

SOUTH AFRICA / JUDGMENT

## African Dynamics Group (Pty) Ltd v Uptown Trading 492 CC (48448/18) [2019] ZAGPPHC 457 (27 August 2019) [2019] ZAGPPHC 457

COURT

North Gauteng High Court, Pretoria

BEFORE

N N Barn

CASE / FILE NUMBER

48448/18

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### Source record

REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH  
AFRICA  
GAUTENG DIVISION, PRETORIA  
(1)

REPORTABLE: NO  
/  
YES  
(2)  
OF  
INTEREST TO OTHER JUDGES: NO  
/ YES  
(3)  
REVISED.  
CASE NO: 48448/18  
27/8/2019

In the matter of: AFRICAN  
DYNAMICS GROUP (PTY) LTD  
APPLICANT  
and  
UPTOWN  
TRADING 492 CC  
RESPONDENT

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**JUDGEMENT**

N N Barn AJ

**A. Introduction**

1. This is an interlocutory application for an order declaring that Rule 35 {13) of the Uniform Rules is applicable to the underlying proceedings launched by the present applicant, to liquidate the respondent. In terms of its notice of motion, applicant seeks a further order directing that respondent comply with its notice in terms of Rule 35 (14), which was served on respondent's attorneys on 8 November 2018.
2. From the preceding paragraph, it is apparent that this application was preceded by the notice in terms of Rule 35 (14) through which

applicant sought that the respondent make available for inspection a document described as:

'A printout of the payment history of all payments made by the Department of Education, Gauteng Province, to the Respondent in respect of goods delivered and services rendered under any School Feeding Tender Contract GT/GDE/075/2016.'

3. Respondent ignored the notice for reasons I will soon deal with.

B.

**Background**

4. The background can be briefly stated as follows: During July 2018 applicant launched proceedings to place the respondent under liquidation on the basis that the latter was unable to pay its debts, following an alleged demand served upon respondent in terms of section 69 (1) (a)[1] of the provisions of the Close Corporations Act.[2] The respondent resisted the application taking various points in limine. Amongst the points in limine was respondent's denial of the applicant's locus standi as a creditor.
5. It is apparent from the record that against a demand made by the applicant for payment of an amount of R821 659, which it alleges is owed by the respondent, the latter, pointing to a statement[3] raised by the applicant, requested source documents to understand how the opening balance of R749 378.50 as at 1 March 2018 had been arrived at. In short, from about April/May 2018 according to the record, applicant knew that the respondent disputed the indebtedness.

When the liquidation proceedings were served upon the respondent, it persisted with the denial.

6. The history which gave rise to the debt had to do with a contractual relationship in terms of which the applicant supplied food to the respondent to enable the latter to discharge its obligations, in a Feeding Scheme contract it had been awarded by the Gauteng Provincial Department of Education. Applicant states that it would, from to time, render invoices to the

respondent. Such invoices were not paid in full. Determined to recover the outstanding amount, applicant made demands which were not met, with the respondent refuting applicant's claims that it (respondent) was indebted to it, leading to the underlying liquidation proceedings.

### C. Applicant's case

7. In these proceedings, applicant contends that the respondent's defence is a sham. In order to thwart the sham defence, applicant served the Rule 35 (14) notice. It further averred that the Department of Education has a history of payments made to each successful tender applicant. What one reads from this submission is that it is open to the respondent to obtain the printout.
8. Applicant further averred that it had written to the Department of Education to request the printout but the department would not release it as the respondent blocked it by invoking the provisions of section 36 (1) (a-c) of the Promotion of Administrative Justice Act[4] (PAIA). The resistance by the respondent, it is suggested, indicates that the respondent is aware that its defence will fail upon production of the document or, will result in the applicant having to withdraw the liquidation application and institute an action.
9. Applicant further states that it would not be in the interests of justice to first request the court to make an order that Rule 35 (14) apply and only thereafter serve the notice on respondent as the latter might simply refrain from responding. This could lead to the applicant having to launch another application to compel the respondents to comply with the notice, resulting in unnecessary delay.
10. Finally, applicant suggests that the court look at substance rather than form; and, in any event, the court has the inherent discretion to regulate its own proceedings.
11. During argument, the history of the parties' relationship was first sketched out briefly, with reference to one or two of the respondent's contractual duties. For example, respondent was, in terms of its underlying contract, required to diligently collect payments or proof of payment from the relevant departments as soon as claims had been submitted, and to ensure that payments are banked into the applicant's bank account within two working days from receipt of payment from the department. Also, in terms of the underlying contract, respondents were obliged to submit copies of the above-mentioned documents to the applicants on a weekly basis. The respondents have countered this submission, stating that they had a choice between collecting proof of payment or effecting payment and so they chose the latter.
12. Relying on several relevant cases, applicant submitted that the provisions of Rule 35 apply to applications in so far as the court may direct and it further acknowledged that the rule (Rule 35 (13)) should be applied only in exceptional circumstances. Applicant then listed a number of factors which it suggested the court should consider as exceptional circumstances, such as:

