

SOUTH AFRICA / JUDGMENT

Naidoo and Another v Ferreiras (Pty) Limited (69094/2014) [2016] ZAGPPHC 897 (9 September 2016) [2016] ZAGPPHC 897

COURT

North Gauteng High Court, Pretoria

BEFORE

W M Msimeki

CASE / FILE NUMBER

69094/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

NORTH

GAUTENG DIVISION, PRETORIA

9/9/16

CASE

NO: 69094/2014

Reportable:

No

Of

interest to other judges: No

Revised.

In

the matter between:

NAIDOO,

VISHNU

KISTENSAMY First

Applicant

REGO,

SAMUEL JORGE DA

SLVA Second

Applicant

and

FERREIRAS

(PTY)

LIMITED Respondent

JUDGMENT

MSIMEKI J,

INTRODUCTION

[1] This is an interlocutory application in which the two applicants seek an order as follows:

"1. Compelling the Respondent/Applicant's compliance with the first and second Respondents' Notice in terms of Rule 35(12) and Rule 35(14).

2. In the alternative to prayer 1 above, an order striking out the Respondent/Applicant's Notice of Motion.

3. Ordering the Respondent/Applicant to pay the costs of this application.

4. Further and/or alternative relief'.

BRIEF BACKGROUND FACTS

[2] The respondent, applicant in the main application, under the same, case number, brought an application against the respondents,

applicants in the interlocutory application, on 29 September 2013, seeking an order for payment to it by the respondent of an amount of R989 000.00; interest thereon at the rate of 15% per annum, a tempora morae to date of final payment and costs. Following the launching of the main application, the respondents delivered a Notice in terms

of Rule 35(12) and (14) of the Uniform Rules of Court, requesting the applicant to furnish them with certain documents referred to therein. The respondent responded to the Notice but the response was regarded by the respondents as inadequate. The inadequacy, according to them, resulted in this interlocutory application. The respondents, originally required the applicant to furnish 26 documents. The request for 20 documents was abandoned by the respondents who still required the remaining 6 documents. This application, therefore, is brought in terms of Rule 30A (2) of the Uniform Rules of Court. The application is opposed.

[3] For the sake of convenience, I shall refer to the parties as they are referred to in the interlocutory application.

[4] Advocate W. Pye (Mr Pye) and Advocate H P Van Niewenhuizen (Mr Van Niewenhuizen), respectively, represented the respondent and the applicants when the matter was argued.

[5] The applicants were directors of the respondent but resigned as directors on 18 and 20 December 2013. The respondent alleges that notwithstanding the resignations, the applicants accessed, the respondent's bank account and paid themselves an amount of R989 000.00. This, according to the respondent, amounts to theft.

[6] The applicants, according to them, brought this application needing the remaining requested documents in order to access information

therefrom to enable them to prepare their answering affidavits in the main application.

[7] The respondent contends that the request for documents under Rule 35 (12) and (14) is merely a delaying tactic as the applicants, according to it, need only deny stealing the money or justify the payment to themselves. The applicants, in any event, according to the respondent, do not need any documents in order to answer the respondent's claim against them.

[8] The respondent further contends that there is no justification for the applicants' invocation of Rule 35 (12) and (14). The rule, according to the respondent, does not assist the applicants who, legally, cannot invoke its application.

[9] The applicants delivered their first heads of argument on 28 May

2015. These heads of argument were replaced with supplementary heads of argument which were delivered on 6 October 2015.

[10] In paragraph 14 of the supplementary heads of argument the following is said:

"AD RULE 35(12)

14 This point is conceded and the Compel/ants (applicants) do not persist in terms of Rule 35(12)" .

Due to the concession, the rule warrants no further attention.

[11] Still to receive attention, remains Rule 35(14). The applicants, according to their supplementary heads of argument, persist with only three requests, namely those listed in paragraphs

1.1, 1.2 and 1.6 of the Notice in terms of Rule 30 A (1) ("the relevant requests"). The effect of this, therefore, is that only three requests remain deserving of attention.

