

SOUTH AFRICA / JUDGMENT

Scormin (Pty) Limited and Another v New Venture Mining Investment Holdings (Pty) Limited and Others (M490/2017) [2018] ZANWHC 16 (21 June 2018)

[2018] ZANWHC 16

COURT

North West High Court, Mafikeng

BEFORE

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CASE / FILE NUMBER

M490/2017

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“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M490/2017

REPORTABLE

In the matter between:-

SCORMIN (PTY) LIMITED FIRST APPLICANT

FRONTOSA INTERNATIONAL (PTY) LIMITED SECOND APPLICANT

And

NEW VENTURE MINING INVESTMENT

HOLDINGS (PTY) LIMITED FIRST RESPONDENT

ISHWAR, RAMROOP SECOND RESPONDENT

MOCWANE, THAYANG GODFREY THIRD RESPONDENT

GOUDINI CHROME (PTY) LIMITED FOURTH RESPONDENT

THE MINISTER OF MINERAL RESOURCES FIFTH RESPONDENT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The first, second and third respondents applied in terms of Rule 30A for the following relief;

“1.1 Directing that Rule 35(12) of the Honourable Court’s Rules are applicable to this application;

1.2 Directing the applicants to comply with the respondent’s Rule 35(12) notice dated 25 January 2018, within 10 (ten) days of the granting of this order;

1.3 Suspending, alternatively staying the time periods within which the respondents are to file their answering affidavits, to 7 days after receipt of the relevant documents as requested in the Rule 35(12) notice dated 25 January 2018; and

1.4 Costs of suits”.

[2] At the hearing, the first, second and third respondents (the respondents) abandoned the relief sought in prayer 1.1 and prayer 1.3 supra. Hence the only issue for determination is whether the respondents are entitled to the order sought in prayer 1.2 supra.

B.

BACKGROUND

[3] The applicants applied for an interim interdict pending the institution of an action against the respondents (Main application).

The interim relief sought by the applicant was inter alia for the following relief:

“1.1 Interdicting and restraining first respondent from ceding, transferring, letting, sub-letting, assigning, alienating or otherwise disposing of the said mining right or any interest therein;

1.2 Interdicting and restraining first respondent from granting directly or indirectly to any person any right or option to participate in the business of mining, removing and/or disposing or chrome or any other mineral for which the said mining right has been granted;

1.3 Interdicting and restraining second and third respondents from performing any act calculated to procure the performance of any act referred to in 1.1 and/or 1.2 above;

1.4 Interdicting fifth respondent from consenting in terms of the Mineral and Petroleum Resources Development Act, 2002 to the cession, transfer, letting, sub-letting, assignment or other disposition of the said mining right, or any interest therein, or a controlling interest in first respondent, to any person other than fourth respondent or first or second applicants”.

- [4] The first, second and third respondents did not file an answering affidavit but served and filed a notice in terms of Rule 35(12) of the Uniform Rules of Court in terms of which they demanded discovery of documents. The applicants did not discover documents and the respondents filed an application in terms of Rule 30A (2) for compliance with the Rule 35(12) notice. (the Interlocutory

Application). It is the interlocutory application that is before this Court for adjudication. For the sake of convenience the parties in the interlocutory application are referred to as in the main application.

C. THE LAW

- [5] Rule 30 A of the Uniform Rules of Court read:

“(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

- (2) Failing compliance within 10 days, application may on notice be made to the Court and the Court may make such order thereon as to it seems meet”.

- [6] Rule 35(12) reads:

“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. 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”. (own emphasis)

- [7] Hence the only requirement in terms of Rule 35(12) is that reference should be made to the document or tape recording in the opposing party's affidavit, the result of which allows a party to a proceeding, any time before the hearing, on delivery of a notice to inspect and make copies of such documents.

- [8] The Supreme Court of Appeal (SCA) in the case of *Centre of Child Law v Hoërskool Fochville and Another*[1] approved the approach followed by the Court a quo, that:

- a) Confidentiality of a document per se is not a valid objection to a Rule 35(12) request for discovery.
- b) Rule 35(12) should not be literally interpreted and despite the absence of wording indicating that relevance or privilege could form a basis for objecting to discovery, only relevant documents should be subjected to discovery in terms of the rule and privilege could be a valid objection to a request for discovery under the rule.

