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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date : 11/04/2022

A Maier-Frawley

CASE NO: 2021/37739

In the matter between:

BENNETT ATTORNEYS INC Applicant

and

PRO-PROP CONSTRUCTION & CIVILS (PTY) LTD Respondent

JUDGMENT

MAIER-FRAWLEY J:

Introduction

1. In this interlocutory application, which is opposed, the applicant applies in terms of Rule 35(13) for an order declaring the provisions of Rule 13(14) to be applicable in motion proceedings instituted by the applicant for the winding-up of the respondent. The applicant ultimately seeks to compel the respondent to produce a document described as a 'statement of funds' (relating to funds held in trust by the respondent's attorneys) for use by the

applicant in the pending winding-up application (hereinafter, 'the main application').

2. In a notice dated 17 September 2021 (hereinafter, 'the rule 35(14) notice'), the applicant requested the respondent to make available for inspection, '*a statement of the funds held in trust on behalf of the Respondent for the period from 1 April 2021 to date hereof.*' As appears from its papers in the present application, the applicant wants to know what amounts were paid by the respondent into its attorney's trust account and on what date. The respondent refused the applicant's request, amongst other reasons, on the basis that the applicant's notice constituted an irregular step, given that leave of court had not been sought or granted for the rules relating to discovery to apply in the main application at the time the notice was delivered. The applicant thereupon launched the present application on 13 October 2021.

3. In this application, the applicant seeks an order to the following effect, namely, that:
   (i) the provisions of rule 35(14) be declared applicable to this matter; and
   (ii) the respondent be ordered to deliver a statement of the funds held in trust on behalf of the respondent for the period from 1 August 2021 to date of the notice (17 September 2021), within 5 days of the order.

Background matrix

4. The main application is for the winding-up of the respondent, Pro-Prop Construction & Civils (Pty) Ltd (hereinafter, 'Pro-Prop' or 'the respondent') on grounds that Pro-Prop is unable to pay its debts as and when they fall due, as envisaged in s344(f) read with s345(1)(c) of the Companies Act 61 of 1973 ('the Companies Act'). The main application was launched on 6 August 2021. The applicant alleges that that Pro-Prop, who was the applicant's erstwhile client, is indebted to it in respect of fees and disbursements[1]

[1] Disbursements included Pro-Prop's counsel's fees, the arbitrator's fees and costs of procuring a transcript of the arbitration proceedings.

incurred by it in representing Pro-Prop in arbitration proceedings held before Adv Farber SC, the appointed arbitrator. In its founding affidavit filed in the main application, the applicant alleges that the indebtedness owed by Pro-Prop to it is in the sum of R2,104,241.27, '*alternatively, and in the event that the respondent has paid Advocate Farber SC directly, the indebtedness is reduced by R374,928.75 to R1,729,312.52.*'[2] In paragraph 44 of the founding affidavit, it is alleged that '*on 3 August 2021 Mr Marks* (Pro-Prop's attorney of record) *addressed an email to me asking if his client could pay the arbitrator directly. Accordingly, at the time of launching this application, the fees of the arbitrator may have been paid directly, although this has not been confirmed as at the date of the signature hereof.*' The applicant further alleges that Pro-Prop has, despite statutory demand, failed to raise a *bona fide* defence to the applicant's claim for payment, despite having admitted its liability to pay; that Pro-Prop has not paid the outstanding indebtedness amounting to either R2,104,241.27 or R1,729,312.52; and that Pro-Prop has failed to secure or compound the outstanding indebtedness,[3] by virtue of which, the applicant avers that Pro-Prop 'is unable to pay its debts as contemplated in section 345(1)(c)of the 1973 Companies Act.'[4]

5. The disbursement pertaining to the arbitrator's fees was not disputed by Pro-Prop in the main application, however, the fees charged by the applicant and the counsel who represented Pro-Prop at the arbitration, remains a point of controversy therein.[5] A request to submit the fee accounts for taxation was refused, leading to an impasse, which ultimately culminated in the liquidation application being launched on 6 August 2021. Pro-Prop has denied that it is factually or commercially insolvent and has alleged that the liquidation application is an abuse in circumstances where the applicant has refused to have its fees, including those of its appointed counsel, taxed.

