

**Case No.: 1.402/2000**

**A VAATZ -v- METJE & ZIEGLER t/a AUDI CENTRE**

Hannah, J  
2001/04/30

**PRACTICE**

Discovery. Rule 35(3) notice required inspection of a large number of documents of which only a few were relevant. Other party was entitled to ignore such notice. Further, in an application to compel in such circumstances the Court is under no obligation to pore over the list of documents in an attempt to identify those which are relevant.

Failure by a party to respond to a Rule 35(3) notice does not entitle the other party to costs of an application to compel. It will suffice if the party who receives the notice files an affidavit in the application to compel.

**Case No.: 1.402/2000**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**ANDREAS**

**VAATZ**

**PLAINTIFF/APPLICANT**

**and**

**METJE&ZIEGLER**

**LTD**

**t/a**

**AUDI**

**CENTRE**

## **DEFENDANT/RESPONDENT**

**CORAM:** HANNAH, J

Heard on: 2001-04-23

Delivered on: 2001-04-

30

## JUDGMENT

HANNAH,J: This is an interlocutory application brought by the applicant, the plaintiff in the trial action, against the respondent, the defendant in the action, in which the applicant seeks an order directing that the respondent replies to the applicant's notice delivered pursuant to Rule 35(3) of the High Court Rules. The respondent opposes the application.

The background to the application is as follows. By summons dated 8<sup>th</sup> March, 2000 the applicant sought an order requiring the respondent to deliver to him an Audi A4 2.4 manual silver metallic motor car with tow bar against payment by the applicant of N\$177 706,00.

The basis for the applicant's claim for this relief, as set out in the particulars of claim, is as follows. On 9<sup>th</sup> June, 1999 the respondent made an offer in a written quotation to sell to the applicant a new Audi A4 2.4 manual silver metallic motor car with tow bar at a price of NS177 706,00. On or about 16<sup>th</sup> June the applicant accepted this offer thus creating a contract. However, despite demand the respondent has failed to deliver the Audi A4 motor car to the applicant.

The respondent's defence to the applicant's claim, as set out in its plea, is two-fold. First, it denies that the written quotation was a binding offer. It alleges that it was only an invitation to treat. Alternatively, if the written quotation can properly be regarded as an offer it alleges that it was made conditional on the manufacturer of the motor car being able to supply a model fitting the description set out in the quotation and at the price quoted and these conditions could not be met.

On 24<sup>th</sup> October, 2000 the applicant delivered a notice in terms of Rule 35(1), (6), (8) and (10) of

the High Court Rules and on 27<sup>th</sup> November, 2000 the respondent filed a discovery affidavit in response to this notice. The first part of the schedule to the affidavit specified all correspondence between the parties' legal representatives, all pleadings, the written quotation dated 9<sup>th</sup> June, 1999 and correspondence between the applicant and the respondent and the applicant and the manufacturer which took place following the applicant's demand that the respondent performs its contractual obligations. The applicant was not satisfied with this affidavit and accordingly served a notice on the respondent's legal representatives in terms of Rule 35(3) of the High Court Rules.

That notice required the respondent to make available for inspection:

- "1. All quotations (similar to quotation No: 1951 given to Plaintiff) issued in respect of Audi vehicles to other interested purchasers, at any time during the period 1 January 1998 to 31 December 1999.
2. Invoices relating to Audi vehicles, in the period 1 January 1998 to 31 December 1999.
3. Correspondence, orders, faxes, invoices and stock records between Defendant and the South African supplier to Defendant, of Audi motor vehicles, for the period 1 June 1999 to 31 December 1999.
4. Franchise contracts, agency contracts, or any other contracts regulating the relationship between Defendant and Volkswagen South Africa (Pty) Ltd and/or any company, supplying Defendant with Audi motor vehicles.
5. Any stock sheets, manufacturing schedules, advices of proposed delivery schedules, delivery records, confirmation of orders, and advices relating to the production of vehicles ordered, relating to A4 Audis, manufactured by Volkswagen South Africa (Pty) Ltd, alternatively the manufacturer of Audi motor vehicles in South Africa in the period 1 June 1999 to 31 December 1999."