- [9] Rule 35(12) creates a prima facie obligation on a party served with a Rule 35(12) notice to discover the documents. If there is an objection to the Rule 35(12) notice, the party objecting has the burden to adduce evidence that the documents are not relevant or are privileged or are no longer in his or her possession. “In *Gorfinkel v Gross Hendler & Frank*[2] the Court held:

... the Rule should, to my mind, be interpreted as follows: prima facie there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12). That obligation is subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court cannot compel him to do so ..., the onus [as qualified by *Centre for Child Law v Hoërskool Fochville and Another* supra] would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document”.

- [10] Landman J in an unreported judgment of this division of *Esprit family and others v Van der Walt*[3] summarised and adopted the following principles of the law relating to an application in terms of Rule 35(12):

“(a) The sub-rule must not be interpreted too narrowly (Universal v Polagric (Pty) Ltd 2001 (2) SA 329 (at 750C-d) and on the other hand not too widely and subject to certain limitations (see Penta Communication Services (Pty) Ltd v King and another 2007 (3) SA 471 (C)).

- (b) The sub-rule is automatically applicable to application proceedings. There is no need for a directive in terms of rule 35(13). See *Minister of Safety and Security and Another v Tembop Recovery CC and Others* (006/2015) [2016] 2ASCA 52 (1 April 2016) and *Machingawuta and others v Mogale Alloys (Pty) Ltd & others* 2012 (4) SA113(GSJ).
- (c) The words "at any time before the hearing" mean that the rights under this sub-rule can be exercised at any stage of the proceedings and thus even before the filing of a replying affidavit. See *Unilever v Polagric (Pty) Ltd 2001 (2) SA 329(C)*.
- (d) This entitlement arises as soon as reference is made in the pleading or affidavit to a document or tape recording. See *Protea Assurance Co. Ltd & another v Waverley Agencies CC and others* 1994 (3) SA 247 (C).
- (e) Delivery of a notice in terms of this sub-rule does not suspend the period referred to in any other rule. But an application may be made for this relief in terms of rule 27(1) and (2). See *Potpale Investments (Pty) Ltd v Mkhize* (11711/2014) [2015] 2AKZPHC55 (15 December 2015) para 23.
- (f) A litigant cannot ordinarily be told to draft and file his or her own pleadings or affidavits before an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleading or affidavits has been given. See *Protea Assurance Co Ltd & another v Waverley Agencies CC & others* 1994(3) SA 247 (C).

- (g) The rule also applies to a document referred to or mentioned in an annexure to the pleading or affidavit. See *Universal City Studios v Movie Time* 1983 (4) SA 736(D).
- (h) It is not permissible to engage in a process of reasoning and inference to discover whether a document does or may exist, in order to invoke the rule. See *Penta Communication Services (Pty) Ltd v King and another* 2007 (3) SA 471 (C) at para 16.
- (i) A litigant is entitled to see the whole of a document or tape recording and not just the portion of it upon which his or her adversary in the litigation has chosen to rely. *Protea Assurance Co Ltd & another v Waverley Agencies CC & others* 1994 (3) SA 247 (C).
- (j) A litigant may rely on the sub-rule before disclosing what his or her defence is, or even before he or she knows what his defence, if any, is going to be. *Unilever plc & another v Polagric (Pty) Ltd supra*,
- (k) A litigant is entitled to have the documents produced 'for the specific purpose of considering his position,' See *Erasrnus v Slomowitz* (2) 1938 TP'D 243 at 244; see also *Gehle v McLoughlin* 1986 (4) SA 543 (W) at 546D-E and *Unilever plc & another v Polagric (Pty) Ltd supra*,
- (l) Whether or not there is an onus or burden to produce evidence concerned, the court has a general discretion which requires it to try to strike a balance between the conflicting interests of the parties to the case. 'Implicit in that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production.

And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.' See *Centre for Child Law v The Governing Body of Hoerskool Fochville* (156/2015) (2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 SA 121 (SCA) (8 October 2015) at para 18.

- (m) The remedy provided for in the sub-rule is a negative one. Any party failing to comply with a notice may not, without the leave of the court, use the document or tape recording in the proceeding. This does not prevent any other party from using the document or tape recording.
- (n) Notice of an irregularity i.e. the failure to comply with the Rule 35, must form part of a Rule 30A. Thereafter an application to compel in terms of Rule 30A may be launched to enforce positive compliance with the sub-rule."

D. INTERIM INTERDICT

[11] The respondents submit inter alia that:

11.1 The applicants' seek to interdict the first, second and third respondents from giving effect to a mining right that has been granted by the fifth respondent to the first respondent and which mining right has its own time frames for compliance and execution, failing which the first respondent will be in breach of such obligations and the mining right then potentially revoked and/or withdrawn for non-compliance by the fifth respondent.

