sharp decrease in the amount in cattle, hence the prayer for full accounting in relation to the aforesaid livestock recorded in 2.1 above.

[5] Needless to say the defendant defended the matter and averred in his plea that he has no documents in his possession, which he can provide for purposes of accounting in relation to the livestock in issue. He contended that all the documents thereto anent, required from him were either in the possession of the plaintiff or its auditors at the time of his removal as director of the plaintiff and is therefore unable to render the account required of him.

[6] The case was managed in terms of the Rules of Court[1] through all the case management stages by Mr. Justice Smuts and was on 26 January 2015 set down for trial before me. At the time of the moving of the application which forms the subject matter of this ruling, Mr. Walter Horst Kaese, (PW 1), was on the witness' stand being cross-examined by Mr Barnard for the defendant. The cross-examination was held in abeyance pending a ruling of this court on the application for further discovery and further directions from the court regarding the further conduct of the trial.

[7] I find it unnecessary and precipitous, to chronicle the evidence led by PW1 and need not, at this stage analyse same for veracity, reliability and hence, credibility. That I expressly reserve for the appropriate stage. I do need to mention though that the general tenor of the cross examination was that the defendant does not have any of the documents required of him and that same are in the possession of the plaintiff and or its agents, mainly the auditors.

[8] In the course of the long and at times brutal cross examination, PW1 was asked about whether he had, in the course of filing discovery affidavits, discovered all the documents in the plaintiff's possession, including those in the possession or control of

[1] Rules of the High Court of Namibia, High Court, 1990

the plaintiff's agents. It was put to him that he was less than candid with the court in the two discovery affidavits to which he deposed for the reason that he had omitted to disclose some of the documents that were in the plaintiff's possession or control thus rendering his purported discovery no discovery at all. It was further put to him that the documents he was desirous of the defendant producing in terms of prayer 1 may well be among the documents that he did not discover in his discovery affidavits.

[9] In order to illustrate the concession that certain documents in the plaintiff's possession were not discovered, I will refer to salient portions of the evidence as recorded in my notes, where PW1 was being cross-examined. I will refer in particular to portions related to the discovery affidavits. In the battle of wits between Mr. Barnard and PW1, the exchange proceeded as follows in part:

> 'Q: Where were these documents when you made the second discovery affidavit?
> A: Some were in in my possession but a couple were in the Pty files.
>
> Q: Those in the Pty files were in your possession?
> A: Yes My Lord.
>
> Q: Those of the Pty were in your possession but you did not browse through them?
> A: Yes My Lord.
>
> Q: When you take an oath it is a serious matter?
> A: Yes.
>
> Q: The first discovery affidavit was therefore false.
> A: I was not aware that these documents were available.
>
> Q: (Portion of para 4 at p 18 of the bundle is read out and PW1 is asked). That portion is incorrect?
> A: Yes My Lord.
>
> Q: You took an oath to say it was true?

A: Yes.

Q: It was not the only documents in your possession?
A: I did not refer to them in the first affidavit.

Q: These documents belonged to the plaintiff?
A: Yes.'

[10] Further on, the following exchange took place between PW1 and Mr. Barnard:

'Q: These documents were then not discovered?
A: Yes My Lord.

Q: Your discovery affidavit is no affidavit at all?
A: I was not aware of this.

Q: Your affidavit at page 135 of the exhibits bundle is no discovery affidavit as nothing is said about the documents in the possession of the company?
A: I was not aware this was no discovery at all.'

[11] From the exchange recorded above, the indubitable fact is that there were documents, which were in the possession of the plaintiff company that PW1, either out of ignorance or inadvertence, did not discover. It is clear from the evidence tendered by him that these were documents that belonged to the plaintiff and were held on the company's behalf and ought, ordinarily to have been discovered if they were relevant to the *lis*. It also transpired in evidence that other documents which were in the possession of an Inspector appointed by the court in terms of the provisions of the Companies Act[2] were similarly not discovered and PW1 seemed to hold the opinion, which appears incorrect, that these documents were not in the possession or control of the plaintiff company as they were attached in terms of a judicial process.

[2] Act No. of 1998????

