REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/11222

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

5/3/2012
DATE

SIGNATURE

In the matter between -

INVESTEC BANK LTD	APPLICANT
and	
BLUMENTHAL, NATHAN *N O*	1ST RESPONDENT
BLUMENTHAL, MELONEY JOE *N O*	2ND RESPONDENT
FELLI, FRANSINA JOHANNA *N O*	
[For the sequestration of the Estate of the	
NATBLUM TRUST, IT5645/1994]	3RD RESPONDENT

JUDGMENT

SUTHERLAND J

[1] The applicant is a bank who has launched an application to sequestrate the Natblum Trust, as represented by its three trustees, the respondents. The application is opposed. The respondents filed an answering affidavit. The next routine step, if the applicant chooses, is to file a reply.

[2] The applicant wants to file a reply, but has hesitated in order to demand from the respondents' discovery of various documents set out in a notice in terms of Rule 35 (14). The respondents refused. The applicant's prayers seek a compelling order.

[3] The relevant sub-rules of Rule 35 Rules provide:

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

[4] There were three controversies between the parties:

a) In the absence of an order by the Court in terms of Rule 35(13) is there an obligation to respond to a demand for discovery under Rule 35(14)?

b) What exceptional circumstances warranted an order in terms if Rule 35(13) in this case and, more especially, was the sequestration character of the main application a factor of importance?

c) Were the requests for discovery compliant with the requirements of Rule 35(14) to be 'clearly specified' documents?

[5] The application can be disposed of on the first issue alone. It is improper to serve a demand under Rule 35(14) before an order has been made under Rule 35(13).

[6] That result is plain from two judgments by Southwood J. (See *Loretz v Mackenzie* 1999 (2) SA 72 (T) at 74G and *Afrisun Mpumalanga (Pty) Limited v Kunene N.O. & Others* 1999 (2) SA 599 (T) at 612B-D.) This proposition is in my view unassailable upon a proper interpretation of Rule 35(13). In *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 144 (T) at 148C such a preliminary application was brought.

[7] There is therefore no room for applications to be brought at the same time under Rule 35(13) for leave to procure discovery, and to compel a reply to a Rule 35(14) request.

[8] Accordingly, this application is premature and for that reason fatally irregular.

[9] Consequently, the respondents were perfectly entitled to ignore the demand and to oppose this application.

[10] Nevertheless, to avoid a fruitless further application under Rule 35(13) I deal with the other issues raised.

[11] Exceptional circumstances must exist to warrant such an order under Rule 35(13). *(See: Moulded Components v Coucourakis & Ano* 1979 (2) SA 462 (W) at 462H-463B.) The exceptionality of discovery in application proceedings was accepted as a given in *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 144 (T) at 149D, 148I–149E. In that matter, the respondent was given leave in terms of Rule 35(13) to obtain discovery of documents relating to an application for a final interdict against the alleged breach of copyright based on the unauthorised use of technical drawings.

[12] It was pressed upon me in argument that the exceptional circumstances in this matter flowed from the fact that it was a sequestration proceeding. The argument ran that because sequestration proceedings can only be initiated by application, the enquiry into whether or not discovery was appropriate had to begin with that factor and to accord it due weight. Moreover, it was a characteristic of sequestration proceedings that once an applicant had shown *prima facie* insolvency, the respondent had to discharge an onus to show that its assets did not exceed its liabilities. (See: *Mackay v Cahi* 1962 (4) SA 193 (O) esp at p199G-H.) On the facts of this case the

indebtedness was admitted and the exposition of the financial condition of the Trust was sketchy at best.

[13] In my view, these observations about the nature of sequestration proceedings and of the facts as revealed in the papers are valid. The implication of these considerations, so it was contended, was that discovery was appropriate in order to enable the applicant to rebut the respondent's evasive and unpersuasive allegations about solvency.

[14] However meritorious these criticisms are, in my view, they not such that they meet the threshold of exceptionality required by Rule 35(13). Very many applications for sequestration must exhibit these very features. If the rule-makers or the drafters of the insolvency legislation, cognisant as we must deem them to be about the procedures for insolvency procedures, had contemplated a need for discovery on account of these considerations *per se,* it would be expected to see that expressly provided for. There is no sign that they did.

[15] A traverse of the case law reveals that Rule 35(13) orders have rarely been granted at the behest of an applicant, and more usually, they have been granted to respondents wanting information to properly counter the allegations of the applicants. There is also a distinction of importance about whether to grant such relief during the exchange of affidavits or only afterwards.

[16] In *Moulded Components and Rotomoulding South Africa v Coucourakis & Ano* 1979 (2) SA 457 (W), the applicant succeeded in getting an order to produce

documents and machinery for inspection in a case about infringement of a design. Reference has already been made to *Saunders Valve Co Ltd v Insamcor (Pty) Ltd*, *supra*, where the respondent succeeded under similar circumstances.

[17] In *Krygcor Pensioenfonds v Smith* 1993 (3) SA 459 (AD), at 470C–E the court considered an application by the wife of a member of the Fund for discovery of the Fund's documents to be used in a divorce action. She invoked the inherent powers of the court to argue it could do so. The court observed that she should have resorted to Rule 35(13) if she could show justice would be thwarted without such an order.