11.2 The consequence, if the interim interdict is granted pending the finalisation of an action for rectification, is that it could take approximately 1 year, if not more, is based on an allegation of a prima facie right to such relief, in light of the alleged grounds for rectification of agreements relating to an alleged common error. This would amount to irreparable harm to the first respondent, who holds a valid mining right and is expected in law to execute same timeously, in order to prevent same from being cancelled or revoked.

11.3 Compliance with the Rule 35(12) notice is of utmost importance to the respondents in order to demonstrate to the Court that the applicants lack a prima facie right to the relief sought and in fact have no legal right at all.

[12] The applicants submit that the interdict applied for in the Main Application, is interim in nature since it will be of force and effect pending the outcome of an action to be instituted for certain relief. However, it does not provide for, or include, any relief in terms of which the first respondent would be prevented or interdicted from exercising its mining right pending the outcome of the proposed action. The duration of the proposed interim interdict is therefore irrelevant and the applicant's submission that an interdict "would amount to irreparable harm to the first respondent" is therefore based on an incorrect interpretation of the relief sought in the main application and the submission is thus factually

incorrect.

[13] Save for the issue of 'relevance', in respect of the documents referred to in applicant's affidavit which is canvassed infra, it is not necessary for this Court to consider the merits of the main application and the consequences of a Court granting the interim interdict.

E. RULE 35(12) NOTICE

[14] The respondents request for inspection of documents under Rule 35(12) is considered seriatim hereinbelow.

Paragraph 1

[15] The respondents under paragraph 1 of the Rule 35(12) notice sought the following:

"Proof of payments of all amounts paid by the first and second applicants as alleged, specifically referred to at paragraph 33.5, 37, 39.4, 39.6 and 41 of the founding affidavit".

[16] Counsel for the respondents, Mr Rossouw referred the Court to the following allegations in the founding affidavit of the main

application pertaining to payment:

- a) Paragraph 22 “second applicant paid R6.2 million which second and third respondents gave Liao to understand would be used by second and third respondents for the purpose of purchasing the shares in first respondent of certain of second and third respondents’

co-shareholders”.

- b) Paragraph 37 “As stated above, second applicant paid R6.2 million pursuant to the Frontosa Subscription Agreement and the

Management Buy-out Funding agreement”.

- c) Paragraph 39.4 and 39.5, 39.4 and 42 refers to payment of R3.5 million. Paragraph 39.4 “the subscription price is a total of R15 million, payable in tranche of R3.5 million R7.5 million and R4 million”.

Paragraph 39.5 “it is recorded that the first tranche of R3.5 million has necessary been paid”.

- d) Paragraph 41 “First applicant paid R11.5 million being the First and Second Subscription Prices in terms of the

Scormin Subscription Agreement....”

[17] Mr Rossouw submitted that the foregoing allegations constitute documentary hearsay evidence and that the said paragraphs are not in accordance with the Best Evidence Rule and the respondents seek documentary proof of payment of R6.2 million, R3.5 million and R11.5 million. The respondents further allege inter alia that:

- a) All payments involve documentation evidencing same, which cannot be denied.
- b) Furthermore, none of the attachments to the interlocutory answering affidavit satisfy the requirements of proof of payment of the amounts as alleged by the applicants in its founding affidavit in the main application.
- c) Proof as requested in the Rule 35(12) notice is important and necessary to determine and demonstrate the extent of the alleged payments made by the applicants and the values as alleged. Reconciliations without any description do not assist in proof of payments. The applicants were the persons responsible and in control of the payments and bank account.

[18] The applicants in response to the respondents request said the following:

- a) Paragraph 33.5 of the founding affidavit in the main application is a sub-paragraph of paragraph 33 which refers to the terms of an agreement and not to any payments. This also applies to paragraphs 39.4 and 39.6 of the said founding affidavit. The respondents’

purported reliance on the said paragraphs is therefore unfounded.