[12] I therefore find and hold for a fact that on the evidence, which is incontrovertible, there are certain documents which were in the possession or control of either of the plaintiff or its agents or other persons connected with it that were not discovered yet these documents may be relevant to the proper prosecution of this case. For that reason, the ineluctable conclusion, which PW1 himself conceded under cross-examination, was that his two discovery affidavits, without mentioning the documents referred to above which belonged to the company but may not have been in the plaintiff's immediate possession at the time ought to have been discovered, amounted to no discovery at all.

[13] I must hasten to add though that there is no basis on the evidence led for an inference or finding that the discovery not made was as a result of deliberate and mendacious efforts by PW1 to conceal the presence of the documents in question. Mr. Barnard was the first to make such a comely concession. At worst, he submitted, PW1 was negligent in not discovering these documents. I am in full agreement with that submission.

[14] I now proceed to consider whether this is a proper case to order the plaintiff to make further discovery. This decision must be considered against the backdrop that when the application for further discovery was moved, the trial in this case had already commenced and that the application for further discovery has in fact dislocated the smooth-running of the trial and may well affect its finalisation which would have been expected to be not inordinate, all things being equal. Is it proper, in the circumstances to order further discovery in view of the disruption to the trial it occasions?

[15] I am of the considered view the court must be astute in answering this question and must do so from the very point of discussing the *raison d'etre* for discovery of documents in trial proceedings. One can do no better in this regard than to quote from the luminary works of Erasmus[3], where the learned author states the following in regard to discovery[4]:

[3] Superior Court Practice, Juta & Co,
[4] Ibid at p….

> ‘The object of discovery was stated in *Durbach v Fairway Hotel Ltd*[5] *to be ‘to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means, the issues are narrowed and the debate of points which are incontrovertible is narrowed.’ Discovery has been said to ‘rank with cross-examination as one of the 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 for, it can be a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or will lose its edge or become debased. . . The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries a duty to put those documents in proper order for both the benefit of his or her adversary and the court in anticipation of the trial action. Discovery assists the parties and the court in discovering the truth and, by doing so, helps towards a just determination of the case. It also saves costs.’*

[16] On the other hand, the learned authors Herbstein & Van Winsen[6] say of discovery:

> ‘The function of discovery is to provide the parties with the relevant documents or recorded material before the hearing so as to assist them in appraising the strength or weaknesses of their respective cases, and thus to provide the basis for a fair disposal of the proceedings before or at the hearing. Each party is therefore enabled to use before the hearing or to adduce in evidence at the hearing documents or recorded material to support or rebut the case made by or against him or her to eliminate surprise at or before the hearing relating to documents or recorded evidence and to reduce the costs of litigation.’

[5] 1949(3) SA 1081 (SR).

[6] The Civil Practice of the High Courts of South Africa, 5th ed, Juta, 2012 Vol. I at p 777.

It is fitting to mention though that although the above authorities relate to cases in the South African jurisdiction, it appears to me that though there may be a difference in wording and to some extent the procedures adopted or prescribed, of the respective rules of court, the principles enunciated therein are however fully applicable even in this jurisdiction and will offer a useful guidance.

[17] A few issues can be distilled from the foregoing quotations regarding the need to make discovery in action proceedings. These include:

- avoiding the element of surprise and ambush in the conduct of litigation;
- to promote fair play and transparency as it were between and amongst protagonists;
- to properly assess the streghts and weaknesses of the respective cases;
- to properly identify the real issues in dispute between the parties;
- to redeem the time expended on litigation; and
- to curtail costs by avoiding following useless causes.

[18] It stands to reason therefore that in cases where there has been less than full and frank disclosure of the documents in the possession of a party to an action, the search for the truth and the identity of the real issues in dispute may be concealed and thus prove elusive, resulting in costs escalating unnecessarily. It would appear to me that what the court has to guard against in applications of this nature, especially when brought at the stage where the trial has commenced, is an abuse of the discovery procedure, in instances where the procedure may be sought to be invoked for no other reason than to harass, intimidate or bully a litigant on the other side. Where the object of the application is not base but is geared to assist in the proper identification, ventilation and determination of the real issues, the court must be very slow to refuse such applications as the truth can only be fully arrived at via the corridor of a full and frank disclosure.