- a) the nature of the defence;
- b) the relevance of the document;
- c) whether or not the application is a fishing expedition;
- d) that their claim is for a substantial amount of money; and more.

#### D Respondent's case

13. The main contentions advanced by the respondents are that:

- (a) It was improper of the applicant to serve a demand in terms of Rule 35 (14) on it prior to the order of the court in terms of Rule 35 (13);
- (a) It is equally improper to bring an application under Rule 35 (13) at the same time with an application to compel a reply under rule 35 (14);
- (b) Applicants have a duty to demonstrate to the court that exceptional circumstances warrant an order in terms of Rule 35 (13) and that justice cannot be served unless the relief is granted. In their view, applicants had failed to discharge such duty.
- (c) The tape, document or recording envisaged must be relevant to a reasonably anticipated issue in the action. It was submitted on

behalf of respondent that it is common cause that the issue/s in the main application are, firstly, the respondent's indebtedness to the applicant or the absence thereof and, secondly, whether or not the respondent is able to pay its debts. In the circumstances, a printout of a schedule of payments made by the Department of Education will not address the issues of whether the respondent is indebted to the applicant, nor will it address whether the respondent is able to pay its debts and is therefore irrelevant.

#### D. The law

14. Having perused the various authorities in this area, it would appear that where discovery would be material to the proper conduct and fair determination of a matter, courts have not hesitated to order it. I consider it opportune to now refer to the relevant rules: Rule 35 provides:

"(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof."

"(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications".

"(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof".

15. The applicant, on its own version, served the respondent with the notice in terms 35 (14) without first seeking an order in terms of 35 (13). If my comprehension of applicant's submissions during argument are correct, applicant suggests to the court that its failure to comply with Rule 35 (13) should be ignored and that the court should look at substance and not form. A further argument was that the court should use its inherent powers and order respondent to comply with the irregular notice in terms of Rule 35

(14) on the basis that rules exist for the court and not the other way round. In other words, the court's imprimatur is sought to endorse applicant's non-compliance with the rules, based on an argument that it will be in the interests of justice and that it will avoid further delay.

16. A look at relevant authorities suggests that such proposition is not likely to succeed. In *Naidoo and Another v Ferreiras (Pty) Limited*[5] where the court was faced with the exact same situation of applicants who had failed to comply with Rule 35 (13), the court had the following to say:... 'Rule 35(13), is a requirement for a party to engage in such an action. Southwood J, at 74F-H of *Loretz v Mackenzie*[6] (supra) said:

"It is clear that the Uniform Rules of Court do make provision for the provisions of rule 35 relating to discovery to apply to applications. But this is clearly and unequivocally stated to be subject to the proviso that the Court direct that this be so. The applicant's first argument requires that the clear wording of the Rule 'insofar as the Court may direct' be ignored. This clearly cannot be done and no authority for so doing was referred to....."(33). The applicants, clearly did not comply with Rule 35(13) and this means that they were not entitled to proceed with the Rule 35 (14) Notice. The direction and permission the rule makes provision for has not been obtained." (own emphasis)...