- b) In respect of paragraphs 37 and 41 of the founding affidavit the said paragraphs refer to payments without any reference to any documents in proof of such payments. Counsel for the applicant, Mr Pistor submitted that the applicant is seeking documents to support the payment. He said that it cannot be argued that because there is a payment there is a document. He submitted that the respondent is engaging in a process of reasoning and inference to discover whether a document does or may exist. He relied on *Penta Communications Services (Pty) Ltd v King and another*^[4] to submit that the respondent cannot speculate whether the document exists or what sort of document the respondent seeks.
- c) The respondents request in terms of Rule 35(12) notice constitutes a request for further particulars, and not for discovery of any specified document. Save for the fact that in the relevant paragraphs in the founding affidavit payments were alleged, no documents are referred to. The request is so wide as they don't refer to any specific documents. Should this relief be allowed it will permit the respondents to further particulars in terms of Rule 21 alternatively to documents in terms of Rule 35(1) or 35(14) which they are not entitled to at this stage.
- d) The incorrect approach of the respondents (i.e. their failure to identify the required documents properly) in respect of this

paragraph of their notice resulted in the fact that the applicants in reaction to the Interlocutory Application provided proof of payments as an annexure to their answering affidavit which proof the applicants clearly considered to be satisfactory. However, the respondents rejected the said proof of payment. The application in respect of this paragraph must therefore fail.

^[19] The applicants in their interlocutory answering affidavit attached the following documents in support of their allegations relating to payment:

- (i) a copy of a statement dated 9 July 2013 from the first applicant attorneys which reflect payments made by the attorney to the first and fourth respondents;
- (ii) a summary of further payments made by the first applicant over the period 27 October 2010 to 28 July 2011; and
- (iii) Proof of certain payments made by the second applicant during the period October 2008 to January 2009 to the respondents' attorneys, Deneys Reitz.

^[20] The respondents were not satisfied with the aforesaid documentation and persisted with their interlocutory application for documentary proof of payment. It is common cause that the applicants did not refer to any specific document in their founding affidavit in the main application in support of the allegation of payments. There could be several documents that the applicants could provide to show that payments were made, such as those documents that were attached to the applicants' answering affidavit.

[21] In *Protea Assurance Co Ltd and another v Waverley Agenues CC and others*[5], the Court held that the respondent's entitlement to inspection only arises if reference is made to the document in the affidavit. From the foregoing, I am of the view that the applicants in their founding affidavit in the main application refer to payments and not to a specific document. One should not have to speculate regarding what document the respondents are seeking to inspect[6]. The respondents are accordingly not entitled to proof of the payments referred to in paragraphs 22, 37, 39.5, 41 and 42 of the founding affidavit.

Paragraphs 2 - 8

[22] The respondent under paragraphs 2 – 8 sought the following documents:

“2. All/or any bank statements of the fourth respondent, specifically the Standard Bank account, that was opened at the instance of the first and second applicants from date of inception to current date;

3. The annual financial statements of the first and second applicants for the financial year and from the year 2008 to current;
4. All/or any proof of submission of financials to the fifth respondent in respect of the first and second applicants or fourth respondents' obligation to the fifth respondent regarding the Section 11 transfer, as well as the confirmation of substitution of the first respondent by the fourth respondent in respect of the first respondent's environmental plan and responsibility to the fifth respondent, in order to give effect to the Section 11 prospecting right transfer;
5. All correspondence and instructions by the first and second applicants to the consultant who attended to the Section 11 transfer on behalf of the first and fourth respondent;
6. All/or any communications and/or confirmations received from the fifth respondent on behalf of the fourth respondent in respect of the Section 11 transfer of the prospecting right;
7. Consent and confirmation of the fifth respondent's consent to the transfer of the prospecting right in terms of Section 11 from the first respondent to the fourth respondent;
8. Copies of all/or any correspondence and/or emails confirming the first and second applicants election to either enforce their put options, alternatively such correspondence indicating the stance taken by the first and second applicants post to the mining right acquisition cut-off date”.

[23] The applicants in their reply to paragraphs 2 – 8 of the notice in terms of Rule 35(12) state that “none of the documentation contained in these items are referred to in the applicants founding affidavit including the annexes thereto”. With reference to the items in paragraphs 2 and 3, the applicants state further that the answering affidavit makes it clear that these documents are in any event not in possession of the applicants. The applicants are not in control of the bank account and the second respondent is a signatory to that account. The respondents do not address this in their replying affidavit.

[24] Mr Rossouw submitted that there are four grounds on which the applicant can object to disclosing a document, namely:-

- 1) Privilege;
- 2) Not relevant;
- 3) Not in its possession; and
- 4) Not referred to.

[25] Mr Rossouw submitted that the documents are relevant and will throw light on the following questions:

- a) whether the fourth respondent applied for the transfer of the prospecting right;
- b) whether they are financially able to take over the prospecting right;
- c) what their financial position is.