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[2] Paras 7 & 45 of the founding affidavit in the main application.
[3] Para 46 of the founding affidavit in the main application.
[4] Par 48 of the founding affidavit in the main application.
[5] The papers reveal that the dispute is about whether or not Pro-Prop admitted its liability to pay the fees that were charged apropos the hours/days of work performed, as reflected in the applicant's invoices.

6. A letter addressed by Mr Marks (Pro-Prop's attorney of record) on 3 August 2021 appears to have precipitated the present application. The letter reads, in relevant part, as follows::

"I am in receipt of certain invoices from you sent to Pro Prop.

I refer to invoice numbers 75, 78, 80, 87, 93, 102 which reflects amounts due to Advocate Farber in a total amount of R325 975.00 plus Vat which comes to R374 871.25

I advise you that I have had sufficient funds placed in my trust account to meet these invoices from Adv Farber.
Please advise if you have paid any of the invoices to Adv Farber?

If you have, please advise what amounts are still due to him and what amounts you have paid.

I am instructed to tender payment of the amounts due to him up to an amount of R374 871.25, either by paying him direct or paying to your trust account for payment of those amounts due to him.

I reiterate that the client disputes your account and fees as well as those of your Counsel.
I again invite you to tax or assess the fees and will then advise clients on payment accordingly..."

7. The aforesaid letter is referred to in paragraphs 20 and 21 of the answering affidavit deposed to on 6 September 2021 in the main application. The deponent indicated that the applicant had on 3 August 2021 confirmed that the arbitrator's invoices had not been paid. The deponent to the answering affidavit went on to state that Pro-Prop '*will ensure that these invoices are settled shortly, and shall file, with the leave of the court a supplementary answering affidavit shortly, attaching proof of payment...*'

8. On 17 September 2021 the applicant delivered the rule 35(14) notice referred to earlier in the judgment. On 20 September 2021, the applicant delivered its replying affidavit in the main application. On 1 October 2021, Pro-Prop delivered a supplementary answering affidavit in which it produced proof of payments made by Larry Marks Attorneys in respect of all the arbitrator's invoices. Payments were made on five occasions: two separate payments were

effected on 18 Sept '21 and three separate payments were effected on 21 Sept 2021.

9. Pro-prop opposes the relief sought in the present application on the basis that the document sought in the rule 35(14) notice does not exist. It states that it has not been presented with statement of funds held in trust, which its attorney (Mr Marks) has also confirmed under oath. Furthermore, Pro-Prop submits that the applicant has failed to meet the required threshold for the grant of the relief.

Relevant Legal Principles

10. Rule 35 is primarily applicable to actions. However, subrule 13 provides that:

"The provisions of this rule relating to discovery shall *mutatis mutandis* apply insofar as the court may direct, to applications."

11. Rule 35(14) states:

"After appearance to defend has been entered, any party to any action may, **for purposes of pleading**, require from the other party to –

(a) make available for inspection within five days **a clearly specified document** or tape recording **in such party's possession** which is **relevant to a reasonably anticipated issue in the action** and to allow a copy of transcription to be made thereof; or

(b) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or

(c) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event, to state its whereabouts, if known."

(emphasis added)

12. It is by now well established, as acknowledged by both parties, that the discovery procedure envisaged in rule 35(13) will only be permitted in motion proceedings in exceptional circumstances.[6] Courts have previously remarked that it is a '*very very rare and unusual procedure*' to be employed in motion

[6] See: *Lewis Group Ltd v Woollam and Others* [2017] 1 All SA 231 (WCC) at paras 4-6, and authorities there cited.

proceedings.[7] In *Lewis,*[8] the court held that the essential criterion is whether discovery would be material to the proper conduct and fair determination of the case.