[19] The question to be answered in the instant case is whether in all the circumstances, the defendant seeks to use this procedure for the nefarious purposes

identified above or it is in the *bona fide* interests of full and frank disclosure and to avoid expending time and money on meritless pursuits that do very little to arrive at the truth and to decide the real issues in dispute. As indicated above, PW1 conceded that he did not discover all the documents that were in the plaintiff's possession, something that the plaintiff ought to have done. If only partial discovery is made, it then becomes clear that the search for the truth may well prove as elusive as chasing a mirage in the desert and the possibility of pursuing useless causes abounds, resulting in the unnecessary expenditure of money, time and energy on fruitless but emotion-draining and disconcerting endeavours.

[20] I am of the considered view that the concession by PW1 that he did not fully disclose all the documents in the plaintiff's possession removes the matter immediately from the bracket of cases of abuse. I am particularly fortified in this view for the reason that the plaintiff is seeking, amongst other remedies, accounting by the defendant that could shed light on the alleged decrease in the number of the plaintiff's cattle. It was put to PW1 in cross-examination that the documents sought to be obtained from the defendant are actually in the plaintiff's own possession and that the prayers sought are nothing but harassment of the defendant by the plaintiff. There is in my view a very real possibility that the documents sought from the plaintiff may well be in the plaintiff's possession and this is particularly so because PW1 conceded that he did not read some of the documents that were not discovered and is acutely unaware of the nature and content of some of the documents which were in the possession of the plaintiff's auditors and I may add, those in the possession of the aforesaid Inspector as well.

[21] It is in my view necessary that the documents not previously discovered should be fully and properly discovered so that the whole truth and the picture of the real dispute between the parties should emerge clearly. It hardly lies in the mouth of a party that has not made a full and frank disclosure of documents in its possession which, as is the case *in casu,* at least with some of the documents it has not read, to exact a demand of documents from another when a possibility exists that the documents sought from that other party may well be in that very party's possession. This possibility was put

to PW1 in cross-examination and he could not proffer a definitive answer thereon. It thus remains a possibility and can only be excluded by the discovery of the documents in issue. Subject to the arguments raised by Mr. Denk for the plaintiff in this matter, which I presently consider below, it would appear to me on first principles that the application for discovery even at this late stage is meritorious.

[22] A word of caution is in this regard in my considered view necessary. Persons who depose to discovery affidavits, whether in relation to personal matters or in a representative capacity, must appreciate that that exercise is a serious and solemn matter. The fact that standard wording is employed in the relevant forms of the rules of court does not in any way detract from the seriousness of discovery affidavits, particularly viewed in relation to the oath taken or affirmation made as the case may be. The words reproduced in the relevant form are not mere incantations that may be repeated with no consequence if proved to be untrue. The failure to make a full and proper disclosure when an oath or affirmation to the contrary has been taken or made, opens the deponent to possible perjury proceedings, which is a serious matter that may result in the deponent forfeiting his or her liberty, in appropriate cases, for a season. This is therefore a procedure that must be taken seriously and with a full presence of mind. It must be undertaken conscientiously and truthfully. It must not be allowed to degenerate into a sacrilege.

[23] In support of the comments above, I quote what the court said in *Natal Vermiculite (Pty) Ltd v Clark*[7]:

> ‘An affidavit of discovery is a solemn document, not merely a scrap of paper, and it is the duty of every attorney to be satisfied that in drawing up a discovery affidavit, the client understands what is required and appreciates that dire results may follow at the trial if an inaccurate discovery is made. Full and honest disclosure should be made.’

I fully embrace these remarks as they coincide with my own views expressed immediately above. See also *Sandy’s Construction Co. v Pillai and Another.*[8]

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[7] 1977 (2) SA 431 (D) at 431 F-432 A
[8] 1965 (1) SA 428 at 429 D-E

[24] I now turn to the provisions of the rule relevant to discovery.[9] Rule 28 (14) is the operative one in the present circumstances and it provides as follows:

> 'On application by a party the managing judge may, at any management conference or pre-trial conference or during any proceeding, order on Form 13 the production by another party thereto under oath or affirmation of any document or tape recording in his or her possession or under the his or her control relating to any matter in question in that proceeding and the managing judge may deal with the document or tape recording that is produced in any manner he or she considers proper.'

[25] A few matters need to be pointed out in relation to the application of this subrule. First is that the managing judge exercises a discretion to order a party to produce documents or recordings in their possession. That this remedy is discretionary may be gleaned from the use of the word "may" occurring therein. As with all other cases of the exercise of a discretion, the managing judge ought to use the power at his or her disposal judicially and judiciously. The power should not be used capriciously, oppressively or whimsically. As was stated previously, "discretion is a safe tool only in the hands of the disinterested". For that reason, a dispassionate approach must be adopted to the use of this power to order discovery.

