

SOUTH AFRICA / JUDGMENT

ALG Boerdery (Pty) Ltd and Another v Van Heerden and Others (2699/2023) [2023] ZAWCHC 145 (14 June 2023)

[2023] ZAWCHC 145**COURT**

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

2699/2023

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Source record**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)****Case No: 2699/2023**

In the matter between:

ALG
BOERDERY (PTY) LTD
First
Applicant
GERRIT
ERASMUS VAN DER MERWE
Second
Applicant
and
HILDA
JOHANNA VAN HEERDEN
First
Respondent
JOHANNES
STEPHANUS SPAMER
Second
Respondent
HERMAN
BESTER N.O.
Third
Respondent
HILBER
(PTY) LTD
Fourth
Respondent

HILBER
II (PTY) LTD
Fifth
Respondent
HILDA
JOHANNA VAN HEERDEN N.O.
Sixth
Respondent
HENDRIK
PETRUS VOS N.O.
Seventh
Respondent
KARIN
LINDA DREYER N.O.
Eighth
Respondent

Coram: Justice J Cloete
Heard: 12 June 2023
Delivered
electronically: 14 June 2023

JUDGMENT

CLOETE J:

- [1] This is an opposed interlocutory application for relief in terms of uniform rule 35(14). It is brought at the instance of the first and fifth to eighth respondents in the main application set down for hearing on 30 August 2023, to compel the first and second applicants in that application to produce a host of documents. The main application is opposed by these respondents along with the second respondent.
- [2] The reason is described in the rule 35(14) notice preceding the current application as being ‘for purposes of pleading, the following documents [are required] which are relevant to a reasonably anticipated issue...’. For convenience, and save where otherwise indicated the first and fifth to eight respondents are referred to herein as “the respondents” and the first and second applicants as “the applicants”.
- [3] In the main application the applicants seek the court’s declaration that: (a) the appointment of the second respondent (“Spamer”) as director of the fourth respondent (“Hilber”) on 12 December 2022 is void; (b) the resolution taken on 16 January 2023 to place Hilber in business rescue is void; (c) consequently, the appointment of the third respondent (“Bester”) as business rescue practitioner (“BRP”) is void; and (d) business rescue in respect of Hilber did not commence.

[4] At this stage only the founding affidavit in the main application is before the court since the respondents maintain they require the documents listed in their rule 35(14) notice to prepare their answering affidavit. Perusal of that founding affidavit reveals the following:

4.1 It contains 101 paragraphs. Of these, paragraphs 51 to 76 (“the relevant paragraphs”) deal with the issues which the later court must determine. The remaining paragraphs provide historical and other context and/or deal with matters which arose subsequent to the events giving rise to the issues;[1] and

4.2 In the relevant paragraphs reliance is placed on the proper interpretation of a certain clause(s) in a joint venture agreement in relation to Spamer’s challenged appointment, which is a matter of law and not fact;[2] and statutory provisions pertaining to the impugned business rescue resolution and subsequent appointment of the BRP. Annexed are documents and correspondence upon which the applicants rely in support of their averments in the relevant paragraphs.

[5] Accordingly, despite the parties’ competing versions in relation to their overall disputes (evident from the founding affidavit in the main application and advanced in substantial part to motivate urgency, which is the basis upon which that application was initially brought), it is evident that any factual dispute(s) which may arise from the answering affidavit in relation to the relevant paragraphs will have limited impact on the legal issues which the later court must determine.

[6] This is borne out by the fact that a sole paragraph in the rule 35(14) notice – i.e. paragraph 74 – deals with the relevant paragraphs. It refers to paragraph 61 of the founding affidavit as well as annexure FA14 thereto, and reads ‘copies of the following documents requested in Annexure FA14’. No documents are separately listed but, on the assumption that paragraphs 75 to 79 of that notice – which fall under the

subheading ‘Ad paragraph 96.6 of the founding affidavit’ – were intended to refer to those documents, they are itemised therein as follows:

‘75. A list reflecting the creditors of Hilber.