13. In their commentary on the requirements of rule 35(14), in *Erasmus,*[9] the learned authors summarise the position thus:

> "This subrule was designed for the situation where a party to an action requires, for the purposes of pleading, the production of a specific document or tape recording of which he has knowledge and which he can describe precisely. The test is whether the document or tape recording in question is essential, not merely useful, in order to enable a party to plead.[10] " (footnotes included) (emphasis added)

14. As regards the requirement in subrule 14(a) of a 'clearly specified document...which is relevant to a reasonably anticipated issue', the learned authors point out that:

> "This subrule does not provide a mechanism whereby a party, by making use of generic terms, can cast a net with which to fish for vaguely known documents.[11] In this respect the subrule differs markedly from subrule (12) and its ambit is much narrower than that of subrule (12).[12] " (footnotes included)

15. In *The MV Urgup,*[13] the court held that Rule 35(14) does not afford a litigant a licence to fish in the hope of catching something useful.

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[7] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 470 D-E. Factors that were taken into account by the court in *Moulded Components* in declining to make the procedure applicable, included: (i) the stage of the proceedings at which the documents were sought; (ii) whether discovery of the documents will widen the ambit of the proceedings; (iii) the relevance of the documents sought; and (iv) the extent of the discovery sought.
[8] Id *Lewis Group*, cited in fn 6.
[9] Erasmus, Superior Court Practice, at D1-482C.
[10] *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F; *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I.
[11] *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F; *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I.
[12] *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648E; *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I.
[13] *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999(2) SA 500 (C) at 515D

16. In *Cullinan,*[14] Van Dijkhorst J held that Rule 35(14) affords "...'n remedie wat vir besondere omstandighede geskep is. Dit vereis die oproep van 'n spesifieke document waarvan die applicant kennis dra en wat hy presies kan omskryf. Slegs dan kan hy deur gebruikmaking van Reel 35(14) die normale blootlegging van Reel 35(1) vooruitloop."[15] (emphasis added)

Discussion

17. There are four features that strike one about the provisions of Rule 35(14). First, to invoke the rule, the document sought to be produced must be required for the purposes of pleading. Second, such document must be clearly specified. Third, such document must be in the other party's possession. Fourth, such document must be relevant to a reasonably anticipated issue in the matter.

18. A further feature arises in the context of when a court will permit discovery in motion proceedings. As was noted by the court in Lewis *supra,* discovery must be *material* to the proper conduct and fair determination of the case. It will therefore not suffice if the desired document would merely assist the court to properly and fairly determine the case. It must be material to the determination of an outcome.

19. As to the first requirement, the applicant indeed filed a replying affidavit in answer to the allegations made in the answering affidavit in the main application, notwithstanding that the desired document had not been produced. The applicant has not disputed the fact that the arbitrator's fees have been paid. Indeed, the case made out in its founding papers in the main application, as outlined earlier in the judgment, reveals that the issue pertaining to payment of the arbitrator's fees was raised only in relation to the *amount* of the indebtedness allegedly owing by Pro-Prop to the applicant.

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[14] Id *Cullinan,* at 648F-G.

[15] Loosely translated, the passage reads: 'A remedy created for special circumstances. It requires calling for a specific document of which the applicant is aware and which he can define exactly. Only then can a party, by use of Rule 35(14), obtain the benefit of general discovery in terms of Rule 35(1)'

Whether the outstanding indebtedness amounted to either R2,104,241.27 (before payment of the arbitrator's fees) or R1,729,312.52 (after payment of the arbitrator's fees), was not alleged to have had any impact, material or otherwise, on the applicant's case concerning the respondent's inability to pay the allegedly undisputed debt. Stated differently, any late payment of the arbitrator's fees (i.e., outside of the 'normal' 97 day payment terms that would ordinarily govern payment of counsel's fees under Bar Council rules) was raised in the context of (i) allegations made to support a conclusion that the debt was admitted by the respondent[16] and (ii) in response to a letter by the applicant in which it stated that it was no longer able or willing to 'fund the litigation' on the respondent's behalf in accordance with an earlier arrangement that was in place to that effect between the parties.

