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IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 29/3/2005

CASE NO: 22760/2002

REPORTABLE

In the matter between:

PLATINUM MILE INVESTMENTS  
229 (PTY) LTD

APPLICANT

And

ERNISTUS JOHANNES JACOBUS VISSER

RESPONDENT

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JUDGMENT

RANCHOD, AJ

This is a matter in which the applicant seeks an order to compel the respondent to comply with the applicant's request for further particulars for trial which was served on the respondent on 7 April 2004. For the sake of convenience I will refer to the applicant as the first defendant and the respondent as the plaintiff as they appear in the main action. Prior to service of the request for further particulars for trial on 7 April 2004 the first defendant's attorneys of record forwarded a copy to the respondent's attorneys of record by telefax on 1 April 2004.

The following relief is sought in the application to compel:

1. The respondent is ordered to comply with the applicant's request or further particulars for trial served on the

respondents on 7 April 2004, within a time period as may be determined by this honourable court.

2. The respondent pay the costs of this application;
3. Further and/or alternative relief.

The application was set down for 4 May 2004 on the unopposed roll. This was the same day on which the trial in the main action was to commence. On 4 May 2004 the first defendant argued that the matter should be postponed and that the plaintiff be ordered to pay the wasted costs occasioned by the postponement and also for the costs of the application for postponement. LEGODI AJ (as he then was) granted an order in terms of which the main action was postponed *sine die* and the judgment on costs reserved. Thereafter on 25 May 2004 judgment was delivered in terms of which the plaintiff was ordered to pay the costs of the postponement and also the wasted costs occasioned by the application for postponement. (I should mention that the date on which the learned judge signed the typed judgment is dated 25 April 2004 which clearly appears to be an error and the correct date is 25 May 2004 as the trial date was 4 May 2004 and the file notes indicate that the judgment was delivered on 25 May 2004.) The judgment sets out in detail the background leading to the application to compel further particulars for trial and other issues and I will not repeat it here as it is on record. The

application to compel the furnishing of further particulars for purposes of trial, which was postponed *sine die* on 4 May 2004 was then re-enrolled on the opposed motion court roll by plaintiff's attorneys for 21 September 2004 which was then argued before me. From the plaintiff's counsel's heads of argument it appears that the reason why the plaintiff chose to re-enrol the matter which was originally launched by the first defendant was for the purpose of requesting the court to dismiss the application to compel further particulars for the purposes of trial and to order the first defendant to pay the costs of the application on the scale as between attorney and client. I was also informed by plaintiff's counsel that the judgment delivered by LEGODI AJ was the subject of request for leave to appeal and as at date of this judgment I am not aware of the outcome of that application. It is common cause that to date the plaintiff has not responded to the first defendant's request for further particulars for trial in terms of rule 21 of the rules of this court. As I understand it the plaintiff is of the view that he is not obliged to reply to the request on a number of grounds. Firstly, he alleges that he did not view the first defendant's request in the light of rule 21 as no specific reference was made in the request that it was in terms of rule 21. Secondly, that in any event the plaintiff had provided the answers to the questions contained in the first defendant's rule 21 notice in the form of a pre-trial minute. However, it is also common cause that the pre-trial conference was not

attended by the first defendant's attorneys and the background in this regard is also sketched in LEGODI AJ's judgment. Thirdly, it was alleged that the request for further particulars for trial was viewed by the plaintiff as a pre-trial agenda in terms of rule 37. Fourthly, the plaintiff alleges that the questions contained in the first defendant's request have been answered in the pleadings. Fifthly, the plaintiff alleges that the request for further particulars was not signed by counsel or an attorney with a right of appearance. Plaintiff filed an answering affidavit to the application to compel further particulars for trial and, before the defendant could file a replying affidavit, set the matter down for hearing. I should mention at this stage that the main action was preceded by an application for a declarator that certain piece of land was acquired by the plaintiff by acquisitive prescription, is therefore owned by the plaintiff and also an order declaring that the plaintiff is entitled as against payment of all costs and charges occasioned thereby to transfer the said piece of land into plaintiff's name. The application was opposed by the first defendant and the matter was then referred to trial by VAN DER BYL AJ on 12 March 2003. The following order was made:

1. The matter is referred to trial.
2. The notice of motion shall stand as a simple summons.

3. The first respondent's answering affidavit shall be regarded as a notice of intention to defend.
4. The applicant is granted leave to file a declaration within 15 days from date of this order.
5. That the normal rules of court relating to pleadings and other processing actions applying this matter hence forth.
6. And lastly that the costs of this matter shall be reserved for determination at a trial, including the costs incurred in respect of the opposition of the referral today.

