IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

20/09/2019 | SIGNATURE
DATE

CASE NUMBER: 44140/18
DATE: 6 September 2019

FARGO INDUSTRIES (PTY) LTD	Applicant
V	
NIEMCOR AFRICA (PTY) LTD (in liquidation)	First Respondent
RICHARD POLLOCK N.O.	Second Respondent
RALPH FARREL LUTCHMAN N.O.	Third Respondent
HILLARY ANN PLAAITJIES N.O. (in their capacities as the duly appointed joint liquidators of the First Respondent)	Fourth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fifth Respondent
ALL AFFECTED PERSONS OF THE FIRST RESPONDENT	Sixth Respondent

JUDGMENT

MABUSE J

[1] On Tuesday, 3 September 2019, the First to the Sixth Respondents ("the Respondents") brought an interlocutory application in terms of Rule 30A(2) of the Uniform Rules of Court against the Applicant and sought the following relief:

"1. In terms of the Rule 30A(2) the Applicant is ordered to respond to the Respondent's Notice in terms of Rule 35(12) and (14) and provide the Respondents with an answer to its notice in terms of Rule 30A(1) dated 8 February 2019 and served on the Applicants' attorneys of record on 11 February 2019 which answer is to be provided within 10 (ten) days from the date of the order;

2. In the event that the Applicant should fail to comply with prayer 1 supra, that the Respondents shall be entitled to approach the above Honourable Court for an order for the striking out of the applicant's application with costs;

3. Costs of the suit on a scale as between attorney and client;

4. Further and/or alternative relief."

[2] This application was opposed by the Applicant which had, for that purpose, delivered an answering affidavit deposed to by a certain Mr Nathan Blumenthal ("Blumenthal"), an adult male and its the general manager. During the course of this judgment, I will revert to the Applicant's reasons for opposing the application.

[3] The genesis of this application has been set out in the founding affidavit of Mr Wikus de Wet ("de Wet"), an adult male attorney practising under the name and style of Van Greunen & Associates Incorporated ("Van Greunen"), the Respondents' attorneys. According to him, on 29 January 2019 the Respondents' attorneys delivered upon the

Plaintiff's attorneys a notice in terms of Rule 35(12) and (14). Rule 35(12) provides as follows:

"35(12): *Any party to any proceeding may act 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, safe with leave of the court, use such document or tape recording in such proceedings provided that any other party may use such document or tape recording.*

Rule 35(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 the 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."*

[4] In the said notice, the Respondents had requested the Applicant to make available to the Respondents certain documentation alluded to in a written deed of sale and cession dated 4 May 2018 that the Applicant had delivered to the Respondent on or about 21 January 2019. These documents were:

4.1 a copy of the written guarantee (dated June 2011) referred to in paragraph (1) of the written deed of sale and cession dated the 4th of May 2018;

4.2 written confirmation that the purchase price of R1,800,000.00 (one million, eight hundred thousand rand) (alluded to in paragraph (3.1) of the written deed of sale and cession) have been paid to Traxys;

4.3 further to (2) above a copy of the written notice referred to in paragraph (7) of the deed of sale and cession, confirming payment of the aforesaid purchase price;

4.4 the signed power of attorney referred to in paragraph (8) of the written deed of sale and cession.

[5] The Applicant failed to respond to the Respondents' Notice in terms of Rule 35(12) and (14) within 10 days of the order. As a consequence of such failure, the Respondents' attorneys approached the Court by way of a notice in terms of Rule 30A(1) dated 8 February 2019. That Notice was served by the Respondents' attorneys on the Applicant's attorneys on 11 February 2019. Still the Applicant failed to respond to the Respondents' Notice in terms of Rule 35(12) and (14), hence the Respondents' application in terms of Rule 30A(2).

[6] When the matter came before me the crucial issue that the Court had to deal with was whether procedurally the Respondents are entitled to the documents that they seek or, to put it differently, whether procedurally the Respondents are entitled to enforce compliance by the Applicant with the Respondents' Notice in terms of Rule 35(12) and (14).

[7] In opposing the application the Applicant, which was represented by Advocate DJ Coetzee, raised a number of grounds. The grounds raised by the Applicants for opposing the said allocation are as follows:

7.1 Fargo failed to produce the documentation sought in the Rule 35 Notice on the following bases:

7.1.1 the documents requested by the Respondents are irrelevant and therefore not required to be produced in terms of the Rule;

7.1.2 the documents requested did not exist since Fargo and Traxys effected various amendments and waivers to the cession agreement. Therefore, the documents are unable to be produced;

7.1.3 the documents requested do not find their origin in an affidavit as contemplated in Rule 35(12) and therefore are not subject to the ambit of the Rule; and

7.1.4 the representatives of Fargo and Traxys, being the parties to the cession agreement have confirmed under oath that the rights, claims and obligations that were owed to Traxys were successfully sold and ceded to Fargo. The First to Sixth Respondents who were not party to this cession agreement, do not have *locus standi* to question the validity, the veracity or otherwise of the transaction between Traxys and Fargo. Therefore, this application is an abuse of the court process.