[12] The issue to be resolved, regard being had to what I said above, is whether the applicants can legally and validly invoke the application of Rule 35(14). Put differently, have the applicants done enough to be entitled to the relief that they seek.

[13] To be able to resolve the issue, regard must be had to Rule 35(14) which should be read with Rule 35(13).

[14] Rule 35(13) provides:

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

[15] Rule 35(14) provides:

"(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'. (my emphasis).

[16] For a better resolution of the issue, although the applicants are not pursuing it, I will refer to Rule 35(12) which 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." (my emphasis).

[17] The respondent opposes this application on the following grounds:

1. The documents that the applicants requested in terms of Rule 35(14) are irrelevant and unnecessary for the purpose of preparing answering affidavits. The reasons therefor are that:

- 1.1 The respondent contends that it simply avers that the applicants stole R989 000.00 from it on 24 December 2013;

- 1.2 The first applicant maintains that he paid himself and the second applicant such amounts in respect of purported "notice period claims".

- 1.3 The applicants simply need to admit or deny the theft and/or justify taking the money.

2. The applicants, in terms of Rule 35(13) failed to seek directions from the Court that Rule 35(14) be invoked.

[18] The remaining documents that the applicants still need in terms of the Notice in terms of Rule 30A(1), dated 17 December 2014, are the following:

"1.1 An Account Confirmation Letter from Standard Bank of South Africa ('Standard Bank') and all documentation evidencing that the bank account referred to in paragraphs 4 and 26 of the Applicants Founding Affidavit is in the name of and/or belongs to the applicant;

1.2 All documentation evidencing the full identity of the account holder of the bank account holder of the bank account referred to in paragraph 4 of the Applicant's Founding Affidavit;

1.6 All documentation evidencing that Annexure: "JLDM5" represents the bank account of the Applicant."

[19] The applicants contend that the documents that are required are relevant and necessary as they would conclusively prove whether or not the respondent is the owner or has interest in the account from which the money was allegedly stolen by them. It is their further contention that the respondent, without raising any technical objection that the applicants were not entitled to employ the provisions of Rule 35(12) and (14), elected to reply, albeit inadequately, to the applicants Notice.

[20] The applicants, in their heads of argument, deal with relevance and the importance of transparency as well as fairness and equity. I do not think that it is necessary to deal with these aspects as the applicants failed to seek and get direction from the court in terms of Rule 35(13). These aspects, in my view, become relevant when the court exercises its discretion to give such direction which, in any event, is given in exceptional circumstances. (See: *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) and *Premier Freight (Pty) Ltd v Breathetex Corporation (pty) Ltd* 2003 (6) SA 190 (SE) at Para [10] and [12]).

[21] To require the applicants to obtain direction from the Court, according to the applicants, would make the application over

formalistic and contrary to the purpose of the rules themselves. For the reasons I shall later give, I do not agree.

[22] The applicants contend that no irregularity or prejudice would result should the relief sought by them be granted. I do not think it is so much the issue of irregularity and prejudice as the issue of complying with the rules which I shall also show later in this

judgment.

[23] The applicants, as a result, implore the Court to exercise its discretion in their favour and direct the production of the

conclusive proof that they request.

[24] A submission on behalf of the respondent is that the applicants cannot invoke Rule 35(14) without the necessary direction from the Court. I agree.

[25] Southwood J in *Loretz v Mackenzie* 1999 (2) SA 72 (T) had an occasion to deal with Rules 35(1) and (13). Rule 35(1) deals with discovery of documents before the close of pleadings. This cannot be

done unless a party has leave of the Court to call on the other party to discover documents. Direction, in terms of in Rule 35(13), is a requirement for a party to engage in such an action.

Southwood J, at 74F-H of *Loretz v Mackenzie* (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." (my emphasis).

[26] It was submitted, on behalf of the respondent, that the wording of Rule 35(14) is unambiguous. It applies to:

1. An "appearance to defend". Clearly a Notice of intention to oppose in an application is excluded.
2. "Any party to any action". Indeed, an action does not include an application just as Rule 35(1) does not.
3. "For purposes of pleading". Indeed, in applications reference would be made to "answering affidavits". Rule 35(14) does not deal with answering affidavits. The documents that Rule 35(14) refers to are documents which are necessary to enable a party to plead which means to deliver a plea.