20. The applicant contends that it is entitled to answer to Pro-Prop's supplementary affidavit and that the document sought is necessary for that purpose, as it will provide evidence of the respondent's inability to pay its debts as and when they fall due. Having regard to the observations made in the preceding paragraph, I am inclined to agree with the respondent's counsel that reliance on any late payment of the arbitrator's fees to ground a conclusion that the respondent was unable to pay its debts as and when they fell due, was a matter that was required to be fully ventilated in the founding affidavit.[17] It was not. The purpose of the supplementary affidavit was solely to confirm that the arbitrator had been paid. That fact is not in dispute, as is evident from the founding papers in the present application. It seems to me, therefore, that the applicant seeks the desired document to enable it to amplify its case in a further pleading, which is not what Rule 35(14) envisages. To my mind, the rule envisages, in the context of motion proceedings, that discovery is necessary for purposes of delivering a sequential affidavit in the

[16] See paras 38-38 and 41 of the founding affidavit in the main application. Ultimately the applicant's case in its founding papers is premised upon the respondent's alleged acknowledgement that it is indebted to the applicant *and* that it is unable to pay the debt as and when it fell due, 'despite later attempts to dispute the indebtedness' – see par 7 of the founding affidavit in the main application.
[17] See *Shepherd v Tuckers land & Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 177 D-E / 173 H-174A.

proceedings. In the present context, the replying affidavit was the sequential affidavit, which was capable of being filed sans the desired document.

21. As to the second and third requirements, namely, that the party seeking discovery must identify a clearly specified document in the other party's possession, the applicant submits that the document requested by it is specific – being a statement of funds held in the trust account of the respondent's attorneys. I do not agree. In terms of the Rule 35(14) notice, the applicant seeks to inspect '*a statement of the funds held in trust on behalf of the Respondent for the period from 1 August 2021 to date hereof.*' It is not clear whether the statement sought comprises a print-out from the respondent's attorney's trust bank account or whether it is a document drawn up by the respondent's attorney and thereafter transmitted to the respondent, reflecting either the aggregate total amount of funds received by the attorneys from the respondent during the period 1 August 2021 to 17 September 2021 or which stipulates the individual dates upon which one or more payment/s were received from the respondent, including the amount of such payment/s.

22. I am therefore inclined to agree with the submission of the respondent's counsel that it is patent from the wording of the notice that it contains a generic reference in relation to the document sought. It seems fairly clear from what is stated in paragraphs 5 and 19 of the founding affidavit in the present application, that the applicant does not refer to a specific document that it knows exists, but really seeks any form of information that will tell it what it wants to know, namely, what funds the respondent's attorneys held in trust for it over the period in question. This too, is evident from the applicant's heads of argument, where the following is submitted:

> "...the fact that Pro-Prop has not yet received the statements does not mean they do not exist. There can be no doubt that Larry Marks Attorneys keeps some form of a record regarding the funds which it holds in trust on behalf of its clients. Those records may take the form of written financial records, but are more likely to be kept electronically on a

computer system. If the former, then those written financial records will constitute a statement of account, which must be provided. If the latter, then Rule 35(15)(a) stipulates that '*a document includes any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act, 2002...and ought to be discovered.*' ... All that Bennett Attorneys requires is the documentary evidence confirming what amounts were paid by Pro-Prop into its attorneys trust account, and on what date...." (emphasis added)

23. Significantly, during oral argument presented at the hearing of the matter, the applicant's counsel submitted that a '*statement of funds*' is a *summary* of what has been paid in *and* what has been paid out of the attorney's trust account in relation to monies held by the respondent's attorneys on its behalf.

24. But, as pointed out by the respondent's counsel, the applicant seeks a document that it argues is in the possession of the respondent's attorneys and not the respondent itself. Until such time as an attorney has created a statement and presented it to his client, any records (be it banking records or records reflected in its books of account, whether electronically stored or otherwise) that the attorney keeps in respect of monies paid to him, are the attorney's records, and he does not hold such records on behalf of his client. Any such document is thus held by a third party, not the litigating party. As such, I am inclined to agree that the request falls foul of the third requirement mentioned in paragraph 17 above.