The respondent failed to respond to this notice hence the present application to compel.

In his affidavit in support of the application the applicant gives as his principal reason for requiring discovery of the documents listed in the Rule 35(3) notice their relevance to establishing:

".....whether or not it is a business practice of the defendant, to give interested purchasers of motor vehicles a low quote, and when it comes to delivering the vehicle, to suddenly claim that the vehicle has increased in price and then claiming a substantially higher price than that originally quoted."

This, according to the applicant, can be established by reference to the documents referred to under items 1 and 2 of the notice.

As for item 3, the applicant avers that these documents are required to ascertain whether the order for the Audi motor car was placed timeously by the respondent with the manufacturer and whether it was followed up promptly.

Item 4, according to the applicant, is required to establish whether, for example, the respondent can require the manufacturers to honour orders placed and item 5 is needed in order for the applicant to check whether the vehicle which he ordered was listed in advices of vehicles on order given by the manufacturer to the respondent.

The respondent's grounds of opposition to the application, as set out in its answering affidavit, are three-fold. Firstly, it contends that the applicant is on a fishing expedition which is an impermissible exercise. Secondly, it contends that the documents listed in the Rule 35(3) notice are not relevant to the issues in dispute. And thirdly it contends that the notice casts a net so wide that it would be impossible for the respondent to comply with any order which may be made.

In *South African Sugar Association v Namibia Sugar Distributors (Pty) Ltd* (Case (P) I. 989/98) (unreported) this Court cited with approval the following two passages from *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971(4) SA 589 (WLD) at 598 D-F and 597 H - 598A respectively:

"The test of discoverability or liability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still *prima facie* conclusive, unless it is shown on one or other of the bases referred to above that the Court ought to go behind that oath; and the *onus* of proving relevance, where such is denied, still rests on the party seeking discovery or inspection ... Rule 35(3) could never have been intended to mean that the mere subjective belief (or even that a mere statement as to the existence of such belief) by the party seeking further discovery, as to the relevance of additional documents, is by itself enough to require the other party on notice to make available for inspection such of those documents as are in his possession."

"The Court will go behind the affidavit only 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;
- (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."

See also *Federal Wine and Brandy Co Ltd v Kantor* 1958(4) SA 735 (E) at 749 H.

With those principles in mind I turn to a consideration of the arguments advanced by the applicant who appeared in person. With regard to the documents referred to under items 1 and 2 of the notice the applicant relied on what was stated in his affidavit and in addition referred the Court to what is set out in paragraph 7 of the respondent's answering affidavit. In that paragraph the respondent admits that during the period from 1<sup>st</sup> January, 1998 to 31<sup>st</sup> December, 1999 it sold approximately two hundred Audi motor vehicles and issued many more quotations. It also admits that during that period price adjustments were for various reasons made by both itself and the manufacturer. The applicant sought to spell out from these admissions a further admission that the respondent has not strictly honoured its quotations and contended that he is entitled to ascertain whether giving incorrect quotations forms a regular pattern of the respondent's business.

I confess to having difficulty in giving paragraph 7 the same interpretation as that espoused by the applicant but, in any event, his contention, in my view, begs the real question. The real question is not what the respondent did in other transactions over the two year period or whether it has applied unfair business practices to its customers but whether its quotation in the case of the applicant constituted an offer and, if so, whether such offer was subject to the conditions set out by the respondent in its plea and whether those conditions could be met or not. Those are the only questions which are raised in the action and I am unable to see how the documents required under items 1 and 2 of the notice are relevant to those questions. What happened in other transactions cannot advance the applicant's case or damage that of the respondent. I agree with Mr Botes, who

appeared for the respondent, that the applicant is not entitled to have access to those documents.