[26] Second, the order to provide the document or recording may be made at any time, including during a management conference; a pre-trial conference or in the course of "any proceeding". Unfortunately, the word proceeding is not defined in Rule 1. The question for determination is whether a trial as is the case presently, falls within the rubric of a "proceeding" as envisaged in the rules. The Collins dictionary[10] defines a proceeding as "any step taken in legal action". On the other hand, The Black's Law Dictionary defines the same term as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of a judgment; any procedural means of seeking redress from a tribunal or agency."

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[9] Rule 28.

[10] Concise Dictionary 4th ed.1999.

[27] It is a wholesome conclusion that the hearing of evidence in an action is a proceeding within the meanings provided above as it constitutes a step in the progression of a lawsuit and is also an act that is directed at seeking redress, in this instance, before a court. I am accordingly of the firm view that this court is empowered to order the production of documents in this matter as it falls squarely within the rubric of a "proceeding" within the above definitions. To hold otherwise would defeat the court's quest to arrive at the truth, especially when it transpires during the trial that there are documents in the possession or control of a party, which have not been discovered, but which may be relevant to the matters in dispute.

[28] Third, Mr. Denk argued that the application to order discovery in this matter (including his application to which reference will be made in due course), was not properly before court for the reason that the applications were not on notice of motion as envisaged in Rule (1). The said rule provides that, "'application" means an application on notice of motion as contemplated in Part 8". It is undisputed that the present application was not made on notice of motion. The question for determination in the circumstances is, should the court then throw out the application for want of form in the peculiar circumstances of this case?

[29] I think not. I say so because it must be recalled that in interpreting these rules, the overriding objectives[11] should not be allowed to sink into oblivion. These should play a pivotal and where necessary, a decisive role, in my view, and should be brought to bear on any interpretation sought to be placed on the rules. Rule 1 (3) for instance states that, 'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute <u>justly, efficiently and cost effectively</u>. . .' (emphasis added). At (d), the rules state further that courts should ensure that cases are dealt with expeditiously and fairly.

[30] In the instant case, it transpired during the cross-examination of PW1 that he may not have discovered certain documents and this became evident when the

[11] Rule 1(3).

protagonists were already in the heat of battle as it were, the battle lines having already been drawn. I am of the view that it would have been disruptive, time-consuming and costly to the parties to adjourn the proceedings in order for a fully-fledged application contemplated in Part 8 to be moved. This would have entailed exchanging a full set of affidavits, and setting the matter down for argument, seeing the application was opposed. To adopt that fastidious approach in the present circumstances would, in my view run counter to the spirit and overriding principles enshrined in the rules, as valuable time would have to be needlessly lost and further costs incurred in drafting, serving and arguing the application. To adopt that strict approach would defeat in a major way the efficient and expeditious settlement of the real disputes in this matter.

[31] In the premises, I am of the view that in an ordinary case, the application would have had to follow the provisions of contemplated in Part 8 but the circumstances of this case are such that following that procedure strictly would yield manifold injustice and inconvenience to the court and the parties and would further result in the loss of time and money, considering as well that there are many cases awaiting trial. Once a party has reached the portals of the courtroom and has accessed the witness box, they should be allowed to utilize that opportunity. In this regard, the court should not allow substance as opposed to form; expediency and efficiency to be sacrificed on the altar of formalism. It must be remembered as well that the rules were made for the court and not the court for the rules. Where considerations of efficiency, justness, speediness, and cost effectiveness dictate, the court should be entitled to allow necessary deviations that will redound to speedy, cost-effective and fair determination of disputes. I think this is such a case and the failure to file a formal application is not fatal in the peculiar circumstances of this case.

[32] I have had regard to *Richardson's Woolwasheries Ltd v Minister of Agriculture*[12] referred to me by Mr. Barnard for other reasons. Interestingly in that case, the plaintiff, according to the court, adopted a very casual approach to making discovery and the court held[13] that "it hardly lies in its mouth to complain that no formal application was

[12] 1971 (4) SA 62 (E).
[13] 11 *ibid* at p 63-64.

before the court when the apparent reason for this was the delay in making discovery." I am of the view that although the reasons differ, the plaintiff cannot be heard to complain of there being no formal application when the fact of there being no proper discovery was only established in cross-examination. This to my mind constitutes a further reason to refuse the dismissal of the application for want of proper procedure. I must, in fairness state that I did not understand Mr. Denk to move for a dismissal of the application on the grounds that no formal application was moved. He pointed this out the proper procedure in his role as an officer of the court.