[26] With regard to the documents requested under paragraphs 2 – 8, particularly the bank statements, the remarks by Bozalek J in the Penta Communication Services matter supra are apposite:

“Reverting to the particular documents sought, no doubt where a bank account is utilised there must exist somewhere documents evidencing its existence and its use. It does not follow, however, that a reference to that bank account, without more, constitutes a reference, for the purpose of Rule 35(12), to documentation relating to such bank account”.

[27] Issues relating to relevance only arise when the documents have been referred to in the founding affidavit[7]. The documents sought under paragraph 2 and 3 are in my view a request for further particulars. Furthermore there is no reference to the bank statements and the financial statements in the founding affidavit. The respondent is accordingly not entitled to the said documents under Rule 35(12). Similarly, there was no reference to the documents under paragraphs 4 - 8 in the founding affidavit.

[28] As stated supra, the test is not whether the documents will lend support the respondents' case to prove that the applicants don't have

a prima facie right to seek interdictory relief. The test is whether the documents were referred to in the affidavit. The fact that other evidence may exist upon which the party may prefer to rely upon in advancing its case is irrelevant to any enquiry under Rule 35[8]. I am accordingly of the view that the respondents are not entitled to the documents in paragraphs 2 – 8 of the Notice.

Paragraph 9

[29] In terms of paragraph 9 the respondents seek discovery of the following documents:

“All/or any agreements signed between the parties during the period 2 September 2008 to current date, save for those agreements attached to the founding affidavits, including but not limited to, the Umbrella Amendment Termination Agreement, referred to at clause 5.1.1.4 of the Reinstated and Amended Subscription Agreement between the fourth respondent and the first applicant”.

[30] Mr Roussow submitted that the fact of this case are relevant to show why the documents referred to in paragraph 9 are of utmost

importance. The facts are briefly summarised hereinbelow:

- a) During 2008, the second and third respondents held discussions with one Liao (a representative of the second applicant) concerning the second applicant assisting the first respondent to exploit a mining right, as the first respondent did not have resources to do so. At that time, the second and third respondents were shareholders of the first respondent together with a number of other co-shareholders. The first respondent had acquired a prospecting right. Briefly, the discussions concerned the buy-out by the second and third respondents of their co-shareholders in the first respondent and the exploitation of the rights held by the first respondent for the mutual benefit of the second applicant and the first respondent (and hence of the second and third respondents by virtue of their being the shareholders of the first respondent). They discussed that this would be done via the second applicant and the first respondent entering into a joint venture relationship. They discussed that the first respondent's contribution to the joint venture would be its rights in terms of the Act in respect of the property, and the second applicant's contribution would be the provision of funds for the purpose of funding the said buy-out, constructing a washing plant at the mine, and implementing the arrangement. They discussed that the joint venture would be a company in which the first respondent and second applicant would be co-shareholders.
- c) At the time, the second and third respondents advised Liao that they would need R10.8 million for the said purpose, and suggested that the respondents enter into a joint venture relationship with the second applicant wherein the second applicant would acquire a 49% interest in the joint venture for R10.8 million. Liao was agreeable to this.
- d) The mechanism which Liao on behalf of the second applicant and the second and third respondents on behalf of the first respondent envisaged to implement the joint venture was a company, namely the fourth respondent, in which the second applicant and first respondent would be shareholders. The said parties agreed that the first respondent would cede and transfer the prospecting right to the fourth

respondent, that the fourth respondent would be constituted the holder of a mining right in terms of the Act. The second applicant

would provide funding to the fourth respondent, who would conduct the business of mining and marketing chrome ore, and the second applicant and the first respondent would benefit from such business via their respective shareholdings in the fourth respondent.

- e) During September 2008, a number of agreements were concluded between the second applicant, the respondents, and the fourth respondent.

These include a subscription agreement dated 2 September 2008, between second applicant and fourth respondent (“the Frontosa

Subscription Agreement”), in terms of which second applicant subscribed for 49% of the issued share capital of fourth respondent

for a total subscription price of R10 780 000.00.