25. The applicant relies on *Mokate*[18] for its submission that even if a statement has not yet been generated or emailed to the respondent, this does not mean that the document sought does not exist, given the widened scope of the definition of 'document' as per the amended Rule 35(15)(a). The applicant argues that the respondent's attorneys would have some record of funds received from the respondent and of funds paid out on behalf of the respondent. In other words, the attorneys would have the information with which to generate the information sought, and thus ought to discover same.

[18] *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ)

The difficulty with this argument is that *Mokate* was concerned with the question of discovery as it applies in *action* proceedings. There Spilg J considered the adequacy of identification of the desired documents in a rule 35(3) notice, and where the document sought was not the source document, but an extrapolation of electronically preserved computer data on a disc through a filtering or series of filtering processes. Aside from the fact that *Mokate* is distinguishable on its facts, it is not authority for the proposition that information that is in the possession of a third party (as opposed to the litigating party) and which the third party is able to extrapolate in order to produce a desired document, meets the requirements of Rule 35(14). The said rule has very specific requirements, one of which is that the document must be in the possession of the litigating party and not merely be capable of being generated for purposes of placing the litigating party in possession thereof.

26. As to the fourth requirement, namely the relevance of the document to a reasonably anticipated issue, the applicant argues that the desired statement is relevant to the issue that arises for determination in the main application, namely, the respondent's ability to pay its debts. It must be remembered that the respondent accepted liability to pay the arbitrators fees and undertook to do so by making payment directly to the arbitrator. In its answering affidavit filed in the main application, the deponent stated that the respondent 'has arranged payment for the invoice of Adv Farber SC' and that the amount would be settled 'shortly and proof thereof filed in a supplementary affidavit on this point only…'.[19] Therefore, the applicant argues, the desired document is relevant to determine when the respondent placed its attorneys in funds and whether its failure to do so timeously confirms that the respondent is unable to pay its debts as and when they fall due. The applicant further submitted during oral argument that the question of when the funds were received and when the funds were paid out 'goes to the respondent's credibility of whether it paid when it says it did and if it was able to pay its debts when they fell due.

[19] When that payment did not take place within a timeframe that the applicant considered was timeous, it delivered the Rule 35(14) notice.

27. The arbitrator was paid within 17 calendar days from the undertaking to do so in the answering affidavit in the main application. No indication was given by the applicant as to why the lapse of such a period would in and of itself speak to the respondent's inability to pay its debts. It seems to me that the applicant seeks to 'fish in the hope of catching something useful' in order to discredit the respondent's deponent or its attorney, which the court in *The MV Urgup* case *supra* cautioned was not the purpose of Rule 35(14). At best for the applicant, it seeks a basis to fish for information to ground an inference - based on its subjective belief that a delay ensued in the payment of the arbitrator's fees - that the respondent was unable to pay an admitted debt (i.e., that portion pertaining to the arbitrator's fees) as and when it fell due. Ultimately, the applicant hopes to learn something useful from the information it seeks, which it cannot articulate until it has the required information. In my view, that amounts to a fishing expedition which Rule 35(14) does not permit.

28. Finally, the applicant has in my view not shown that the desired document is material to the outcome of the main application or its determination. The requirement of materiality goes to the necessity of the document for a successful outcome. Implicit in the argument that the document is necessary or essential or material to the outcome of the main application, is the acknowledgment that the founding affidavit in the main application otherwise falls short of making out a proper case.

29. For all these reasons, I am not persuaded that the applicant has established the requirements of Rule 35(14) or its entitlement in terms of Rule 35(13) to the relief sought herein.

30. The general rule is that costs follow the result. I see no reason to depart therefrom.

31. Accordingly, the following order is granted:

ORDER:

1. The interlocutory application is dismissed with costs.

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	15 March 2022
Judgment delivered	11 April 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 11 April 2022.

APPEARANCES:

Counsel for Applicant:	Adv G. Heroldt
Attorneys for Applicant:	Vermaak, Marshall, Wellbeloved Inc Attorneys
Counsel for Respondent:	Adv A. Bester SC
Attorneys for Respondent:	Larry Marks Attorneys