[33] Mr. Denk had another bow up his string. He submitted that the application in the instant case was incompetent for the reason that the documents required to be discovered are not in the possession or control of the plaintiff herein. This statement is not entirely accurate as the reading of the evidence shows indubitably that PW1 conceded that some of the documents required to be discovered are in the plaintiff's possession. In so far as it is contended that the documents in the possession of the plaintiff's auditors and the inspector, is Mr. Denk correct in his submission?

[34] Rule 28 (4) (a) requires the parties to discover separately, "documents, analogue or digital recordings in his or her possession or in possession of his or her agent other than the documents, analogues or tape recordings mentioned in paragraph (b)". In (d), the rules call for the discovery of "documents, analogues or digital recordings, which he or she or his agent had, but no longer has in his or her possession at the date of the affidavit." It was Mr. Denk's submission that the auditors of the plaintiff were not the agents of the plaintiff within the meaning of the rule and there was, thus rendering the said documents not amenable to a discovery order. Mr. Barnard argued that the word agent, as used in the rule signifies a person who has been mandated to carry out certain tasks on behalf of the party from whom discovery is required and does not refer to an agent in the sense of a person, in the law of agency, who has authority in law to bind the principal.

[35] I find it unnecessary to decide whether the auditors and the inspectors are the plaintiff's agents within the meaning of the rule in question. I do so for the reason that a close reading of Rule 28 (4) (c), quoted above indicates that each party should specify documents previously in its possession but which are no longer in that party's possession. The documents in the possession of the auditors and the inspector clearly belong to the plaintiff and the plaintiff was in duty bound to disclose these documents in the discovery affidavit and state that they were no longer in its possession but in the possession of these two aforementioned parties. In the ordinary business intercourse, the plaintiff should know what documents belong to it that are no longer in its possession and should maintain a record of all its documents, which are in the hands of third parties and identifying these should for that reason not be a tall order.

[36] In this regard, the court in the *Richardson* case (*supra*),[14] the following was said regarding the contents of affidavits filed on behalf of companies:

> 'Where an affidavit is made by a director or officer of the company the affidavit must state in terms that the company has not in the possession, custody or power of its attorney or other agent or any other person on the company's behalf, any document, etc. This is not an insignificant detail, it is a matter of substance. Great weight is given to these affidavits and they should not be drawn in so loose a manner as to leave an avenue of escape to the document if it should turn out that the relevant documents were in the possession of some other officer of the company.'

Admittedly, the wording in the local rules on discovery differs from that in the Republic of South Africa and the process of discovery now differs but the main essence is that the principles enunciated above are applicable in this jurisdiction as well. Where as in the instant case a deponent deposes to the affidavit on behalf of a company, he or she should state the documents no longer in the company's possession.

[14] At page 65

[37] In the premises, I am of the considered view that this is a proper case in which to grant the application for the plaintiff to make full and frank disclosure of the documents which it was conceded in evidence, were not discovered on its behalf.

The defendant's counter-application

[38] In the course of the argument of the application, Mr. Denk, indicated that he was moving a similar application to that moved by Mr. Barnard on behalf of the defendant. He contended that there were documents in the defendant's possession that had not been discovered and that the court should forthwith order the defendant to discover these.

[39] I must state from the onset that I have great difficulty with this application for a number of reasons. First, this application seems to have been tit-for-tat and that is how Mr. Barnard described it. I say so because when Mr. Barnard indicated that he would move his application, the defendant demurred and contented itself in opposing the defendant's application. It was only when he was on his feet, having answering the salvos fired by Mr. Barnard that the court for the first time learned that the plaintiff had a counter-application on similar terms as that of the plaintiff. As it is, the application by the plaintiff was not on notice any to the opposite party, whether oral or written. A surprise was thus sprung on Mr. Barnard and the court in argument and this should ideally not be the case.