17. In *Investec Bank Ltd v Blumenthal NO and Others*[7], the court, dealing with a situation such as the present noted as follows:

"There were three controversies between the parties:

a) In the absence of an order by the Court in terms of Rule 35(13) is there an obligation to respond to a demand for discovery under Rule 35(14)?..... ..The application can be disposed of on the first issue alone. It is improper to serve a demand under Rule 35(14) before an order has been made under Rule 35(13)... That result is plain from two judgments by Southwood J. (See *Loretz v Mackenzie* (T); and *Afrisun Mpumalanga (Pty) Limited v Kunene N.O. & Others*[8] . This proposition is in my view unassailable upon a proper interpretation of Rule 35(13). In *Saunders Valve Co Ltd v Insamcor ( Pty) Ltd*[9] such a preliminary application was brought... There is therefore no room for applications to be brought at the same time under Rule 35(13) for leave to procure discovery, and to compel a

reply to a Rule 35(14) request.' (own emphasis)

18. The authorities cited in the preceding paragraphs demonstrate that applicant's choice of first serving the Rule 35 (14) was not a wise one. Its conduct is impermissible according to the aforementioned authorities. A similar conclusion obtains in respect of the applicant's choice of bringing the two applications (Rule 35 (13) and (14)) at the same time. The deduction to be drawn, on this point alone, is that applicant does not succeed on the relief it seeks.
19. Before one looks at the subsequent objections raised by the respondent, a comment is warranted in relation to the ease with which applicant decided to invite the court's assistance in seeking to invoke this procedure. It appears to this court that the situation may not have been properly thought out. This is not a provision to be likely invoked, in particular by applicants in underlying proceedings, as it is the case here. Instead of looking at other means to overcome what it calls a ruse or skirmish, applicant simply chose to proceed by means of the present application. In *Lewis Group Limited v Woollan and Others*[10], the court, referring to the comments in *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others*[11] noted:

'.. ...by contrast, an application for discovery in motion proceedings was dismissed, amongst various reasons because it was sought in proceedings that were only incidental to the principal proceedings between the parties. Thring J made the following observations in that respect (at p.513H-I) '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 for 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 or it will lose its edge and become debased. It seems to me that, generally speaking, its employment should be confined to cases where parties are properly before the Court and are litigating at full stretch, so to speak. It is not intended to be used as a sniping weapon in preliminary skirmishes, such as the main application in this matter is, unless there are exceptional circumstances present'.

Whether applicant has shown exceptional circumstances

20. It was submitted on behalf of the applicant that exceptional circumstances are to be evaluated within the broader context of the values of fairness, equity, openness and transparency[12]. The exceptional circumstances cited by the applicant are:
21.
  - (a) the substantial amount owed by the respondent;
  - (a)that the respondents had raised a bare denial or sham defence;
  - (c) that the printout was essential to counter what is seen by the applicants as a ruse;

- (d) and that the applicant could not have anticipated that the respondent would attempt to mislead the court and raise a dispute of fact where none exists.
- 22. Applicant contended that in the event the defence was bona fide, respondent would have annexed the payment history from the Department of Education to its papers.
- 23. The history of this matter suggests that the amount was denied by the respondents from as early as April/ May
- 2018. That, on its own, does not make the dispute any more genuine. Having said this, it must be understood from the applicant's case that the relationship between the parties was essentially about the supply of food as and when ordered by the respondent to enable the latter to perform its obligations in terms of various Feeding Scheme Tenders as awarded to it from time to time. Each time the respondent secured a tender, the parties would sign a fresh agreement. Viewed against this background, the dispute that has arisen between the parties is not a matter of rocket science that it cannot be overcome by delivery notes signed by the respondent or any of its representatives, along with a reconciliation of payments made against each invoice raised pertaining to the various orders. Applicant has not said in its papers that it does not have such records from its own accounting systems. Based on the aforesaid, it becomes a matter of logic that the applicant failed to demonstrate the existence of exceptional circumstances.
- 24. According to the court in *Free state Steam & Electrical CC v Minister of Public Works and Others*[13] , the factors that the court has to consider when deciding whether exceptional circumstances exist are set out in *LTC Harms, Civil*

Procedure in the Superior Courts, at p 8253: They include, inter alia:

- (a) the discretionary nature of the relief;
  - (b) whether the applicant for discovery is the applicant or respondent in the main matter;
  - (c) the stage of the proceedings
  - (d) the nature of the matter and the evidence adduced.
25. The point was made in *Investec*[14], that discovery is not a tool to enable a party to draw the battle lines and discover factual issues.....