[27] Rule 35(14), according to the respondents counsel, differs from Rule 35(12) which clearly applies to applications. Rule 35(12) applies to "any proceeding" which in its context includes "applications" and "actions". Reference is also made to "pleadings or affidavits". Rule 35(14) clearly excludes applications. If an extension is required to cover applications in discovery matters, clearly the direction of the

Court, becomes a requirement. What Southwood J says at 75A-C in the Loretz case is very instructive. There the Court said:

"The Rules, and in particular Rule 35(13), provide for a party to seek to have the rules of discovery made applicable to a particular application. That is an essential prerequisite for a notice in terms of Rule 35(1) and obviously for an application to compel compliance with a notice in terms of Rule 35(1). There is no need for the court to exercise any discretion or inherent power or jurisdiction before an order has been sought in terms of rule 35(13) and refused. All the issues relating to fairness and equity can be considered when such a discretion is sought. The Court will normally only exercise a discretion or an inherent power or jurisdiction to regulate its proceedings where there is a lacuna in the Rules". (my emphasis).

[28] The submission, on behalf of the respondent, is that the Court's reasoning in the Loretz case (supra) equally applies to a case where a party seeks to invoke Rule 35(14) such as the current case.

[29] Counsel, on behalf of the respondent, submitted that the respondent's failure to answer the applicants' Rule 35(14) Notice in no way amounts to an irregular step as the applicants failed to obtain a direction and/or permission from the Court to proceed as they did. They did not have such an entitlement in terms of Rule 35(14).

[30] It was further submitted, on behalf of the respondent, that the obtaining of the direction would not have saved the applicants who still would have needed to comply with the requirements of Rule 35(14). These requirements were laid down in *Cullinan Holdings Ltd v Mamelodi Staadsraad* 1992 (1) SA 645 (T) at 647 E-F. These are:

1. that the litigant must show that the documents requested are essential for purposes of pleading, and
2. that the documents must be relevant to a reasonably anticipated issue between the parties. At 647F of the *Cullinan* case (supra) the test was said to be whether the documents are "essential" and not "useful".

The applicants' conduct, according to Counsel, for the respondent, amounts to a "fishing expedition". (See: *Cullina's* case (supra) at 648F-G).

[31] Further it was submitted that it is not essential before delivering their answering affidavits, for the applicants to see:

"1. The account confirmation letter from Standard Bank or documentation evidencing that the bank account referred to is in the name of and/or belongs to Ferreiras;

2. documentation evidencing the full identity of the account holder of the bank account;
3. any documentation submitted to Standard Bank in terms of the Financial Intelligence Centre Act 38 of 2001 in order to procure the opening of the bank account;
4. the account application forms or documentation submitted by Ferreiras to Standard Bank to procure the opening of the bank account;
5. the resolution purportedly referred to in paragraph 12 of the founding affidavit in the main application; or
6. the documentation evidencing that annexure 5 to the founding affidavit (a printout of Ferreiras' bank statement) represents Ferreiras' bank account (referred to as "request 1" to "request 6" respectively)".

I agree.

[32] Indeed, the respondent's case is simple and straightforward. The averment is that the applicants stole the respondent's R989 000.00 when they unlawfully accessed its bank account and paid themselves such an amount after they resigned from the respondent as directors and employees. All the applicants need to do, according to the submission, is to state that they are not guilty of the conduct complained of i.e. denying that they paid themselves as alleged or that they have some or other justification for paying themselves. I agree.

[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. They further failed to prove that the documents are essential and relevant to any anticipated issue between them. Failure to obtain direction or permission, on its own, is sufficient to have the application dismissed.

[34] Finally, it was submitted on behalf of the respondent, that the applicant's irregular step Notice and the application based thereon are consequently without merit and that the current application, in terms of Rule 30A (2), falls to be dismissed with costs. I agree.

[35] The following order, in the result, is made:

The application is dismissed with costs.

W. M. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA

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