[40] Secondly, and importantly, the basis for the defendant's application was made clear in the cross-examination of the plaintiff's first witness, as indicated above. There is no denying that Mr. Kaeise admitted that certain documents in the plaintiff's possession were not discovered. The basis for the defendant's application on the other hand, was in my view was not established and there is no basis yet to assume that the defendant did not disclose certain documents. I do not, however, rule out such a possibility if this should be established in cross-examination of the defendant or be made manifest in the course of the trial. The court should be very slow to allow applications for further

discovery during the trial when these applications are based on speculation, conjecture or surmise. The good faith of the deponents to discovery affidavits must be assumed until the contrary appears or is proven and it is then and only then that the court should intervene.

[41] There must be strong grounds, which tend to show that no full discovery has been made to persuade the court to adjourn a trial in order to call for further discovery. What may appear to be reasonable grounds to the practitioner at first blush may well be answered fully and persuasively once the party suspected of not making a full disclosure is on the stand. I say so because such applications, if granted merely for the asking, serve to disrupt the smooth running of the trial as indicated earlier. To grant the application in the present circumstances, in the absence of any clear indication of non-compliance with the discovery procedure would in my view be presumptuous and precipitate in the circumstances. I would for these reasons dismiss the application at this stage. This is not to say the door is forever closed on the plaintiff on this score, as intimated earlier.

Proper order to issue regarding the future conduct of the trial

[42] The other question that arose was the proper order to issue relating to Mr. Kaese who was on the witness' stand being cross-examined at the argument of this application. Mr. Denk took the view that it would be unfair to keep PW1 in harness and subject to the stringent requirements not to discuss his evidence with anyone including his attorneys as he may for a long time be kept in limbo and under a bar not to speak whilst waiting for the trial to resume. He reasoned further that PW1 may well need to confer with his lawyers regarding the evidence that may be discovered upon the court granting the application in the defendant's favour.

[43] In my view, this matter is very simple. Mr. Kaese remains a witness in the stand and in the circumstances of the present case, it was not feasible nor practical to call any other witness to testify as this application was undergoing consideration and it would

have, in any event, been disruptive to call another witness when his evidence had not been concluded. In the premises, once discovery has been made, he will be cross-examined further on the documents he will have discovered, if necessary.

[44] The basis for the discomfort on the part of Mr. Denk was that his witness would remain subject to what was referred to in the trial as the 'water in the mouth' principle, (referring to him not being able to discuss his evidence because he is on the stand) for an oppressively long time and would further impede Mr. Denk and his instructing attorney from in interviewing the witness in relation to the documents to be discovered as a result of the order for further discovery. In this regard, and to ameliorate the harshness of the principle, Mr. Barnard fairly and rightly conceded that the plaintiff's counsel had a right to consult PW1 regarding the limited issues arising from the newly discovered documents. He mentioned that as an officer of the court, he had all the confidence that the plaintiff's team would abide by all the ethical and professional dictates at this time. I similarly share that sentiment and am confident that as officers of the court, the plaintiff's team will uphold the proper standards and will not breach the rules of a fair trial in this regard.

[45] I must mention that the plaintiff finds itself in this rather invidious position as a result of its own doing by not discovering all the documents it should have. The difficulties it faces would have been avoided had full discovery of all documents been made at the right time. I accordingly order that the plaintiff shall depose to an affidavit enumerating such relevant documents and the defendant shall have a right to inspect and to make copies of same.

[46] The parties will hopefully meet and discuss which documents of those discovered are relevant for the trial and shall identify same and cause them to be bound into a bundle of further exhibits for reference as is necessary in the further proceedings.

[47] I must state that I invited the parties to make further submissions regarding the introduction of the discovered documents and I did not receive any submissions from

the plaintiff's attorney on this issue. I found the submissions by the defendant's legal team sensible and practicable in the circumstances and have adopted them *mutatis mutandis* in this matter.

[48] They submitted that the plaintiff, which was in possession of or knew of the existence of the documents did not discover them and could not in the circumstances, have the documents introduced by them into the record. These could be introduced once bound in cross-examination and then they can, then deal with them as they will find appropriate, in re-examination. The plaintiff's it was argued, could not benefit from their non-compliance with the rules.

[49] In the peculiar circumstances of this case, namely the nature of the case, the centrality of the documents required and the defence posited both in the pleadings and in cross-examination, I am of the view that it is fair to adopt the procedure advocated by the defendants.

