IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

	DELETE WHICHEVER IS NOT APPLICABLE
(1)	REPORTABLE: YES/~~NO~~
(2)	OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3)	REVISED
	DATE: 7/12/2016
	SIGNATURE: Frawley

CASE NO: 52620/2015

In the matter between: 7/12/2016

ISP CASH EKURHULENI (PTY) LTD Applicant

and

ISP CASH (PTY) LTD Respondent

JUDGMENT

A. MAIER-FRAWLEY AJ

1. This is an opposed interlocutory application to compel compliance with a notice delivered in terms of Rule 35(12) of the Uniform Rules of Court (the rules). The application, ostensibly one in terms of Rule 30A of the Uniform Rules of Court, is directed at compelling the respondent to produce and make available for inspection, certain documents that were referred to by the respondent in its answering affidavit filed in the main application.

2. The main application is for a final winding-up order against the respondent. The main application has progressed to the stage whereby the applicant is to file its replying affidavit. Prior to filing its replying affidavit, the applicant delivered a Rule 35(12) notice, which the respondent failed to comply with.

3. In the main application, the applicant relies on a restitutionary claim for the establishment of a debt owed to it by the respondent. The respondent's indebtedness is said to have arisen as a result of the cancellation by the applicant of a licence agreement ("the agreement") concluded between the parties, either on the basis of a consensual cancellation during January or February 2015, alternatively, a unilateral cancellation by the applicant on 18 February 2015 for breach of contract pursuant to a notice of default having been dispatched to the respondent and the latter's failure to remedy alleged material breaches, or further alternatively, a cancellation by the applicant on 24 June 2015 on account of false representations made by the respondent both before and during the conclusion of the agreement.

4. The relevant portion of Rule 35(12) reads as follows:

> "(12) Any party to any proceeding may at any time before the hearing deliver a notice…to any other party in whose...affidavits reference is made to any document…for inspection and to permit him to make a copy…thereof. Any party failing to comply with such notice shall not, save with leave of the Court, use such document…in such proceeding provided that any other party may use such document... "

5. In its answering affidavit filed in the present application, the respondent opposed the relief sought on two grounds, the first being that the documents sought were not

relevant to the proceedings and the second being that the documents called for were confidential by their very nature and therefore privileged from disclosure.

6. In its answering affidavit filed in the present application, the respondent avers that the documents referred to by it in the main application contain confidential information pertaining to itself and third party entities with whom it contracted, which contracts either contain express confidentiality or non-disclosure clauses or are protected by separate non-disclosure agreements. The respondent contends that disclosure of such contracts could lead to the cancellation of those contracts or even expose the respondent to damages claims.

7. Counsel for the respondent did not pursue the respondent's confidentiality defence in argument, and quite correctly so, as no case of privilege was made out in the respondent's answering affidavit.

8. Documents containing information of a confidential nature are not *per se* privileged.[1] Confidential information which is not privileged cannot be refused on grounds of confidentiality.[2] The mere agreement between parties that certain communications will be treated as confidential does not preclude a court from requiring the disclosure of documentation that is relevant to a matter forming the subject matter of litigation.[3] Furthermore, production of the documents under compulsion of a court order would not expose the respondent to an unlawful breach of any confidentiality agreement.[4]

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[1] See Erasmus: Superior Court Practice at D1-460 fn 7.

[2] *Centre for Child Law v The Governing Body of Hoërskool Fochville* (156/2015) [2015] ZASCA 155 (8 October 2015) at 570B–571E.

[3] See *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services: in Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at paragraph 25, where the following is stated: —
'Ordinarily courts would look favourably on claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interests of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present ones case is a time-honoured part of a litigating party's right to a fair trial.'

[4] Support for this contention can be found in paragraph 43 of *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84 (31 May 2013).

9. As regards the second ground of opposition, the argument proffered was that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds, as liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. This rule is generally known as the 'Badenhorst rule'.[5]

10. The respondent's counsel argued that the main application constitutes an abuse of the process relating to liquidations, in that it is directed at establishing (and enforcing) payment of an alleged debt which is *bona fide* disputed. The alleged misrepresentations, including the applicant's alleged right to cancel the contract, its purported cancellation thereof, the validity of the purported cancellation and the applicant's right to restitution, are all in dispute in the main application. The documents sought to be inspected are sought with the purpose of attempting to prove the alleged misrepresentations and consequent alleged cancellation and thereby to establish the existence of a debt which is *bona fide* disputed, as was argued by counsel for the respondent.

11. Counsel appearing for the applicant sought to counter the aforementioned argument on the basis that the Badenhorst rule is not an inflexible rule,[6] as the Supreme Court of Appeal has held in *Exploitatjie-En Belegginsmaatschappij Argonauten 11 BV and Another v Honig* 2012 (1) SA 247 (SCA) at paragraph [12], where it was stated that '...there can be no guarantee that the appellants will fail in the main application on that score alone'. He submitted that in the main application the respondent merely made bald allegations that it concluded contracts with various entities, which were lacking in particularity, such that it impacts adversely on the *bona fides* of the raised dispute.

12. In this regard, the remarks of Heher JA in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* (66/2007) [2008] ZASCA 6 at paragraph [13] are apposite. There is was said that a 'real, genuine and *bona fide* dispute of fact can

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[5] As propounded in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H–348C.