- f) The said agreement contains a defined term – “Mining Right Acquisition” – which means the cession by the first respondent to the fourth respondent of the Prospecting Right and/or the grant to the fourth respondent of a mining right in terms of the Act. The said agreement further provides that R4 280 000.00 of the said subscription price is payable on the date on which the said Mining Right Acquisition occurs.
- g) The second applicant paid R6.2 million, which the second and third respondents gave Liao on the understanding that it would be used by the second and third respondent for the purpose of purchasing the shares in the first respondent of certain of the second and third respondents’ co-shareholders.
- h) Due to financial constraints following the 2008 financial crisis, the second applicant was unable itself to provide additional funding, and Liao introduced the first applicant to the respondents to be a co-participant in the said joint venture.
- i) In or about early 2010, the first applicant became a participant in the said joint venture relationship. The first applicant’s

contribution being of the same nature as that of the second applicant, that is, to provide necessary funding. Ultimately, the parties agreed that the first respondent would benefit from the joint venture to the extent of 37.23%, the first applicant to the extent of 33.33% and the second applicant to the extent of 29.43%.

- j) The Frontosa Subscription Agreement was amended in light of the changed circumstances, and the other agreements concluded in 2008 were all replaced by similar agreements which were calculated to reflect the first applicant’s inclusion, via the joint venture vehicle, being the fourth respondent, in the joint venture relationship between the parties, to reduce the second applicant’s interest in the joint venture, and to provide for the contributions to the joint venture already made and to be made by the applicants and the first respondent. These agreements were all signed by the second applicant, the respondents and the fourth respondent on 23 March 2010, and by the first applicant on 31 March 2010 and consist of the following agreements which were attached to the founding affidavit:
- (i) ‘Reinstated and Amended Subscription Agreement’ between first applicant and fourth respondent (“the Scormin

Subscription Agreement”);

(ii) “Payment Agreement” between first and second applicants, second and third respondents and fourth respondent (“the

Payment Agreement”);

(iii) A shareholders agreement between applicants, first respondent and fourth respondent (“the Shareholders Agreement”)

(iv) A “Reinstated and Amended Umbrella Amended Agreement” between second applicant, respondents and fourth respondent;

(v) The “Agreement”, between applicants and fourth respondent (“the Mandate”).

[31] Mr Roussow submitted that all previous agreements are dependent on the Scormin Subscription Agreement which contains a suspensive

condition in clause 5. The suspensive condition fulfilment date was 26 March 2010. In terms of the suspensive condition there were a number of documents that had to be delivered to the first applicant on the due date or any such other date as the parties agree in writing. One such document under clause 5.1.1.4 is the document the respondents request in the Rule 35 notice namely the Umbrella

Amendment Termination Agreement. Mr Rossouw submitted that the applicants failed to attach the Umbrella Agreement Termination Agreement which is a suspensive condition and they are entitled to a copy. If the suspensive condition is not fulfilled, all the other agreements automatically terminate and the Scormin Subscription Agreement is of no force or effect. He said the Shareholders’

Agreement which the applicants are seeking an order for rectification is subject to the same suspensive condition as the Scormin

Subscription Agreement. He said that in terms of clause 4.3 of the Shareholders’ Agreement if the condition precedent is not fulfilled, then the Shareholders’ Agreement shall be of no force or effect and neither party shall have any claim against the other party.

[32] Mr Rossouw submitted that the said agreement is relevant to see how the Shareholders’ Agreement can be rectified. The respondents submit that, the applicants refuse to comply with the respondents’ request without giving any reason for their refusal. They do not allege that the so-called lapsed agreement is irrelevant or that same is not in their possession. The respondents are entitled to have regard to the terms and conditions contained in the “Umbrella Amendment Termination Agreement” in order to establish whether any inference could be drawn from the contents thereof relating to the issues in dispute and more in particular the alleged common intention pertaining to the claim for rectification.

[33] The applicants allege that:

- a) Save for the Umbrella Amendment Termination Agreement the respondents fail to state where in the founding affidavit in the main application the various agreements, referred to in the Rule 35(12) notice, are mentioned and they are thus not entitled to copies of unspecified and unidentified documents.
 - b) The founding affidavit in the main application shows that some agreements which had been entered into at some stage have been replaced by others. The latter have been attached to the founding affidavit to the main application whilst the former became irrelevant because of their replacement and, apart from the fact that they have not been specified in the Rule 35(12) notice, they need not be discovered because they are irrelevant in the main application.
 - c) With regard to the said Umbrella Amendment Termination Agreement:
 - (i) The definition of “Umbrella Amendment Termination Agreement” is contained in the Scormin Subscription Agreement. It means “the agreement entitled “Termination Agreement in relation to the Umbrella Agreement” to be concluded or concluded between the company (Goudini), Scormin, New Venture Mining Investment Holdings (Proprietary) Limited, Ramroop Ishwar, Thayang Godfrey Mocwane and Frontosa on or about the same day as this agreement pursuant to which those parties agree to terminate the Umbrella Amendment Agreement concluded on or about 10 October 2009”.
 - (ii) The “Umbrella Amendment Agreement” is defined as “the Lapsed Agreement” and is recorded as having lapsed by reason of non-fulfilment of a condition precedent.
 - (iii) The Umbrella Amendment Termination Agreement has therefore become irrelevant.
- [34] Mr Pistor submitted that the suspensive conditions do not assist the respondents as the agreement was subject to the fulfilment of the suspensive condition, that in terms of 5.1.1 of the subscription agreement, copies or the original duly executed documents listed under 5.1.1 were to be delivered to the subscriber and the subscriber is the first applicant. He submitted that there is no basis for the respondents to ask the applicants to supply the document if it was not delivered as the applicants would not have the document. Mr Pistor submitted that they should ask the fourth respondent to deliver the document. Mr Pistor further submitted that the Reinstated and Amendment Umbrella Amendment Agreement supersedes the ‘lapsed agreement’ which he reiterated has lapsed because of non-fulfilment. This document has become irrelevant because it lapsed.
- [35] As stated supra, there is a prima facie obligation on a party who refers to a document in its affidavit to produce such a document under Rule 35(12)[9]. Rules 35(1), (13) and (11) have specific reference to the relevance of documents while Rule 35(12) contains no such limitations. This does not mean that the mere reference to a document in the affidavit creates an unqualified obligation to produce such a document. Our Court have found that the obligation to produce the document is subject to certain limitations such as privileged and relevance[10].

- [36] In the case of *Machingawuta v Mogale Alloys (Pty) Ltd*[11] the Court held that the grammatical meaning of the words in Rule 35(12) are clear, namely that “once a reference is made to a document in a pleading or affidavit, it must be produced, neither privilege nor relevance play a role”.
- [37] The onus is on the party who is obliged to produce the documents to set up fact relieving him of the obligations and to allege that the material is privileged, irrelevant or no longer in his possession. The applicants failed in its answering affidavit to allege specifically that the Umbrella Amendment Termination Agreement was either privileged, irrelevant or no longer in its possession. The applicants in their answering affidavit, under paragraphs 9 – 12, broadly deny that “there are any documents relevant to the matters in issue in the main application which are not in respondents’ possession”. There are no allegations providing any explanation why they allege that the Umbrella Termination Agreement is not relevant or that it is not in their possession.
- [38] It is not in dispute that the Umbrella Termination Agreement is a document which is referred to in the Scormin Subscription Agreement which was attached to the founding affidavit. In *Universal City Studio*[12] supra, the Court found that Rule 35(12) also applies to a document referred to or mentioned in an annexure. Hence as the annexure to the founding affidavit makes reference to the Umbrella Amendment Termination Agreement, the applicants are obliged under Rule 35(12) to make the document available for inspection, provided that the applicants are in possession of the said agreement.
- [39] Clause 5 of the Scormin Subscription Agreement suspends the fulfilment of the agreement until the documentation listed under 5.1 were delivered to the first applicant and one such document is the Umbrella Amendment Termination Agreement. Thus the submission that the Umbrella Amendment Termination Agreement is irrelevant as the Reinstated and Amendment Umbrella Amendment Agreement supersedes the Umbrella Amendment Termination Agreement does not assist the applicants. There is merit in the contention that if the

suspensive condition is not fulfilled, then the Scormin Subscription Agreement is of no force or effect. It remains for the parties to debate this issue in the Main Application. When considering the history of the matter referred to supra, and the several agreements concluded between the parties, the respondents are in my view entitled to inspect all the documents referred to in their founding affidavit and annexures.

- [40] Accordingly, the respondents are entitled to inspect the Umbrella Termination Agreement. Save for the Umbrella Termination Agreement, the other documents sought under paragraph 9 were not identified or referred to in the founding affidavit. The respondents are accordingly not entitled to those documents.

Paragraphs 10 and 11

- [41] The respondents seek the following documents in terms of paragraphs 10 and 11:

“10 The first addendum to the Frontosa Subscription agreement referred to in clause 5.1.1.5 of the Reinstated and Subscription agreement

between the fourth respondent and the first applicant;

1 The agreement concluded between the first respondent and the first applicant as referred to in clause 5.1.1.6 of the Reinstated and Amended Subscription agreement between the fourth respondent and the first applicant”.