[8] The Applicant raised the following points of law:

8.1 though the provisions of Rule 35 relating to discovery apply to applications as far as the Court may direct, discovery is rare and unusual in application proceedings and should be ordered by the Court only in exceptional circumstances;

8.2 factors taken into consideration to determine the notion of the exceptional circumstances include:

8.2.1 the relevance of the document requested; and

8.2.2 whether the application is a fishing expedition.

8.3 Rule 35(3) clearly and unequivocally states that, although the provisions of Rule 35 relating to discovery apply to applications, such application is subject to the *proviso* that the Court direct that it be so. Such direction is an essential requirement for a Rule 35 Notice as well as an application to compel compliance therewith;

8.4 The Applicant submitted therefore that:

8.4.1 the Respondents have failed to demonstrate exceptional circumstances allowing the Court to make a direction that the provisions of Rule 35 ought to apply; and

8.4.2 the Respondents have failed to seek a direction from the Court that the provisions of Rule 35 ought to apply.

In the circumstances the Respondents have failed to make out a case for their application to compel.

[9] The Respondents delivered a replying affidavit in which De Wet extensively dealt with reasons why, in the view of the Respondents, the documents requested were relevant. The affidavit also dealt with the procedure set out in Rule 35(12) and (14) and in the alternative sought an order in terms of Rule 35(13).

[10] I made it very clear to both counsel that the issue that I would deal with in this matter was the one clearly set out in paragraph 6 *supra* and that I would not entertain any issue that related to the relevance or irrelevance of the documents requested. That issue was not before me. This Court was not the proper place at which, on 3 September 2019, the issue regarding the relevance or irrelevance of the documents requested could be debated. Consequently, the most crucial issues raised by the Applicant are encapsulated in paragraph 6 *supra.*

[11] Rule 35(13) of the Uniform Rules of Court provides that:

"13: The provisions of this rule relating to discovery shall mutatis mutandis apply, insofar as the Court may direct, to applications."

At the commencement of the matter, I enquired from Adv. A Duvenhage, who appeared for the Respondents, whether he had an occasion to peruse Lorentz v MacKenzie 1999 (2) SA 72 (TPD) at 74F-G. In this case, which has not been overruled, the Court, in dealing with Rule 35, had the following to say:

"It is clear that the uniform rules of court do make provisions 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."

See also Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd 2003 (6) SA 190 at paragraph [9] at page 194C where Plasket AJ, as he then was, had the following to say:

"[9] The starting point in the enquiry as to the application of Rule 35(13) is that there is no discovery in applications: it is only possible for discovery to apply in applications if, in terms of Rule 35(13), a Court has been approached to make the Rules relating to discovery, or some of them, applicable and makes an order to this effect. A Court has a discretion to allow discovery in applications."

[12] In his heads of argument and also in his argument Mr Duvenhage referred the Court, in support of his point that the legal position that the Niemoller respondents are required to show "special and/or exceptional circumstances" and be burdened with so-called evidential burden, is bad in law, to the textbook of Herbstein and Van Winsen, the Civil Practice of the High Courts of South Africa, Fifth Edition, where the learned authors expressed the view that there is no foundation in our rules and it appears to be unnecessary for a litigant to showcase "exceptional or special circumstances" before a Court will order discovery or the production of the documents. The authors in Herbstein and Van Winsen did not make the law by making that statement. Instead what they did was to make a suggestion. The full statement at page 86 volume 1 reads as follows:

"It is suggested that this sometimes agonising search for "special circumstances" is not only unnecessary but also has no foundation in the rules."

[13] It is so that though the provisions of Rule 35 apply to applications, as far as the Court may direct in terms of Rule 35(13), discovery is rare and not a usual occurrence in application proceedings and should be ordered by the Court only in exceptional circumstances. Therefore, unless it has been overruled, of which I am not aware, the case of Moulded Components and Rosto Moulding SA (Pty) Ltd v Coucourakis and

Another 1979 (2) SA 457 (W) is still the authority on the requirements of "special circumstances". This case has been followed in several other cases including Saunders Health Co Ltd v Insacor (Pty) Ltd 1985 (1) SA 146 T; Lorentz v MacKenzie supra. It is stated by the same authors that another reason for requesting exceptional circumstances is that:

"Discovery has been set to rank with cross-examination as one of the two mightiest engines for the exposure of truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for it can be, an often is, a devastating tool. But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased." See in this regard MV Urgup: Owners of the MV Urgup v Western Bark Carriers (Aust) 1999 (3) SA 500 (C) at 513.

[14] Mr Duvenhage also relied on the case of The Centre of Child Law v Hoërskool Fochville and Another 2016 (2) SA 121 SCA. He quickly realised that he could not put much reliance on the said authority by reason of the fact that that issue relating to the application of Rule 35(13) was not decided.

