REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2013/45313

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

8 OCTOBER 2014 **FHD VAN OOSTEN**

In the matter between

MUTCH BUILDING MATERIALS CC **APPLICANT**

And

JOHN HANEKOM **RESPONDENT**

Discovery and Inspection – Discovery - Production of documents - Notice in terms of rule 35(12) and (14) to produce documents for inspection referred to in the applicant's founding affidavit - no reference to such documents in the founding affidavit or annexures thereto - reference by mere inference not reference for purposes of rule 25(12) - application dismissed.

Costs - punitive costs - rule 35 procedure invoked by respondent merely to harass applicant - abuse of court process - punitive costs justified.

Costs – de bonis propriis against attorneys acting for respondent - absence of reprehensible conduct- order sought not justified.

J U D G M E N T

VAN OOSTEN J:

[1] This is an interlocutory application in which the respondent seeks an order compelling the applicant to produce certain documents allegedly referred to by the applicant in its founding affidavit.

[2] The applicant instituted proceedings by way of motion against the respondent in which it seeks payment, in two separate claims, of the amounts of R416 567.53 and R382 513.11 respectively, together with interest thereon and costs on the attorney

and own client scale. Each claim is based on an acknowledgment of debt including a deed of suretyship. The acknowledgment of debt and deed of suretyship referred to in claim A was signed by the respondent 'in his personal capacity as the duly authorized representative of' and 'surety on behalf of Build Plum and Tile Blackheath CC' (the principal debtor). The acknowledgment of debt and deed of suretyship referred to in claim B is in similar terms except that it was executed in favour of a company, Mutch Transport (Pty) Ltd (Mutch Transport), the claim having been ceded to the applicant. The respondent filed a notice of intention to oppose the proceedings which was followed by a notice in terms of rule 35(12) and (14) in which production and inspection is requested of certain documents 'which are referred to in the applicant's application and/or which are relevant to a reasonably anticipated issue in the consolidated application'.

[3] In response to the rule 35 notice the applicant, although denying the respondent's entitlement to the documents sought, and merely 'in order to avoid protracted ancillary interlocutory applications' produced copies of the documents requested except for the following:

'4. The document/resolution referred to [in the acknowledgment of debt and deed of suretyship on which claim A is based] authorising Anton Carl Landman to act on behalf of the applicant.
5. The appointment letter and/or employment contract of Anton Carl Landman as a director and general manager of the applicant, as stated in [the certificate of balance).
6. The document/resolution referred to in [the acknowledgment of debt and deed of suretyship on which claim B is based] authorising Anton Carl Landman to act on behalf of [Mutch Transport].'

In support of its refusal to produce these documents the applicant advanced the grounds that the documents are neither referred to in the paragraphs referred to by the respondent, nor required for the purpose of delivering an answering affidavit and, in any event, that rule 35(12) requires production of documents mentioned in an affidavit and not in an annexure thereto. This prompted the respondent, much as was predicted, to launch the present application.

[4] The founding affidavit on behalf of the applicant in this application was deposed to by the said Landman (Landman) who states that he is the managing member of

the applicant. The documents in issue concern Landman's authority to act on behalf of the applicant as well as on behalf of Mutch Transport in the execution of the acknowledgments of debt and deeds of suretyship and, further, the capacity in which he signed the certificate of balance (as the general manager of the applicant) on which the applicant relies as proof of the amount of the respondent's indebtedness to it in claim A.

[5] Rule 35(12) provides for the production, at the request of any party to the proceeding, of any document to which *reference is made* in the other party's pleadings or affidavits [emphasis added]. 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) 750D). The objection on this ground raised by the respondent in its response to the rule 35 notice accordingly is flawed and cannot be sustained.

[6] The hurdle the respondent is facing concerns the requirement in rule 35(12) that the documents required to be produced must be referred to in the affidavit or annexures thereto. It has been held, on the one hand, that the rule must not be interpreted too narrowly (*Universal* 750C-d) and on the other, not too widely and subject to certain limitations (see *Penta Communication Services (Pty) Ltd v King and another* 2007 (3) SA 471 (C)). The documents we are here concerned with are not referred to at all in the applicant's papers. As much was readily and correctly conceded by counsel for the respondent. Counsel however sought to justify the existence of such documents by way of inference based on the startling proposition that Landman's authority and capacity could only have been conferred on him in writing. A process of reasoning and inference whether a document does or may exist in order to invoke the rule, was specifically disapproved of by Bozalek J in *Penta* (476 para [16]). In the absence of any reference to the documents the application is doomed to failure. I should add that the applicant, rather belatedly in its answering affidavit in this application, for the first time alleged that those documents in any event do not exist. The applicant was severely criticised for not having disclosed this information at an earlier stage, in response to the rule 35 notice which, so it was contended by counsel for the respondent, may well have obviated the launching of this application. I am unable to agree: the respondent nevertheless persisted in the

application. In any event, as I will presently deal with, the application was ill-conceived right from the outset.

[7] Rule 35(14) adds the qualification of relevancy to the documents required to be produced: 'which are relevant to a reasonably anticipated issue in the action'. Nothing in support of this requirement appears in the papers before me. On the contrary, the inference is irresistible that the rule 35 notice procedure invoked merely to harass the applicant which constitutes an abuse of the process of court (cf *The MV URGUP. Owners of the MV URGUP v Western Bulk Carriers (Australia) (Pty) Ltd and others* 1999 (3) SA 500 (C) 513H). The documents relating to the authority of Landman to act on behalf of the entities I have referred to or, the capacity in which he signed the certificate of balance, assuming they did exist, cannot on the facts of this matter have any relevance to any anticipated issue in the main application. At best for the respondent, those documents, again assuming they did exist, concern nothing more than a challenge to the authority and capacity of Landman. It is abundantly clear that the respondent embarked upon a fishing expedition: Landman at all times acted on behalf of the entities as is clearly and repeatedly stated in the acknowledgements of debt. The indebtedness in respect of which the securities were obtained arose from goods sold and delivered by the applicant to the principal debtor during the period from May to July 2012. The respondent was the sole member of and signed the documents on behalf of the principal debtor which was subsequently placed in voluntary liquidation. A business relationship thus existed between the parties. Against this background I would have expected the respondent to set forth a strong case in order to afford any credence to the challenges now raised, which he has evidently failed to do.

[8] It remains to deal with the costs of this application. Counsel for the applicant persisted in asking for costs on the punitive scale and further submitted that those costs be paid by the respondent's attorneys *de bonis propriis*. Reliance was placed on the forewarnings of an abuse of the court process in the applicant's response to the rule 35 notice as well as subsequently, in somewhat stronger terms, in a letter by the applicant's attorneys to the respondent's attorneys. I am satisfied, in the exercise of my discretion, that a punitive costs order is amply justified in the circumstances of this case which I have already alluded to. Although the request for a costs order

against the respondent's attorneys is not altogether without merit, I am unable to find that their conduct was reprehensible in any way.

[9] In the result the application is dismissed with costs, such costs to be taxed on the scale as between attorney and client.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV M DE OLIVEIRA***
APPLICANT'S ATTORNEYS	***JASON MICHAEL SMITH INC***
COUNSEL FOR RESPONDENT	***ADV V VERGANO (HEADS OF ARGUMENT SIGNED BY ADV N RILEY)***
RESPONDENT'S ATTORNEYS	***SNAID & EDWORTHY***
DATE OF HEARING	***6 OCTOBER 2014***
DATE OF JUDGMENT	***8 OCTOBER 2014***