

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Jordaan N.O (16335/2014) [2014] ZAGPPHC 867 (6 November 2014)

[2014] ZAGPPHC 867

COURT

North Gauteng High Court, Pretoria

BEFORE

A.M.L. Phatudi

CASE / FILE NUMBER

16335/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case No: 16335/2014

Date heard: 28

October 2014

Date of judgment: 06

November 2014

In the matter

between:

NEDBANK

LIMITED.....Appli

cant

and

JEAN-PIERRE

JORDAAN N.O.

.....Respondent

In re: JEAN-PIERRE
JORDAAN N.O.
.....Applicant
And
THE
MASTER OF THE HIGH
COURT.....1st
Respondent
NEDBANK
LIMITED.....2nd
Respondent
CHRISTIAAN
FREDERIK DE WET N.O.
.....3rd
Respondent
POGISO
TUMISANG MFOLOE N.O.
.....4th
Respondent

JUDGMENT

A.M.L. PHATUDI J:

- [1] The applicant seeks to compel the respondent to respond to the applicant's Notice in terms of Rule 35(12) of the Uniform Rules of this Court. The applicant is the second respondent in the main application and the respondent, the applicant. I will refer the parties as they are referred in this interlocutory application.
- [2] The applicant served the respondent with a Notice in terms of Rule 35(12) requiring the respondent to produce documents referred to in annexure "JP4" for their inspection and/or to make copies thereof. The applicant seeks to have the documents for them to consider their position as to whether to file the answering affidavit to the main application or not.
- [3] "JP4" is an annexure referred to in the respondents founding affidavit in the main application. "JP4" is the respondent's account in respect of services rendered pertaining to business rescue services.
- [4] In response to the applicant's Notice in terms of Rule 35(12), the respondent stated:
- 'Kindly take notice that the documents requested by the [applicant] [are] not documents referred to in the founding affidavit by the applicant. All documents made reference of in the founding affidavit by the [respondent] has been provided and forms part of the annexures to the founding affidavit as [deposed] to by the [respondent]'

- [5] Rule 35(12) provides that '[a]ny 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. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.'
- [6] The phrase "in whose ... affidavits reference is made to any document" has been unpacked in Erasmus Superior Court Practice to mean that 'the sub rule authorises the production of documents which are referred to in general terms in a party's pleadings or affidavits: the terms of the rule do not require a detailed or descriptive reference to such documents.' (B1 — 261)
- [7] Mr Lee, the applicant's counsel, submits that Rule 35(12) pertains to any document referred to by a party in an affidavit or an annexure (his emphasis). He submits further that the entitlement of a party to production for inspection of documents in the other party's possession arises as soon as reference is made to a document in the other party's affidavit or annexure thereof. He further thereto submits that annexure "JP4", being the respondent's account, is the kernel for the relief sought by the respondents in the main application. The main relief sought in the main application is that 'the Liquidation and Distribution account, compiled and filed by Third and Fourth respondents in the Liquidated Estate Bremen Beleggings CC be ratified by the First Respondent, as far as the Second Respondent's [applicant] indebtedness to the liquidated estate of Bremen Beleggings CC is concerned.'
- [8] In rebuttal thereto, Mr Van Der Merwe, counsel for the respondent, submits that it is common cause that both parties participated in the liquidation proceedings of Bremen Beleggings where they both proved their claims against the liquidated estate. He submits that at no stage did the applicant object to the respondent's claim as set out in "JP4". He further submits that the purpose of the main application is to rectify the error made by the liquidators by their failure to properly account for the respondent's proven claim as set out in JP4'. Mr Van Der Merwe lastly submits that "JP4" is a document referred to the respondent's founding affidavit but the documents the applicant now seek to have are neither documents referred to nor relied upon in the founding affidavit.
- [9] It is clear from the reading of Rule 35(12) that any party to any proceedings may, at any time before the hearing deliver a notice ... to any other party in who's ... affidavits reference is made to any document ... to produce such document. The applicant's submission is that on a proper conspection of Rule 35(12), it pertains to any document referred to by a party in an affidavit or an annexure has no merit. The wording of the Rule is clear in that it only refers to "documents referred" to by a party in an "affidavit."

Nowhere in the rule are the words "or annexure(s)" used.

- [10] The relief of production of documents referred to in an affidavit is sought only where there is a reference to the document in a party's affidavit. The rule does not qualify the documents referred to in an affidavit. See *Magnum Aviation operations v Chairman NTC* 1948(2) SA 398 (WLD) at page 400 D-E. In *Inglelew v The Financial Services Board in re: The Financial Services Board v Van Der Merwe and Another* CCT 6/02 [2003] (13 May 2003) held that Rule 35(14) '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 reasonable anticipated issue in an action" and further limits the documents in question to those required "for purposes of pleadings" (paragraph 15) In my view, the principle applies to the provisions of Rule 35(12). The sub rule unequivocally limits the production of documents referred to in the pleadings or an affidavit.
- [11] The applicant does not dispute the fact that "JP4" is an account proven as a claim at the creditors meeting in the Estate Bremen Beleggings CC. The contents of "JP4" were never disputed and are still not in dispute. What is in dispute in the main application is the overpayment to the applicant by the liquidators.
- [12] "JP4" is a document referred to in the affidavit. The respondent annexed the document which is in the applicant's possession. In my view, the applicant has been provided with a copy of the document referred to in the affidavit, being "JP4."
- [13] Criticism was levelled against the applicant's submission that they need such documents even though they do not know what its defence is going to be. It is trite that a party is entitled to have documents referred to in an affidavit for the purpose of the party requiring such documents to consider its position. The applicant may seek production of documents in terms of Rule 35(12) before disclosing what his defence is, if any, is going to be. (See: *Unilever PLC v Polagric (Pty) Ltd* 2001 (2) SA 329 (C)). The applicant is within their right to seek production of documents even if they do not know what to do with such documents but to afford them with an opportunity to consider its position.
- [14] In conclusion, I am of the view that the applicant's application to compel documents set out in "JP4" is not as provided in Rule 35(12).
- [15] It is trite law that costs follow the event. The respondent succeeds with its defence and is thus entitled to costs occasioned by the application.

The following order is thus made.

Order:

The applicant's application to compel the respondent in terms of Rule 35(12) is dismissed with costs.

A.M.L. Phatudi

Judge of the High Court

On behalf of the Applicant: Van Hulsteyns

C/O Lee Attorneys

51 Elandslaagte Street

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Pretoria

Adv. B. Lee

On behalf of the Respondent: Cawood Attorneys

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Neuw Mucklemeuk

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