Plaintiff then filed his declaration and first defendant its plea whereafter the pleadings having closed, the first defendant requested the further particulars for purposes of trial. One of the reasons submitted by plaintiff's counsel for plaintiff's failure to furnish an answer to the request for further particulars for trial was that the first defendant's request was not based on the plaintiff's declaration but on allegations that the plaintiff had made in his founding affidavit in support of the main application which was referred to trial. It was further submitted that many of the answers to the questions in the request were in the main application, others were irrelevant, others came down to evidence which the first defendant was seeking and others were nothing other than cross-examination. It was further submitted by plaintiff's counsel that the

reason plaintiff did not regard the request as been a request in terms of rule 21 and rather that it was a request for particulars in terms of rule 37(3) is that all questions that are asked at a pre-trial conference relating to the merits are nothing other than a request for particulars for the purposes of trial. I will revert to this later. Plaintiff's counsel further submitted that before the first defendant launched the present application it was already in possession of answers to its request for further particulars for purposes of trial because the plaintiff had already prepared a draft pre-trial minute, which was in effect nothing other than an agenda for a pre-trial, which had been sent to the defendant on 28 April 2004, i.e. before the trial date of 4 May 2004. It was argued that accordingly the defendant was already in possession of the answers or particulars that it sought.

Plaintiff then held a pre-trial conference in the absence of the first defendant and the details or the background leading up to the holding of the pre-trial without the first defendant being present are also set out in LEGODI AJ's judgment and I will therefore not repeat it here. Counsel for plaintiff submitted that the minutes of the pre-trial conference contained the answers to the first defendant's request for further particulars and these minutes had been sent or delivered to the first defendant on 30 April 2004.

Rule 21 of the Uniform Rules of Court provides:

- “(1) ...
- (2) 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 of receipt thereof.
- (3) The request for further particulars for trial and the reply thereto shall, save where the parties are litigating in person, be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Rights of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney.
- (4) 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 or for the dismissal of the action or the striking out of the

defence, whereupon the court may make such order as to it seems meet.

- (5) 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.”

In my view the submissions by the plaintiff for his failure to provide a formal answer to the first defendant’s request for further particulars for trial cannot be sustained. Sub-rule (5) of rule 21 makes it clear that the court shall *mero motu* consider whether the request for further particulars were strictly necessary and may even make a punitive costs order if it finds that the request was unnecessary. To my mind, plaintiff should have furnished a reply and thereafter at the conclusion of the trial request the court to make an appropriate order for costs. Plaintiff has taken upon himself the function of determining whether the defendant’s request for further particulars were strictly necessary which function should have been left to the court in terms of sub-rule (5).



The argument that it could not be determined from the request whether it was a request for further particulars for purposes of trial in terms of rule 21 because no reference to rule 21 was made in the request can also not be sustained. The heading is clear and it states:

“Request for further particulars for purposes of trial.”

It is disingenuous to suggest that it could not be determined whether this was a request in terms of rule 21.

I turn then to the argument that only the defendant’s attorney had signed the request and counsel had not signed it. With effect from 1 July 1996 provision was made for the signing of request for further particulars and replies thereto by attorneys who have been granted the right of appearance in the High Court in terms of section 4 of the Right of Appearance in Courts Act 62 of 1995. In my view, if the plaintiff’s attorney had any doubt about the first defendant’s attorneys’ authority to sign the request, a simple enquiry by letter would have resolved the issue. In any event from the papers it is clear that the attorney for the defendant has the required authority in terms of the Right of Appearance Act.

That the plaintiff considered the request for further particulars for trial as an agenda for the holding of a pre-trial is also disingenuous, given the heading to the request which makes it clear that it is a request for further particulars for trial and not an agenda or questions to be asked at the pre-trial conference.

Lastly, I turn to plaintiff's submission that the information requested in the request for further particulars for purposes of trial was already in the possession of first defendant's attorneys. In my view, the plaintiff should have replied to the request and state that specifically in his reply. He could have then invoked the provisions of rule 21(5) at the close of the trial. I accordingly make the following order:

1. The plaintiff is ordered to furnish a reply to the first defendant's request for further particulars for purposes of trial within ten days from date of service of this order upon the plaintiff's attorneys by first defendant's attorneys;
2. The costs of the application to compel further particulars for purposes of trial be paid by the plaintiff.

N RANCHOD

ACTING JUDGE OF THE HIGH COURT

22760/2002

Heard on: 04/12/2002

For the Applicant: Adv A B Rossouw

Instructed by: Ben Bekker Att

For the Respondents: Adv L G van Tonder

Instructed by: L G Mostert & Co

Date of Judgment: 29/03/2005