[18] In *Premier Freight (Pty) Ltd v Breathtex Corporation (Pty) Ltd* 2003 (6) SA 190 (SECLD) the respondent succeeded in getting an order under Rule 35(13). The information in the judgment says only that the case was about a money claim and a defence based on misrepresentation by the applicant. Discovery was sought of all documentation pertinent to the parties' contractual dealing and payments made at the same time as an application to obtain time to file the answering affidavit. Plasket J, in the course of elucidating the appropriate factors to weigh in considering an application under Rule 35(13), alluded to the choice made by the applicant not to come by way of action, which deprived the respondent of the utility of discovery (at [16]).

[19] Notshe AJ, in *African Bank Ltd v Buffalo City Municipality* 2006 (2) SA 130 (Ck) at [8.3], in the context of setting out guidelines for an application under 35(13), alluded to the appropriateness of distinguishing the position of an applicant who sought the relief from a respondent. An applicant would have to explain why it had

not employed "the instruments at his disposal". What those 'instruments' might be is unclear to me, but I suppose the option of a trial action must be one such instrument contemplated. In that matter, after the replying affidavit had been filed, at which time the applicant had sought to have itself substituted by another company, the respondent successfully sought discovery of documents pertinent to that issue.

[20] In *STT Sales (Pty) Ltd v Fourie 2010 (6) SA 273 (SGJ)* , Lamont J dealt with an applicant's attempt to use Rule 35(13) to procure documents in a dispute over the wrongful use of confidential information and technology. He expressed the view that discovery was inappropriate until all the legal issues had been clarified. He summed up the purpose of discovery thus:

> "[14] In trial proceedings the legal issues existing between the parties are apparent once the pleadings are closed. That is the purpose of pleading. The factual issues are, however, not identified. The factual issues can only become identified once the facts in question are produced. This takes place by way of production of documents and by way of evidence given in court. The purpose of discovery is to enable the parties to become aware of documentary evidence that is available and to identify factual issues. In addition, discovery results in the production of documents that can be used in the course of interrogation of witnesses.

[21] He then went on to declare:

> "[15] Discovery is not intended to be used as a weapon in preliminary skirmishes. See The MV Urgup: Owners of the MV Urgup v Western Bulk

> Carriers (Australia) (Pty) Ltd and Others 1999 (3) SA 500 (C) at 513I. The right to discovery is an easily abused right and must be properly protected to ensure that it is used in the context in which it was designed for use.
>
> [16] The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established."

[22] The remarks of Lamont J are especially important because they address the forensic function of discovery, not merely considerations about the interests sought to be served by the invocation one or another legal device. This approach, in my view, must be the appropriate point of departure for any enquiry as to the propriety of an exceptional procedure as in Rule 35(13). The examples cited above where respondents were granted the opportunity to obtain discovery were premised on demonstrating that a clear prejudice would result without such relief.

[23] On such an approach, the peculiarities of sequestration proceedings do not and ought not to weigh heavily. An applicant for sequestration, where a referral to oral evidence is not appropriate must make out the case on the papers, and a respondent who chooses to be lean in its exposition of its financial position must run the risk of being disbelieved for want of a plausible exposition of its case, as contemplated in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (AD) at 635B.

[24] It seems that the law is as follows:

24.1 The primary rule is that discovery is available to a party after the legal issues have been set out, not before.

24.2 In application proceedings the Courts' specific authorisation is required before a demand can be made under Rule 35(14).

24.3 The condition for such an order to be justified is exceptionality; this means:

24.3.1 If the discovery is wanted before the completion of the filing of all affidavits, prejudice must be shown of a nature that cannot be cured without discovery.

24.3.2 If the discovery is sought after the filing of all affidavits, it must be demonstrated that it is necessary, not merely useful, to achieve a fair hearing.

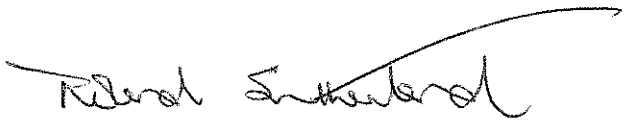
[25] Lastly, the respondent's contentions about the actual requests lacking the particularity required by Rule 35(14) were cogent.

[26] An examination of the request does, it seems, justify the criticism that it is a fishing expedition. Some requests were abandoned, but even those that remained were mostly vaguely described, often in mere generic terms. For example "documents providing proof that the Trust was possessed of the necessary financial resources with which to pay" identifies no document at all. Similar criticism of other requests are equally valid; *eg*, "documents ... setting out request for indulgences ..."; and "documents demonstrating the value and origin of book debts ...". Other requests might be thought to be borderline, such as the request for the "share certificates held by the trust...." or "all audited financial statements. ..."

[27] Where Rule 35(14) stipulates that the documents be clearly and specifically described, this ought to be strictly applied. The impression gained from a reading of this request is that the applicant is seeking further particulars rather than wanting the disclosure of particular documents that it knows exist. Even if there is the odd properly specified document the overall scheme of the request is out of bounds of the intended scope of the Rule.

[28] In the result:

The application is dismissed with costs.



ROLAND SUTHERLAND
JUDGE OF THE
SOUTH GAUTENG HIGH COURT

FOR APPLICANT	:	ADVOCATE JE SMIT (082 468 1755 / 011 324 0500) WERKSMANS ATTORNEYS Ref: Mr F v TONDER/INVE5533.38 Tel: 011 535 800 Fax: 011 535 8600
FOR FIRST & THIRD RESPONDENTS		ADVOCATE T OSSIN Tel: 011 290 4000 / 082 771 4210 CYRIL ZIMAN & ASSOCIATES INC Ref: Mr Ziman Tel: 011 880 9363 Fax: 011 880 8848