'In *SIT Sales (Pty) Ltd v Fourie* 2010 (6) SA 273 (SGJ). Lamont J dealt with an applicant's attempt to use Rule 35(13) to procure documents in a dispute over the wrongful use of confidential information and technology. He expressed the view that discovery was inappropriate until all the legal issues had been clarified. He summed up the purpose of discovery thus:

"[14] In trial proceedings the legal issues existing between the parties are apparent once the pleadings are closed.....

"[16] The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established."

'[22] The remarks of Lamont J are especially important because they address the forensic function of discovery, not merely considerations about the interests sought to be served by the invocation of one or another legal device. This approach, in my view, must be the appropriate point of departure for any enquiry as to the propriety of an exceptional procedure as in Rule 35(13). The examples cited above where respondents were granted the opportunity to obtain discovery were premised on demonstrating that a clear prejudice would result without such relief.'

26. From the beginning, applicant knew that there was a dispute raised by the respondent regarding how it had arrived at its opening balance of the statement of 1 March 2018. When applicant launched liquidation proceedings, it was met with the same defence. Now applicant is before this court seeking an order in terms of 35 (13) citing, inter alia, the size of the debt allegedly owed and failure to anticipate that the respondent would dispute the debt. Without a statement that the applicant has no other means in its possession to overcome what it calls, a sham defence, I see no need to read anything further in these statements other than to conclude that there must be other means at applicant's disposal to demonstrate respondent's indebtedness. The result is, there is no material from which to conclude that an injustice would result or that the matter would not be fairly determined without the desired discovery. Accordingly, applicant has failed to discharge the burden of demonstrating exceptional circumstances. The application then must fail.
27. It is accordingly not necessary to decide on the third issue of whether the tape/record or document is relevant to a reasonably anticipated issue.

Order

28. The application for orders in terms of Rule 35 (13) and Rule 35 (14) is dismissed with costs.

N N BAM

ACTING JUDGE OF THE HIGH

COURT, GAUTENG DIVISION,

RETORIA

APPEARANCES

DATE OF HEARING

:14 August 2019

DATE OF JUDGMENT

: 27 AUGUST 2019

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OLIVETTI BUILDING CNR SOPIE DE

BRUYN & PRETORIUS STREETS, PRETORIA

[1] '69. Circumstances under which corporation deemed unable to pay debts:(1) For the purposes of sec- ion 68 (c) a corporation

shall be deemed to be unable to pay its debts, if- a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less (a) than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the

corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound

for it to the reasonable satisfaction of the creditor:

[1] '69. Circumstances under which corporation deemed unable to pay debts:(1) For the purposes of sec- ion 68 (c) a corporation

shall be deemed to be unable to pay its debts, if-

a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less

(a)

than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the

corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound

for it to the reasonable satisfaction of the creditor:

[2] Act 69 of 1984

- 
- [3] This is the statement relied upon by applicant to demonstrate respondent's indebtedness. The document is not paginated but simply attached to an unattested statement meant to support applicant's application for liquidation.
- [4] Act 2 of 2000
- [5] (69094/2014) [2016] ZAGPPHC 897 (9 September 2016 para 20
- [6] 1999 (2) SA 72 (T) at 74G
- [7] 2011/11222) [2012] ZAGPJHC 21 (5 March 2012) para 4-7
- [8] 1999 (2) SA 599 (T) at 6128 -0
- [9] 1985 (1) SA 144 (T) AT 148 C
- [10] Lewis *supra*, para 7
- [11] 1999 (3) SA 500 (C),
- [12] Firststrand Bank Ltd t/a Wesbank v Manhattan (Operations (pty) Ltd, & O 2013 (5) SA 238 (GSJ)
- [13] (7810/2008) [2008] ZAGPHC 256 (18 August 2008)
- [14] see note 8 *supra*
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