With regard to the documents required under item 3 the applicant seeks, in his affidavit, to limit the documents to those which relate to his particular transaction but that, of course, is not what is set out in the notice. The notice goes much wider than that and covers what must be a huge amount of documentation. Whilst the documents relating to the applicant's own transaction may be relevant to the issues in the case I cannot see how those relating to other transactions can be.

Where a party delivers a notice in terms of Rule 35(3) requiring inspection of a large number of documents of which only a small number are relevant I do not consider that there is any obligation on the other party to sift through the documents referred to in the notice in order to identify those which are or may be relevant. In my view, he is entitled, in such circumstances, to adopt the stance that he need not comply with the notice and leave the other party, if he so wishes, to pursue the remedy afforded by Rule 35(7). However, in such circumstances the Court will also be under no obligation to pore over the list of documents in an attempt to identify those which are or may be relevant. Accordingly, I will refuse to make an order in respect of the documents required under item 3.

I have already stated the applicant's reasons for requiring inspection of the documents referred to under items 4 and 5. Again, I am unable to regard those reasons as having any validity. If the quotation was conditional in the manner pleaded by the respondent then the only issues are whether the manufacturer of the motor car was able to supply a model fitting the description set out in the quotation and at the price quoted. The documents required are not relevant to those issues.

The last point advanced by the applicant concerns the costs of this application in the event of the Court finding against the applicant on the merits. The applicant submitted that the respondent was under an obligation to react to the Rule 35(3) notice by filing an affidavit giving its reasons for failing to make the required documents available for inspection. This the respondent failed to do

and it should therefore bear the costs of this application.

The applicant sought to support the foregoing submission by reference to the following comment on Rule 35(3) in Erasmus: *Superior Court Practice* at B1-258:

"The subrule concerns documents not yet discovered and contemplates an affidavit other than and additional to one made under subrule (1)."

Reference is then made to *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983(1) SA 556 (N) at 559 C.

The *Rellams* case (*supra*) was concerned with an application to compel in terms of Rule 37(7) in circumstances where there had not only been no response to a Rule 35(3) notice but no response to the application itself by any official or servant of the defendant. It was in this context that Van Heerden J said at 559 C:

"Rule 35(3) concerns documents not yet discovered and clearly contemplates an affidavit other than and additional to one made under Rule 35(1). There is as yet no such affidavit by the defendant nor any acceptable explanation for the omission. The plaintiff is at least entitled to be informed in proper form if the documents called for are in the defendant's possession and if their relevance is being disputed. This has not yet been done and the application calling upon the defendant to comply with Rule 35(3) should accordingly have been granted."

I do not understand the learned judge to have said that an affidavit must be filed before an application to compel is brought. Indeed, in my view it is implicit in the language used that all he was saying was that an affidavit should be filed by the time the application to compel is heard. That, of course, has been done in the present application. I can therefore see no merit in the applicant's submission on costs.

For the foregoing reasons the application is dismissed with costs.

**For the applicant:**

**Instructed by:**

**For the respondent:**

**Instructed by:**  
**Mr A. Vaatz**

**In Person**

**Advocate L C Botes**

**Messrs Engling,  
Stritter &  
Partners**



Case No.: I. 1731/2000  
Case No. I. 485/2001  
Case No.: 1772/2001  
Case No.: 1773/2001  
Case No.: 1732/2000  
Case No.: 1343/2000  
Case No. 1342/2000

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d Court may however have regard to extrinsic evidence properly before court. Applicant/plaintiff attempted to have an additional affidavit filed as extrinsic evidence by referring to it as a "discovery" or "replying" affidavit-such not permissible. Applicant must stand or fall by his/her verifying affidavit.

j  
u Defence of  
d prescription

g raised.  
m Interpretation of phrase "debtor is outside Republic".  
e Not to be interpreted literally. The word  
n impediment as it appears  
t in section 13(1)(i) of Act 68 of 1969 not to  
d be taken too  
o literally.  
c

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