[42] At the hearing, Mr Rossouw abandoned their request for the documents referred to in paragraph 10 and 11 of the Notice in terms of Rule 35(12) and conceded that they were identified by the applicant in their answering affidavit and their reply to the Rule 35 notice.

Reserved Costs

[43] Mr Pistor submitted that the respondents gave notice in terms of Rule 35(12) and then filed an application in terms of Rule 30 A which was served on the applicants on the 22 February 2018. The respondents followed the form 2A notice when it should have followed form 3. In terms of Rule 6(5)(b)(3) the respondent had to “set forth a day not less than 5 days” and not “within 5 days”. Hence the notice to oppose was to be filed on not less than 5 days’ notice. The 2 March is the last day of the 5 days. He submitted that the matter should not have been enrolled for hearing. On the 6 March 2018, Gura J postponed the matter and reserved costs. Mr Pistor submitted that the costs for the 6 March 2018 should accordingly be borne by the respondent. On the 19 April, the matter was postponed because of protest action.

[44] Mr Rossouw submitted that the respondents could follow the short form and that there are no hard and fast rules with interlocutory

applications. He submitted that the respondent was only one day short and that costs should follow the costs of the application.

[45] The term ‘notice of motion’ is used in two different senses:

- (i) to denote particular written notices, the form of which is prescribed in the First Schedule to the Rules;
- (ii) to denote one of the different ways in which civil proceedings may be initiated[13].

Rule 6(5)(b)(3) reads:

“5(b) In a notice of motion the applicant shall:-

(iii) subject to the provisions of Section 27 of the Act, set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice”.

[46] Hence the respondents should have given the applicant 5 days' notice. As the respondents set the matter down prematurely by one day, the respondent should bear the wasted costs occasioned by the postponement of the 6 March 2018. The costs of the postponement of 19 March are costs in the application as fault cannot be attributed to any one party.

[47] Turning to the costs of the application, I am of the view that the applicants were substantially successful in its opposition of Rule 35(12), save for the one document referred to in paragraph 9 of its notice in term of Rule 35(12). Accordingly the respondent should bear the costs.

F. ORDER

[48] In the result,

- a) the applicants are directed to deliver to the respondents the Umbrella Amendment Termination Agreement referred to in clause 5.1.1.4 of the Reinstated and Amended Subscription Agreement, if in their possession;
- b) The first, second and third respondents are jointly and severally liable to pay the costs of the application including the costs of the 19 March 2018;
- c) The applicants are jointly and severally liable to pay the costs of the 6 March 2018.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING: 03 MAY 2018

DATE OF JUDGMENT: 21 JUNE 2018

ADVOCATE FOR APPLICANT: ADV A.B ROSSOUW (SC)

ADVOCATE FOR RESPONDENT: ADV JHF PISTOR (SC)

ATTORNEYS FOR PLAINTIFF: KGOMO ATTORNEYS INC

(Instructed by: AFZAL LAHREE ATTORNEYS)

ATTORNEYS FOR DEFENDANT: VAN ROOYEN TLHAPI WESSELS INC

(Instructed by: RAYMOND DRUKKER ATTORNEYS)

[1] 2016(2) SA 121 (SCA)

[2] 1987(3) SA (C) 766 at 774 G - I

[3](M372/15) , North West Provincial Division, date of Judgment 30 June 2016

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- [4] 2007(3) SA 471(C) at para 16
- [5] 1994(3) SA 247(c)
- [6] Penta Communication Services (Pty) Ltd vs King 2007(3) SA 471 (C) at 16; Holdsworth v Reunert Ltd 2013(6) SA 244 (GNP) and 246 I - J
- [7] Gorfinkel v Gross, Hendler and Frank 1987(3) SA 766(c) at 773F. Penta Communications Services (Pty) Ltd v King 2007(3) SA 471(c)
- [8] Erasmus: Uniform Rules of Court, Rule 35(12) commentary. B1 – 262 [Service 45 ‘2014]
- [9] Magnum Aviation Operations v Chairman, National Transport Commission 1984(2) SA 398 (W) at 400 C; Penta Communications Services (Pty) Ltd v King 2007(3) SA 471(C)
- [10] Gorfinkel v Gross, Hendler and Frank 1987(3) SA 766(c) at 773F; Penta Communications supra; Universal City Studios v Movie Time
1983(4) SA 736(D) at 747B
- [11] 2012(4) SA 113(GSJ) at 117 C – F and 120 A – D
- [12] 1983(4) SA 736(D)
- [13] Erasmus – Rule 6 – B1 – 38 service 41 2013
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