

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 20/18686

1. REPORTABLE:	NO
2. OF INTEREST TO OTHER JUDGES:	NO
3. REVISED	
06/10/2021	

In the matter between:

ADVANCED VALVES CC

Applicant

and

ELECTROLUX SOUTH AFRICA (PTY) LIMITED

First Respondent

THE SOUTH AFRICAN BUREAU OF STANDARDS

Second Respondent

THE NATIONAL REGULATORY COUNCIL FOR

COMPULSORY SPECIFICATIONS

Third Respondent

Delivery: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 05 October 2021.

Summary: Application to invoke the provisions of Rule 35 (13) read with Rule 35 (14) of the Uniform Rules of the High Court. Application of the discovery rules to motion proceedings.

JUDGEMENT

Molahlehi J

Introduction

[1] The issue for determination in this interlocutory application is whether the court should permit the applicant's request to invoke the provisions of rule 35 (13) of the Uniform Rules of the High Court (the Rules). In other words, the applicant's request is that the court should allow the rules relating to discovery to find application in the main application instituted by the applicant, Advance Valves CC, against the first respondent Electrolux South Africa (Pty) Limited (Electrolux).

[2] The other relief sought by the applicant is that if successful in its request, then the court should order the second respondent, the South African Bureau of Standards (SABS), to make available for inspection and copying in terms of rule 35 (14) of the Rules a report concerning the products of the Electrolux.

[3] The applicant contends that the findings in the said report are related to the complaint it had lodged with the SABS and are thus relevant to the main application which it had instituted against the respondent.

[4] The applicant avers that it became aware of the existence of the SABS report and findings through the correspondence dated 23 October 2020 from the SABS.

[5] The Electrolux opposed the application mainly because, according to it, the requested report is irrelevant to the determination of the dispute in the main application.

The parties

[6] The applicant is a closed corporation with limited liability and incorporated in terms of the close corporation laws of the Republic of South Africa.

[7] Electrolux is a private company registered in terms of the company laws of the Republic of South Africa. It is a division of an international company, Electrolux AB, a Swedish global home appliance manufacturer in Stockholm, Sweden.

[8] The SABS and the National Regulatory for Compulsory Specification are statutory bodies established respectively in terms of the Standards Act,¹ (the Standards Act) and the National Regulator for Compulsory Specifications Act,² (the NRCS Act).

[9] The NCRS is, in terms of the NCRS Act, charged with determining compulsory specifications for the safe storage of water in the water heaters. In terms of section 13 of the NRCS Act, the NCRS is responsible for the following:

¹ Act number 8 of 2008.

² Act number 5 of 2008.

- a. making recommendations to the Minister of Trade Industry to declare a SANS compulsory specification of a product.
- b. issuing a letter of authority to permit the sale of goods falling within the ambit of a particular compulsory specification.
- c. monitoring compliance with the NRCS Act by role players in the industry.

[10] In terms of the NRCS Act, businesses are prohibited from importing, selling or supplying a product to which the compulsory specification applies unless that product complies with the mandatory specification.

[11] The applicant and Electrolux are competitors in the market of the sale of water heaters and the parts thereof.

History of the litigation

[12] The application in this matter was instituted as an urgent application on 31 July 2020, and it was struck off the roll for lack of urgency on 25 August 2020. After that, the applicant re-enrolled the matter on the ordinary roll for a hearing on 27 October 2020.

[13] A day before the hearing date, namely 28 October 2020, the applicant filed a supplementary affidavit indicating that it requires the discovery of the SABS October report before the main application could be heard. This resulted in the postponement of the hearing with the applicant granted leave to institute the current application.

[14] The papers in the current application were filed between December 2020 and January 2021.

The case of the applicant.

[15] The applicant seeks a final interdict based on the allegation that the respondent does not have the necessary permits to sell the regulated goods.

[16] The application to compel discovery is related to the proceedings instituted by the applicant (the main application) concerning the first respondent's alleged unlawful and illegal competition.

[17] The alleged unlawful and illegal competition in the main application concern the following allegations by the applicant:

- (a) The respondent does not have permits issued in its name, which entitled it to affix the SABS approved mark on its drain cork, temperature and pressure safety valves (T&P valves).
- (b) The respondent's T & P valves and drain cork, did not comply with the relevant South African National Standards (SANS) and was not eligible to affix the SABS mark to its products.

[18] The above complaint arose from purchasing the Kwikot branded temperature and pressure of the T & P valves and the branded drain cocks from a spares retailer, Plumblink.

[19] The T & P valve's purpose is to ensure safety in the regulation of excessive water pressure in the electric water heater and to avoid any possible explosion of the water heater.

[20] The applicant's conclusion that it is entitled to call for the discovery as envisaged above arises from the letter of the SABS to it dated 23 October 2020 where in the last paragraph thereof the following is stated:

"The SABS has conducted an investigation, the conclusion of which will be informed by the general permit conditions between SABS and Electrolux. Our findings were communicated to Electrolux for action."

[21] On 26 October 2020, the applicant's attorneys addressed a letter to SABS's attorneys requesting that it make available a copy of the findings alluded to in the letter of 23 October 2020.