[15] Mr Duvenhage raised another point. He contended that similarly the Applicant complained that the Niemoller Respondents were required to seek the leave of this Court to serve and file its second Rule 35 Notice is fundamentally flawed for the following reasons:

15.1 as already showcased Rule 35(12) can clearly be distinguished and does not form part of "discovery" as envisaged in Rule 35(13);

15.2 in any event, even if the Niemoller Respondents were wrong in this regard, it has sought to the leave of this Court in terms of Rule 35(13) in its replying affidavit;

15.3 over and above the aforementioned this Court as a matter of law, retains its inherent jurisdiction to order the production of documents.

On the other hand, Mr Coetzee argued that the Applicant is procedurally not entitled to request the documents in terms of Rule 35(12) but should rather have applied to Court for an order that the entire discovery procedure as envisaged in Rule 35 be made applicable to these motion proceedings. I agree with him.

[16] On the argument by Mr Duvenhage that this Court, as a matter of law, retains inherent jurisdiction to order the production of documents, Mr Coetzee argued that while the Court has an inherent power to order a party to produce for inspection documents not referred to in that parties' pleading or affidavits, 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. Mr Coetzee relied in this regard on the case of Moulded Components at 462H - 463B where Botha J stated that:

"I would sound a word of caution generally in regard to the exercise of court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The rules are there to regulate the practise and procedure of the court in general terms and strong grounds would have to be advanced, in my view, to persuade the court to act outside the powers provided for specifically in the rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall

not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the court will only come to the assistance of an applicant outside the provisions of rules when the court can be satisfied that justice cannot be properly done unless relief is granted to the Applicant."

[17] Relying on Moulded, I am satisfied that the Respondents are required to show special or exceptional circumstances. Whether or not they have done so will be decided later.

[18] In this Division the law as set out by Southwood J in Lorentz v MacKenzie *supra* still reigns supreme. Unless it has been overruled there exists no reason, in my view, for me to deviate from it. Accordingly, a party may not, without much ado, deliver a Notice in terms of Rule 35(12) and (14) without such Notice having been preceded by a directive issued by the Court in terms of Rule 35(13). According to Botha J in the Moulded case, the reason for requiring a party to first obtain a directive in terms of Rule 35(13) before invoking the provisions of Rule 35(12) and (14) is 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 that it is only in exceptional circumstances, in my view, that discovery should be ordered in application proceedings."

[19] In Lorentz v MacKenzie *supra* the Court approached and applied the approach of the Court in the Moulded case, in particular the dicta at 462 H – 463 B and 470 D-E. In the premises it is clear from the authorities I have referred to that it has now become a crystallised principle of our law that discovery in motion proceedings is not there for the

taking and that a party who seeks it in those circumstances must first approach the Court for a directive as set out in Rule 35(13) before invoking the provisions of Rule 35(12) and (14). In the **Premier Freight** case the following was stated on page 194 [10]:

"[10] As stated above, the cases make it clear that an order in terms of Rule 35(13) is not simply there for the asking. There must be a good reason to justify a departure from the usual procedure for the launching, hearing and completion of application proceedings. Indeed, if orders are made as a matter of course in terms of Rule 35(13), much of the efficacy of motion proceedings would be lost."

It follows that where there has been failure to first seek and obtain a directive of a Court in Rule 35(12), such a party may not procedurally enforce compliance, in terms of Rule 30A(2), with a Notice in terms of Rule 35(12) and (14). See also **Afrisun Mpumalanga (Pty) Ltd v Kunene N.O. and Others 1999 (2) SA 599 TPD at 611G-I.**

[20] I have already, on the basis of **Moulded**, made a finding that discovery is rare and unusual in application proceedings and furthermore that it should only be granted in exceptional circumstances. It goes without saying that a party will not be able to set out those exceptional circumstances in a notice unsupported by an affidavit. Therefore, the notice must be accompanied by an affidavit in which the reasons for seeking the provisions of the Rule 35 to be made applicable to the application proceedings are set out. Such reasons will also include the exceptional circumstances that have to be placed before the Court to enable it to assess whether or not to make a directive in terms of Rule 35(13).

[21] As matters stand now, no such reasons have been set forth in the Respondents' applications in terms of Rule 35(13) read with Rule 27(3). No exceptional circumstances that a Court must consider before it can issue a directive in terms of Rule 35(13) are before Court. In the absence of such reasons the Court is unable to consider the application in terms of Rule 35(13) favourably.

[22] For the same reasons the Court is unable to find that the application in terms of Rule 35(12) read with Rule 27 can be granted without the relevant reasons.

[23] In the result the Court makes the following order:

1. **The applications of the Respondents in terms of Rule30A(2), and Rule 35 read with Rule 27(3) are hereby dismissed, with costs.**

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv DJ Coetzee
Instructed by:	Van Greunen & Associates Inc
Counsel for the Respondents:	Adv A Duvenhage
Instructed by:	Namely Traxys Africa (Pty) Ltd c/o Jacobson & Levy Inc
Dates heard:	3 September 2019
Date of Judgment:	6 September 2019