76. Copies of any and all responses by the applicants to the e-mail, Annexure FA14.

77. Copies of any agreements as set out in paragraph 1 of the e-mail.

78. Copies of any agreements as set out in paragraph 2 of the e-mail.

79. Copies of any agreements as set out in paragraph 3 of the e-mail.’

- [7] Annexure FA14 to the founding affidavit is an email from the first respondent (“Van Heerden”) to the second applicant (“Van der Merwe”) dated 12 January 2023 requesting certain financial documentation and information in relation to Hilber, seemingly for purposes of the shareholders/directors meeting scheduled for 16 January 2023. At all relevant times Van Heerden and Van der Merwe were co-directors of Hilber until Spamer was also purportedly appointed as such on 12 December 2022.
- [8] This email was thus sent by Van Heerden to Van der Merwe after the impugned appointment of Spamer on 12 December 2022 and any documents sought therein cannot be relevant to such appointment. In addition, according to Spamer (who is the deponent to both the main and replying affidavits in the current application) that information and documentation (amongst others) has never been provided to Van Heerden. The relevance of this allegation is that on 16 January 2023, Van Heerden nonetheless signed the impugned resolution to place Hilber in business rescue in terms of s 129 of the Companies Act[3] i.e. on the basis that the board of directors had reasonable grounds to believe Hilber was financially distressed and there was a reasonable prospect of rescuing it.
- [9] It is not in dispute that this resolution was taken at a time when Van der Merwe was no longer in attendance at that meeting. It thus stands to reason that Van Heerden (and Spamer) must already have had information and documentation in their possession which they considered sufficient to conclude that business rescue, due to financial distress, was the appropriate option for Hilber. In these circumstances, I do not see how documents produced ex post facto can be of any relevance to the taking of that resolution. Further, it should also be self-evident that these documents have no relevance to Van Heerden’s subsequent appointment of Bester as BRP.
- [10] Put differently, the documents requested in the rule 35(14) notice for determination of the issues by a later court are neither essential nor material to the ‘proper conduct and fair determination of the case’ which the respondents are required to meet. As stated in *Lewis Group Ltd v Woollam (2)*[4]:

‘[4] Rule 35, which regulates the discovery procedure in general civil litigation, is primarily applicable in action proceedings. Rule 35(13) provides, however, that “The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications”. The fact that, differently to the position in respect of actions, a party seeking discovery in motion proceedings is able to obtain it only insofar as the court might direct points to the availability of the procedure in applications as being out of the ordinary, and, to that extent, exceptional. Indeed, in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979

- (2) SA 457 (W) at 470D-E, Botha J remarked:

“In application proceedings we know that discovery is a very, very rare and unusual procedure to be used and I have no doubt that that is a sound practice and it is only in exceptional circumstances, in my view, that discovery should be ordered in application proceedings.”

[5] In Moulded Components, the learned Judge declined the request to make the procedure applicable for a number of reasons, including the failure of the

party seeking discovery to have sought the documents concerned earlier, the danger that acceding to the request could lead to an

unwholesome widening of the ambit of the proceedings, the limited relevance of the documents sought, the wide form in which the relief was sought and the court’s perception that the contemplated exercise would be something of a “fishing expedition”.

The court’s reasoning confirms that the determination of an application for discovery in motion proceedings proceeds upon an examination of the request with reference to its particular content assessed in the context of the peculiar characteristics of the litigation and mindful of the premise that the request should, as a matter of policy, be granted only exceptionally.

[6] The pertinent principles have been rehearsed in a number of other reported judgments, notably *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985

(1) SA 146 (T), *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003

(6) SA 190 (SE), *STT Sales (Pty) Ltd v Fourie and others* 2010 (6) SA 272 (GSJ) and *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ). It seems to me that the essential criterion is whether discovery would be material to the proper conduct and fair

determination

of the case.’