[22] The applicant further interprets the letter's contents to say that SABS must have committed some form of transgression. It is based on this that it contends that the report is relevant to the main application. The relevant part of the letter reads as follows:

"It is abundantly clear that your client must have transgressed on one or more of the grounds contained in our client's application (as there were the grounds which informed the complaint to

the SABS). The report and findings are highly relevant to the issues before the Court and, as such, we request that you provide us with a copy thereof forthwith."

[23] The SABS never responded to the request for the report's release, and thus the applicant instituted this application.

[24] In its supplementary affidavit, the applicant alleges that an employee of SABS informed it that the respondent's drain cork and T & P valves were non-compliant and impermissibly embossed with the SABS mark. It further contends that the SABS's findings are inextricably linked to the reports relied on by Electrolux as part of its defence.

The respondent's case

[25] The respondent's case is that the test conducted by the SABS and its findings in the report are applicable as of May 2020 reveal that the valve, the drain cork and the vacuum breaker were compliant with the SANS standard and accordingly certified as such. The respondent further contends that there has been no subsequent decision by SABS.

[26] It is on the basis of the above that the respondent contends that:

- a. The documents sought by the applicant have no bearing on the factual or legal position as of May 2020.
- b. The relationship between it and SABS is contractual, and in terms of the contract, the respondent is allowed to use the license issued to it by SABS. As a third party

to the contractual relationship, the applicant has no interest in the issue of the license granted by SABs.

- c. The Electrolux contends further that the SABs's employee's evidence is unreliable and prejudicial as it is based on hearsay. It may also constitute a breach of the confidentiality rule of the employee's employment contract.

Legal principles

[27] The broad principles governing the approach to discovery in application matters are set out in *First Rand Bank Ltd t/a West Bank v Manhattan Operations (Pty) and Others*,³ as follows:

"The authorities are in agreement that, in general, discovery does not apply in application proceedings as a matter of course..."

[28] The court further in that case quoted with approval, what was said in *Moulded Components and Routoumolding South Africa (Pty) Ltd and another*,⁴ where the court said:

"In application proceedings, we know that discovery is a very rare and unusual procedure to be used and have no doubt that is a sound practice and it is in exceptional circumstances, in my view, the discovery should be ordered in application proceedings."

³ 2015 (5) SA 238 [GCJ].

⁴ 1979 (2) SA 457 (W) at 470D – E.

[29] It is trite that the court has a very wide discretion to order discovery in application proceedings. It will do so where it is persuaded that it is in the interest of justice to grant permission for discovery.⁵ To avoid a compelling order of discovery, the respondent in an application such as the present must show that the document requested is irrelevant to the issues at hand or privileged.⁶

[30] In *Premier Freight v Breathtex*,⁷ the court identified two aspects relating to the notion of exceptional circumstances that may require permission for discovery in a motion proceeding as being:

- a. it is rare that a litigant would seek a compelling order of discovery in application proceedings.
- b. there must be special features that render the application of the rules of discovery applicable to application proceedings.

[31] The court further opined that the notion of exceptional circumstances has to be seen in the context of the Constitutional values of fairness, equity, openness and transparency. *Moulded Components (Supra)*

⁵ *Pensionfonds v Smith* [1993] ZASCA 47: [1993 [3] SA459 [A at 467B – D.

⁶ See *Center for Child Law, the Government Employee Hoer Skool Fotchville and another* (2015) 4 ALL SA 571 at 582.

⁷ [20301/02] [2003] ZAECHC 10 (10 March 2003).

[32] In the heads of argument, the applicant submits that it seeks to invoke rule 35 (13) not on the grounds of seeking general discovery.

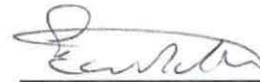
[33] In my view, this matter turns on whether the issue of the requested discovery is relevant. As the above discussion shows, the October report was issued several months after the sale of the products in question by Electrolux in May 2020. There is no dispute that the SABS had issued certificates and permits after conducting the tests on the products. In the circumstances, this renders the sales of the products to be compliant with the required standard.

[34] The contention of the applicant that the report may say that the certificates were incorrectly issued and thus Electrolux must take corrective action does not assist the applicant's case. As stated earlier, the discovery application was issued in October 2020 when the sale of the products in question was in May 2021. This means that even if the October report was to say that the certificate of permits at the time of the sale was incorrect, that would have no bearing on the lawfulness of the sale. The legality or otherwise of the sale would turn based on the certificate or permits that existed at the time. I am thus in agreement with the submission by Electrolux that the legality or otherwise of the sale must be determined as at the date of the sale.

[35] In the circumstances, I find the October report to be irrelevant and thus the applicant's application stands to fail

Order

[36] In the circumstances, the applicant's application is dismissed with costs.



E Molahlehi

Judge of the High Court

Gauteng Local Division,

Johannesburg

Representation:

For the Applicant: Adv G Kairinos SC with Adv R Pottas

Instructed by: Smit and Herbst Attorneys

For the Respondent: Adv G Marriot

Instructed by: Adams and Adams Attorneys.

Heard: 29 July 2021

Delivered: 6 October 2021