Costs

[50] According to the learned authors Herbstein & Van Winsen,[15] costs occasioned by discovery are normally ordered to be costs in the cause. In *Sandy's Construction Co. v Pillai*[16] however, the court ordered the party, which had not made full and proper discovery to pay the costs occasioned by a postponement. In *Tarry & Co Ltd v Matatiele Municipality*[17] Kannemeyer A.J. expressed himself in the following language in a case where the plaintiff had not made proper discovery thereby necessitating a postponement of the trial:

> 'This is a case in which the Rules have been disregarded and as a result of the disregard of the Rules the postponement is made necessary and in my view brings this

[15] *Ibid* Vol I at page 827.
[16] *Ibid.*
[17] 1965 (3) SA 131 (ECD) at 137.

> case within the ambit of the decision in *Reid v Royal Insurance Co. Ltd.* And I order that the costs I have awarded will be paid as between attorney and client.'

[51] It is apparent in the instant case that the adjournment of the trial is as a result of the plaintiff disregarding the full and proper application of the rules relating to discovery. Had the plaintiff properly and fully discovered all the relevant documents in its possession and also disclosed those no longer in its possession, the trial would have proceeded and may have been concluded. As indicated earlier, there is no suggestion that there was any bad faith on the part of PW1 not to disclose these documents. Mr. Barnard submitted that an order for costs on the normal scale would meet the justice of the case and I agree. It would be harsh in the extreme to mulct the plaintiff in this case with an order for costs on the punitive scale, given the matrix of the present case.

[52] I have considered that in the *Reid* case (*op cit*), the court ordered costs to be paid on the attorney and client sole for the reason that the party mulcted with costs brought the application "under a complete misconception as to the function of particulars, and it has also had the effect of unnecessarily delaying the further prosecution of the action. . ." Roper J. in that case also made reference to an unreported case of *Steinman v Dry (T.P.D.. 1/4/49,* where punitive costs were ordered on the grounds that the exception moved was "trifling and frivolous". No such or similar epithets accompany the conduct of the plaintiff in this case to warrant an adverse order for costs on the punitive scale. It must be recalled that costs are a discretionary remedy and the court will assess all relevant circumstances before making a determination of an appropriate order in any given case[18].

In the premises I issue the following order:

1. The plaintiff is ordered to discover, in terms of the provisions of Rule 28, the following documents in its possession or in the possession of its directors or shareholders, or in the possession of its current auditors, bookkeepers or

[18] A.C. Cilliers, Law of Costs, Lexis Nexis, 2006 at 1.07

accountants, or in the possession of entities which previously served as its auditors, bookkeepers or accountants on behalf of the plaintiff, namely:

(a) All vouchers, documents, written calculations, informal notes and similar documents, whether or not same were used in the preparation of the financial statements of the plaintiff, relating in whatsoever manner to the cattle-farming business of the plaintiff between January 1997 to July 2005;

(b) All correspondence, of whatsoever nature, exchanged, received or dispatched between the plaintiff or any party, for the period January 1997 to July 2005, relating in whatsoever manner, to the cattle-farming business of the plaintiff;

(c) All documents, of whatever nature, memoranda, notes, instructions and/or mandates given by or on behalf of the plaintiff to any of its auditors, bookkeepers or accountants during the period January 1997 to July 2005, relating in whatsoever manner to the plaintiff's cattle-farming business.

2. The plaintiff is furthermore ordered and directed to, for the above purposes, depose to a discovery affidavit in which all the above documents are identified with sufficient particularity to enable the legal representatives of the defendant to identify each such document so discovered, separately and independently.

3. The plaintiff is furthermore ordered and directed to furnish to the legal representatives of record the defendant, namely Behrens & Pfeiffer, the originals of all such documents and permit them to make photocopies of whichever of such documents they wish to do so.

4. That PW1 Mr. Walter Kaeise remains a witness under oath and shall not in the interregnum discuss or in any way consult any person in relation to his evidence,

save for the limited purpose of consulting with the plaintiff's legal representatives in relation to the new documents to be discovered as stipulated in paragraph 1 above, until he has finished adducing evidence and has been duly excused by the court.

5. The plaintiff is ordered to pay the wasted costs occasioned by the postponement of the trial and the costs resulting from the application to compel further discovery on the ordinary scale.

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TS Masuku, AJ

APPEARANCES

PLAINTIFF:	A. Denk Instructed by Theunissen, Louw & Partners
DEFENDANT:	T. Barnard Instructed by Behrens & Pfeiffer