[11] In support of the rule 35(14) relief Spamer also explicitly stated (in the replying affidavit) that ‘[i]t has become even more important that the parties’ disputes be determined once and for all to avoid a multiplicity of applications

and actions and the Respondents therefore intend to bring all the issues/disputes before this Court for determination’. That is a course of action open to the respondents, but not in the context of a rule 35(14) application, as was made clear in *Ingledeu v Financial Services Board*: [5]

‘[15] Both section 32(1)(a) [of the Constitution] and rule 35(14) confer a right to obtain information. However, section 32 confers a general and an unqualified right to information. By contrast, the subrule confers a limited right. It can only be invoked during litigation by a litigant after appearance to defend an action has been entered and its terms unequivocally limit the nature of the documents and tape recordings covered by the rule to those “relevant to a reasonably anticipated issue in an action” and further limits the documents in question to those required “for purposes of pleading”. There is no reasonable constitutional construction of the

rule that could broaden such purpose to accommodate the construction of it contended for by the applicant. Accordingly, the subrule grants a right to information that is narrower, to that extent, than the right in section 32(1)(a).'

[12] The same applies to any contemplated counter-application, as was held in *Quayside Fish Suppliers CC v Irvin & Johnson Ltd*:^[6]

'[16] Mr Burger, who appeared for the applicant, submitted that the *Cullinan Holdings* case was wrongly decided. Mr Burger contended that the interpretation attributed to Rule 35(14) by *Van Dijkhorst J* effectively renders the Rule inoperative. I cannot agree with this submission. Rule 35(14) is limited in application and is aimed at operating only in the very specific circumstances set out in the Rule. To interpret it more widely would make inroads into the general principle that prior to the institution of an action a party cannot snoop around other people's books. See, too, *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999

(3) SA 500 (C) at 515B-I. In my view, the issues pending between the parties are those reflected in the pleadings. What the applicant is asking me to do is to permit it to search amongst the documents of the respondent to find out whether or not it has an additional or alternative counterclaim against the respondent. If this is what Rule 35(14) contemplates, it will give a plaintiff in reconvention a right

which a plaintiff in convention does not have. The legislature could never have envisaged that once appearance to defend has been entered to a claim in convention it would give a plaintiff in reconvention carte blanche to ask for the production of documents to establish whether he/she has a legal or factual foundation to formulate a claim in reconvention.'

[13] During argument counsel for the respondents developed their contention that the applicants seek in the main application to have the business rescue resolution set aside under s 130(1) (a) of the Companies Act, and it is for this reason that some of the documents required to be produced will assist in determining whether or not Hilber is indeed financially distressed. However as pointed out by counsel for the applicants this fundamentally misconstrues the basis of the relief claimed in the main application. In *Panamo Properties v Nel*^[7] the court put it as follows:

'[22] Counsel derived support for the first submission from *D H Brothers*, where a resolution to commence business rescue was passed without the board of directors being properly constituted. The court said that this amounted to a failure to comply with the procedural requirements of s 129(1) of the Act. In my view that was incorrect. The consequence of the board not having been properly constituted, (which was not what occurred in the present case), would be that the resolution was not a resolution of the board of directors. As such it was a nullity and ineffective for the purpose of commencing business rescue proceedings. Equally, in the absence of such a resolution, there was nothing to set aside in terms of s 130(1)(a)(iii)...

[14] In the result the following order is made:

1. The interlocutory rule 35(14) application is dismissed with costs, including the costs of two counsel where so employed, such costs to be paid jointly and severally by the first and fifth to eighth respondents; and
2. The first, second and fifth to eighth respondents in the main application set down for hearing on 30 August 2023 shall deliver their answering affidavit(s), if any, within ten (10) court days from date hereof.

J I CLOETE

For 1st and 5th to 8th respondents in the main application: Adv R W F MacWilliam SC Instructed by: Spamer Triebel Inc. (JS Spamer) For 1st and 2nd applicants in the main application: Adv I J Muller SC and Adv H Du Toit Instructed by: Van der Spuy & Partners (CH Van Breda)

[1] See Rail Commuters' Action Group v Transnet Ltd 2006

(6) SA 68 (C) at 84B and G.

[2] KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009

(4) SA 399 (SCA) at para [39].

[3] No 71 of 2008.

[4] [2017] All SA 231 (WCC)

[5]

[2003] ZACC 8; 2003

(4) SA 584 (CC) at para [15].

[6] 2000

(2) SA 529 (CPD) at para [16], cited with approval in Ingledew (supra) at para [15].

[7] 2015

(5) SA 63 (SCA) at para [22].

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