

SOUTH AFRICA / JUDGMENT

Fourie N.O and Others v Bosch and Others (56027/2020) [2021] ZAGPPHC 553 (27 August 2021)

[2021] ZAGPPHC 553

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

56027/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 56027/2020

DATE:

27 August 2021

JACOBUS

PETRUS FOURIE

N.O.

First Applicant

RICHARD

KEAY POLLOCK

N.O.

Second Applicant

MARGARET

GONDORA

N.O.

Third Applicant

[In

their capacities as joint provisional liquidators of

HJ

Bosch and Seuns Motors (Pty) Ltd (in liquidation)

With

registration number 1969/012109/07]

V

HENDRIK

JOHAN
BOSCH
First Respondent
CHRISTINE
BOSCH
Second Respondent
THE
MASTER OF THE HIGH COURT,
PRETORIA
Third Respondent

JUDGMENT

MABUSE J

- [1] On 24 May 2021 I dismissed, with costs the First Respondent's application in terms of Rules 30A and 35(13) and due to time constraints, did not furnish reasons. These are therefore reasons for the order that I made on 24 May
2021. On 6 November 2020 this Court granted an order in terms of which the First Respondent, Hendrik Johan Bosch ("Bosch") was placed under provisional sequestration following an urgent application lodged by the joint liquidators ("the liquidators") of HJ Bosch and Seuns Motors (Pty) Ltd in liquidation ("HJB"). This order was granted upon the parties having filed all the relevant affidavits.
- [2] The order that was granted on 6 November 2020 was returnable and the Rule Nisi was extended on various previous occasions, inter alia, 2 March 2021.
- [3] On 23 February 2021 Bosch delivered a notice wherein he sought, from the liquidators, the production of a litany of documents under the auspices of Uniform Rule 35(12) of the Uniform Rules of Court. In response the liquidators delivered, on 24 February 2021, some documents to the Respondents and refused to deliver the rest by reason of the fact that such documents had not been mentioned in the answering affidavit of the main application. Disgruntled by the refusal of the liquidators to comply fully with his request in terms of Rule 35(12), on 13 March 2021 Bosch brought an application in terms of Rule 30A and Rule 35(13) to order the production of the documents sought in terms of Rule 35(12). The said application is opposed by the liquidators who have for that purpose delivered an opposing affidavit. In terms of the said Rules the Respondents applied to Court for an order in the following terms:

"1. that the First, Second and Third Respondents be compelled to grant access to the documents requested in the notice in terms of Rule 35(12) dated 17 February 2021;

2. alternatively, that it be directed that the rules pertaining to discovery be made applicable mutatis mutandis to the application for the Applicants' sequestration under the above case number;
3. that the notice in terms of Rule 35(12) stands as a notice in terms of Rule 35(3);
4. that the First, Second and Third Respondents be compelled to provide access to the documents requested in terms of notice in terms of Rule 35(12) delivered on 12 February 2021;
5. that the First, Second and Third Respondents pay the costs of the application, alternatively that whosoever opposes the application pay the costs occasioned by the opposition thereto."

The application in terms of Rule 30A and 35(13) was predicated on the founding affidavit deposed to by Bosch.

- [4] The liquidators delivered an answering affidavit deposed to by Jacobus Petrus Fourie (Fourie), a major male insolvency practitioner. He confirmed in the answering affidavit that the Applicants had refused to supply the Respondents with certain documents. He raised two points in limine against the application to compel compliance. The first point in limine that they raised against the Application to compel was that Rule 35(12) is not applicable in this matter and that the relief sought was incompetent. He has been advised that Rule 35(12) makes no provision to produce documents to which reference is not made in the pleadings or affidavits. He pointed out that none of the documents sought by Bosch has been referred to in any of the affidavits deposed to by the liquidators in the main application for sequestration and for that reason the provisions of 35(12) are not applicable. Bosch was accordingly advised that the documents sought by the Respondents in terms of Rule 35(12) could not be produced by the liquidators. Bosch was informed that his attempts to invoke Rule 30(A) as a mechanism to compel compliance with Uniform Rule 35(12) was bad in law and constituted a patent abuse of the Court processes which warranted an outright dismissal of the application together with a punitive order for costs.
- [5] Bosch delivered a replying affidavit in which he disputed the statement by Fourie, the deponent to the liquidators' answering affidavit in the Rule 30A and 35(12) application that he has been advised that Uniform Rule 35(12) makes provision to produce documents to which reference has been made in pleadings or affidavits only. Bosch disputes furthermore the statement by Fourie that the documents sought by him have not been mentioned or referred to in any of the affidavits deposed to by the liquidators. Rule 35(12) of the Uniform Rules of Court provides that:

“35(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near 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. Any party failing to comply with such notice shall not, save with leave of the court, use such document or tape recording in such proceeding provided that any other party may such the document or tape recording.”

