HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 40502/2014

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY Applicant

and

GRANDBRISGE TRADING 74 (PTY) LTD First Respondent
ZINGARO TRADE 6 (PTY) LTD Second Respondent
BENONI PLAZA (PTY) LTD Third Respondent

Case Summary: **Interlocutory application - in terms of rule 30A of the Uniform Rules of Court - to compel production of documents referred to in founding affidavit of the main application – the obligation on a party, who refers to a document, to produce it, is subject to certain limitations, one being that a document which is irrelevant will not be subject to production – documents in question are relevant to primary issues in the main application. Production order granted.**

JUDGMENT

MEYER J

[1] This is an interlocutory application by the applicant, Ekurhuleni Metropolitan Municipality (Ekurhuleni), in terms of rule 30A of the Uniform Rules of Court, to compel the third respondent, Benoni Plaza (Pty) (Ltd) (Benoni Plaza), to produce certain documents under rule 35(12) (the interlocutory application).

[2] The first respondent, Grandbridge Trading 74 (Pty) Ltd (Grandbridge), the second respondent, Zingaro Trade 6 (Pty) Ltd (Zingaro) and Benoni Plaza as the first, second and third applicants, instituted the main application against Ekurhuleni as the respondent, in which application they seek an order interdicting Ekurhuleni from terminating the electricity supply to a shopping mall, the Benoni Plaza, or, in the alternative, relief by way of the *mandament van spolie* (the main application). In its replying affidavit in the interlocutory application, Ekurhuleni abandoned its claim for relief against Grandbridge and Zingaro in the interlocutory application. In this regard it is stated in paragraph 23 of the replying affidavit that-

'. . . Ekurhuleni will not seek any order herein as against the First and Second Applicants [Grandbridge and Zingaro].

Grandbridge and Zingaro are accordingly entitled to their costs of opposing the interlocutory application until 29 August 2016, which is the day when the replying affidavit was filed.

[3] By the time the interlocutory application was argued, Benoni Plaza limited its objection to produce the documents in question to irrelevancy. The obligation on a party who refers to a document, to produce it, is subject to certain limitations, one being that a document which is irrelevant will not be subject to production.

[4] In *Centre for Child Law v The Governing Body of Hoërskool Fochville* (156/2015) [2015] ZASCA 155 (8 October 2015), Ponnan JA said the following:

'[18] . . . For my part, I entertain serious reservations as to whether an application such as this should be approached on the basis of an onus. Approaching the matter on the basis of an onus may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term onus is not to be confused with the burden to adduce evidence (for

example that a document is privileged or irrelevant or does not exist). In my view, the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is 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.'

[5] Ekurhuleni owned the land on which the shopping mall was built. In the founding affidavit in the main application it is alleged that, in terms of a head lease agreement to which Ekurhuleni is a party, Benoni Plaza obtained the right to sublet parts of the shopping mall (the head lease agreement). In paragraph 10.3 thereof it is *inter alia* stated that-

'. . . the Third Applicant [Benoni Plaza] has entered into lease agreements with all tenants who occupy premises (shops) within the shopping mall. As stated previously these individual sub-tenants occupy approximately 33 tenements within the shopping mall in terms of the lease agreements with the Third Applicant.'

[6] In its affidavit in response to Ekurhuleni's notice in terms of rule 35(12) and in its answering affidavit in the interlocutory application, Benoni Plaza explained that it authorised Assetlink Investments (Pty) Ltd (Assetlink) to administer, enter into agreements of lease, collect rentals and conduct the business affairs of the shopping mall. It also appears that Benoni Plaza is a subsidiary of Assetlink. Ekurhuleni presently seeks the production of the lease agreements referred to in paragraph 10.3 of the founding affidavit in the main application.

[7] In the main application, Benoni Plaza relies heavily on clause 22 of the head lease agreement, which provides as follows:

‘THE CORPORATION (Benoni Plaza) shall be liable for and shall promptly on the due date thereof pay to the Council [Ekurhuleni] all municipal fees for water, electricity, sewerage, sanitary and refuge removal supplied or rendered to or for the leased premises at such tariffs as shall from time to time be applicable other than for the following:

(a) Charges for electricity supplied to any tenant of a shop of the CORPORATION, for whom a separate meter has been installed by the CORPORATION to measure the electricity supplied to such tenant.’

(b) Charges for electricity consumed or water use in the parking bays sub-let to the COUNCIL, in accordance with separate meters installed by and at the cost of the CORPORATION to measure such electricity and water.

(c) Charges for refuge removal from the Parking bays sub-let to the COUNCIL.’

[8] The case put up by Benoni Plaza is that it indeed installed separate meters for all the tenants of the shopping mall, and that Ekurhuleni, therefore, is contractually bound to read the individual meters of each tenant and to bill the tenants separately for electricity usage. Instead, so Benoni Plaza avers, Ekurhuleni ‘. . . had unilaterally and of its own accord elected to install some sort of a bulk meter in respect of the entire mall and was now holding the Third Applicant [Benoni Mall] liable for the entire charges outstanding on such bulk meter’ and that, according to Ekurhuleni, an amount of R2 307 347.89 was outstanding ‘on such account’. Benoni Mall disputes its liability to Ekurhuleni for payment of that amount.

[9] From a reading of the affidavits in the interlocutory application, the primary issues in the main application seem to be whether there were indeed separate metres installed for all the tenants and whether there was a shifting of liability for the payment of electricity charges from Benoni Plaza to the individual tenants. I agree with Ekurhuleni that the provisions of particularly clause 22 of the head lease

agreement, the provisions of the individual lease agreements with tenants relating to electricity charges and the applicable legislation, including Ekurhuleni's by-laws, *inter alia* those relating to the liability for and the recovery of electricity charges, are all relevant to these issues.

[10] In the result, the following order is made:

(a) The third respondent is to comply with the applicant's notice in terms of rule 35(12) of the Uniform Rules of Court, dated 31 August 2015, within a period of ten days of the date of delivery of this order to the offices of the third respondent's attorneys of record.

(b) In the event of the third respondent failing to comply with paragraph (a) of this order, the applicant is given leave to enroll the matter on notice, on the same papers as duly supplemented, for an order striking out the third respondent's claim in the main application under case number 40502/2014 to which this application is interlocutory.

(c) The third respondent is to pay the applicant's costs of the interlocutory application, except the costs pertaining to the first and second respondents' opposition.

(d) The applicant is to pay the first and second respondents' costs incurred in opposing the interlocutory application until and including 29 August 2016.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	28 October 2016
Date of judgment:	28 March 2017
Counsel for applicant:	N Felgate
Instructed by:	KM Mmuoe Attorneys, Hyde Park, Johannesburg
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