[6] The *Badenhorst* rule was not applied in *Kalil v Decotex* 1988 (1) SA 943 (A) at 980H–I.

exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party'. As pointed out in *Gap Merchant Recycling CC v Goal Reach Trading 55CC* 2016 (1) SA 261 (WCC) at paragraph [20], in relation to the respondent's liability, the question is whether the applicant's claim is truly disputed on reasonable and *bona fide* grounds.[7] That will be for the court hearing the main application to determine.

13. I pause to add that there is merit in the applicant's assertion in its replying affidavit that 'other than a bald assertion to this effect, the respondent has not placed any evidence whatsoever before this Honourable Court which demonstrates the existence of the alleged...agreements. Not only does this cast doubt upon their existence, but it prevents the respondent from demonstrating the extent to which it may be liable or prejudiced, should the documents be produced... '.

14. The applicant contends that the documents called for are relevant because: (i) the misrepresentations consisted of false representations made before and during the conclusion of a license agreement between the parties on 9 October 2014 and related to the alleged contractual commitment by the respondent of various service providers and merchants at that time; (ii) in the answering affidavit filed in the main application the respondent alleged that the representations made were actually true and that various agreements had been signed with service providers and merchants in 2013 and 2014 prior to the conclusion of the license agreement with the applicant, and (iii) whether or not these agreements were in fact concluded may have the ability to either advance or destroy the case of either party, this being the test for relevancy.

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[7] Wightman's case *supra* offers an informative approach in determining the resolution of disputes.

15. Relevance is a matter for the Court to decide, having regard to the issues between the parties.[8] The test for relevancy is whether the documents contain information which *may* – not which *must* – either directly or indirectly enable the party requiring the document either to advance his own case or to damage the case of his adversary.[9]

16. Having regard to the issues in dispute in the main application and on the strength of the quoted authorities, I am persuaded that the documents referred to by the respondent and which the applicant seeks to have produced for inspection under Rule 35(12) are indeed relevant to the issues at hand. They reflect factually on whether or not the representations made by the respondent are true or false, this not only being an issue that will impact on whether or not the dispute raised by the respondent in the main application is *bona fide* and reasonable,[10] but also because the documents contain information which may advance the applicant's case or damage the respondent's case.

17. During oral argument presented to court, counsel for the respondent sought to advance a further ground of opposition to the relief sought in the present application, namely, that the present application is an ordinary application to compel and not an application in terms of Rule 30(A) of the rules of court in that it does not contain a reference to Rule 30(A) in the heading of the application. Further, the applicant failed to comply with the requirements of Rule 30(A) in that the respondent was not afforded a period of ten days – but only five days – within which to comply with the applicant's Rule 35(12) notice.[11] This ground was not addressed in counsel's written heads of argument or in the respondent's answering affidavit.

18. Rule 30(A) reads as follows:

> "(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order

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[8] See Erasmus: Superior Court Practice at D1-460 and authorities cited in fn 6.
[9] See *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 563H–564B.
[10] This being an issue which the court hearing the main application will ultimately have to decide.
[11] Notice was given in an email addressed by the applicant's attorneys to the respondent's attorneys on 28 October 2015 that 'if we do not receive a reply within 5 days from date hereof, we are proceeding with an application to compel'.

that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

19. The argument that the heading of the application does not refer to Rule 30(A) and that the application is not one in terms of that rule, lacks merit. I can do no better than to refer to what was stated in *Centre for Child Law v The Governing Body of Hoërskool Fochville* (156/2015) [2015] ZASCA 155 (8 October 2015) at paragraph 17, namely, '... the real complaint in this case is that however the application was presented, the learned judge in the court *a quo* failed to appreciate that he was, in truth, considering an application in terms of rule 30A'.

20. In order to determine the nature of the application, the principle that has been applied by courts for time immemorial is that substance rather than form has to be considered to ascertain the true nature of a transaction.[12]

21. Rule 30(A) requires 10 days' notice within which to comply with a notice given in terms of the rules before the launch of an application to court. In the present matter, the respondent was effectively given 12 days in which to comply with the applicant's Rule 35(12) notice before the application was launched. I am satisfied that there has been substantial compliance with the requirements of Rule 30(A).[13]

22. I therefore conclude that the documents called for in the applicant's Rule 35(12) notice are subject to disclosure.

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

24. The following order is made:

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[12] See for example *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC & others* [2014] ZASCA 40; 2014 (4) SA 319 (SCA) para 23 and *Four Arrows Investments 68 v Abigail Construction* (20470/2014) [2015] ZASCA 121 para 8.

[13] See: *Arendsnes Sweefspoor CC v Dalia Marcelle Botha* (471/12) [2013] ZASCA 86 (31 May 2013) para 14 and authorities there cited.

24.1. The respondent is ordered to make the documents listed in the applicant's Rule 35(12) notice dated 5 October 2015 available for inspection and to permit the applicant to make copies thereof within ten days of the date of this order.

24.2. In the event of the respondent's failure to comply with paragraph 1 of this Order, the applicant is given leave to apply on notice, on the same papers, supplemented if necessary, for a striking out of the respondent's opposition in the main application and for the grant of a liquidation order.

24.3. The respondent is ordered to pay the costs of the application.

Frawley

A. MAIER-FRAWLEY

ACTING JUDGE OF THE HIGH COURT

Date of hearing:	29 November 2016
Date of judgment:	7 December 2016
Judgment delivered:	7 December 2016
Counsel for the applicant:	Adv FP Strydom (082 446 3081)
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Ref: A. Volschenk/NK/MAT