REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2013/28497

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

5 MARCH 2014 **FHD VAN OOSTEN**

In the matter between

ENVIROSHORE (PTY) LTD **APPLICANT**

and

ENERGY BROKERS (PTY) LTD **RESPONDENT**

Practice - Rule of Court 35(12) - respondent's failure to comply - application to compel in terms of rule 30A - document sought to be produced referred to in answering affidavit in motion proceedings - relevance of document - existence of document inconclusive - respondent ordered to respond to rule 35(12) notice within 10 days

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J U D G M E N T

VAN OOSTEN J:

[1] This is an interlocutory application in terms of rule of court 30A. In the main application the applicant seeks an order against the respondent for payment of R2 619 650-99, interest thereon and costs, based on an oral agreement of compromise concluded between the parties resulting from the respondent's alleged failure to meet its payment obligations in terms of a credit facility, in respect of heavy fuel oil sold and delivered, granted to it by the applicant. The respondent opposes

the application and in essence denies that the agreement of compromise was concluded. Central to the issue is the minute of two meetings at which according to the applicant, the agreement of compromise was concluded. In its answering affidavit the respondent alleges that it was agreed at the meetings that the respondent would prepare a minute of what had been discussed at the meetings and only if those minutes were 'satisfactory' to both parties, an agreement would be signed and become binding. The deponent to the answering affidavit, who is the managing director of the respondent, then states that even if the minutes accurately reflected what had been discussed at the meetings, he decided that the respondent would not sign the agreement 'as it had already become apparent that the applicant was unable to supply heavy fuel oil that would be fit for purpose (sic)'. The business of the applicant, I need to add, is refining raw materials into heavy fuel oil for supply into the South African market and that of the respondent buying and selling energy. The respondent purchased heavy fuel oil from the applicant for the use thereof by its associated companies in operating boilers for the supply of steam to manufacturers. Two further references are made in the answering affidavit to the minute to the effect that the signed minute was 'essential' to the agreement being concluded. The applicant thereupon delivered a rule 35(12) notice on the respondent calling for production of the minute referred to in the answering affidavit. The respondent did not formally respond to the notice but the respondent's attorneys, in an email addressed to the applicant's attorneys, advised that the respondent did not intend to comply with the notice. The main reason for the refusal relied on is the absence of any statement in the answering affidavit that the minute in fact was either signed or that it existed.

[2] The provisions of rule 35(12) authorise production of documents to which *reference* is made in the proceeding, in this case the answering affidavit (Erasmus *Superior Court Practice* B1-260). The minute is clearly relevant to the defence raised by the respondent. The answering affidavit indeed refers to a minute of the meetings albeit in general terms. It is true that there is no positive allegation in the answering affidavit that the minute was either signed or that it exists. In fact the answering affidavit is silent on these aspects. The enquiry however, does not end there: the deponent to the answering affidavit, as I have alluded to, states that he in any event had decided that the respondent would not sign the agreement due to the applicant's

alleged inability to perform. The references to the minute, as for the existence thereof, either signed or unsigned, are seemingly inconclusive. The applicant, in my view, was entitled to call upon the respondent for production thereof in terms of rule 35(12). The respondent instead of addressing its obligations to respond to the rule 35(12) notice embarked upon raising arguments as to its obligation to comply with the notice. Those arguments were repeated before me. In my view the arguments do not address the real issue in this matter and therefore cannot be sustained. The real issue having crystallised, quite simply, is the following: does the minute, signed or unsigned, exist or not? If it exists the respondent should have produced it pursuant to the rule 35(12) notice. If not, the respondent should have stated as much in its response to the rule 35(12) notice. Neither happened, and the respondent by its refusal to comply with the notice caused an unnecessary application to be brought to this court.

[3] I am satisfied that the respondent's refusal to comply with the applicant's rule 35(12) notice cannot be sustained and that the applicant accordingly is entitled to the relied sought.

[4] In the result the following order is made:

1. The respondent is ordered to respond to the applicant's notice in terms of rule 35(12) within 10 days of the date of this order.

2. The respondent is ordered to pay the costs of this application.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV AJ DANIELS*** ***ADV G STEYN***
APPLICANTS' ATTORNEYS	***BICCARI BOLLO MARIANO INC***
COUNSEL FOR RESPONDENT	***ADV A MILOVANOVIC***

RESPONDENT'S ATTORNEYS	***WEBBER WENTZEL***
DATE OF HEARING	***5 MARCH 2014***
DATE OF JUDGMENT	***5 MARCH 2014***