- [6] The second point in limine that the Applicants raised was that the relief sought was incompetent. In prayers 2-4 of the notice of motion in the interlocutory application, Bosch sought the relief, in the alternative to the above, to the effect that the Rules of discovery be made applicable to the application as contemplated by Rule 35(13); that the notice in terms of Rule 35(12) should stand as a notice in terms of Rule 35(3) and that the liquidators be compelled to produce the said document. It was argued on behalf of the liquidators that this was indicative of Bosch's obstinate refusal to accurately apply the Rules.
- [7] Rule 35(13) clearly states that although the provisions of Rule 35 relating to discovery apply to applications mutatis mutandis, such application is subject to the proviso that the Court direct it be so. There must accordingly, first be a finding by a Court in terms of Rule 35(13). An order in terms of Rule 35(13) is also not for the mere asking. Discovery in application proceedings is rare and unusual and only ordered when exceptional circumstances are demonstrated to exist. In this case such exceptional circumstances have not even been suggested in the founding affidavit that are adequately addressed. Bosch has therefore failed to make any case at all for an order in terms of prayer 2 of the notice of motion.
- [8] The Court's direction in terms of Rule 35(13) is a pre-requisite for a notice in terms of sub-rule
- (1) as well as a pre-requisite for an application to compel compliance. Accordingly, it follows that a Court cannot compel compliance unless and until the Court makes an order in terms of Rule 35(13) and further unless and until a further notice in terms of Rule 35(1) has been delivered.
- [9] For the following reasons there seems to be some merit in the point in limine raised by the liquidators. Firstly, to succeed with this application to compel, the Respondents must prove that the liquidators have, in their answering affidavit, referred to the documents that they compel the liquidators to deliver. In casu, the Applicants have stated that those documents that the Respondent seek to be delivered have not been mentioned in their answering affidavit in the main application. Accordingly, based on this fact the Respondent should not have brought this application. The second crucial point which they raised, and which is, in my view, a valid point is that Rule 35(13) states that:

“The provisions of this Rule relating to discovery shall mutatis mutandis supply, insofar as the Court may direct, to applications.”

The operative words in this sub-rule are “as far as the Court may direct”. Accordingly, a party may not invoke the provisions of Rule 35(12) unless it has sought and obtained the direction of the Court in terms of Rule 35(13). A party may not, without much ado, deliver a notice in terms of Rule 35(12) without such notice being preceded by the Court’s directions. The judgment of Loretz v McKenzie 1999 (2) SA 72 TPD at 74 F-G comes to mind in respect of this requirement. In the said judgment the Court had the following to say:

“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 clearly and unequivocally stated to be subject to the proviso that the Court direct that this is so. The Applicant’s first argument requires that a 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.”

The reason for Rule 35(12) for requiring a party to first obtain the directive of the Court before invoking the provisions of Rule 35(12) is, according to Botha J, that:

“In application proceedings we know that discovery is a 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 cases, in my view, that discovery should be ordered in application proceedings.”

[10] Adv HC van Zyl, who appeared for the First Respondent, referred the Court, in his heads of argument, to a number of judgments. Some of these judgments support the principle that a litigant may only be requested to produce documents which are referred to by such a party in its pleading or affidavit. This principle was underscored in The Body Corporate of Der Flora Scheme N.O. SS117/1984 v H&M Property Management, the unreported judgment of Cruchfield AJ.

[11] He also referred the Court to The Civil Procedure in the Superior Courts by Harms in particular to a paragraph that deals with Inspection of Documents Referred To In The Pleadings or Affidavits. In this topic the learned author stated that:

“A reference to the document is essential, but the right to inspect is not dependent upon a detailed or descriptive reference to such documents. No distinction is made between documents upon which the proceeding is actually founded and documents possessing merely evidentiary value. The rule is intended to cover the situation where an averment flows from or is related to something contained in the document, and not to an averment based on inference drawn from the absence of any reference in any document. Furthermore, inspection cannot be demanded of documents not referred to by the existence of which can be inferred from affidavit or pleading.”

I think this paragraph speaks for itself. Sub-rule 35(12) authorises the production of documents which are referred in general terms in a party’s pleadings or affidavits. The terms of the sub-rule do not require a detailed or descriptive reference to such documents. The sub-rule creates a prima facie obligation and a party who refers to a document in a pleading or affidavit, to produce such document when called upon to do so in terms of the sub-rule.

- [12] The Court has an inherent power to order a party to produce for inspection documents not referred to in that party's pleading or affidavits and also to order a party to produce for inspection items of machinery, in other words, objects which are not documents. Such inherent power will not, however, be exercised as a matter of course, and only when the Court can be satisfied that justice cannot otherwise be properly done. See in this regard Moulded Components and Rotomoulding case supra.
- [13] It would appear from the authorities that I have been referred to that it is now a crystalized principle of our law that discovery in motion application is not there for the taking and that a party who seeks discovery in such circumstances must approach the Court for directions as set out in the provisions of Rule 35(13). In Loretz v McKenzie the application to compel discovery under these circumstances was dismissed with costs. I see no reason why I should not uphold the points in limine. Accordingly, the Applicant's points in limine are hereby upheld and the following order is made:

The Respondents' application in terms of Rules 30(a) and 35(13) is hereby dismissed, with costs.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:

Adv U van Niekerk

Instructed by:

Vermaak Beeslaar Attorneys

Counsel for the First & Second Respondents:

Adv HC van Zyl

Instructed by:

Brits Pretorius Grobler Attorneys

Date on the opposed roll before Mabuse J:

24 May 2021 & 5 July 2021

Date of Judgment:

27 August 2021

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Prepared on 10 October 2026 · Esheria