IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/3/2016

CASE NO: 7406/2015

DATE OF HEARING: NOVEMBER 2015

Not reportable

Not of interest to other judges

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

23/3/2016
DATE

SIGNATURE

In the matter between:

TRACKLOT GENERAL TRADING (PTY) LTD	Applicant
and	
SETHOLE, BUSISIWE AGNES	First Respondent
TOBIPROX (PTY) LTD	Second Respondent
SHELL SOUTH AFRICA MARKETING (PTY) LTD	Third Respondent

J U D G M E N T

OLIVIER, AJ

[1] This is an application to strike out the first and second respondents' opposition to the main application, as well as the counter application of the first and second respondents. The application results from the respondents' alleged failure to comply fully and properly with the rule 35(12) notice of the applicant. The applicant also seeks orders in terms of the relief sought in the main application.

[2] The applicant is Tracklot General Trading (Pty) Ltd, a private company incorporated in terms of the laws of South Africa. The first respondent is Busisiwe Agnes Sethole; the second respondent is Tobiprox (Pty) Ltd, a company duly incorporated in terms of the law of South Africa; and the third respondent is Shell South Africa, also a company duly incorporated in terms of the law of South Africa. The third respondent does not oppose the main application.

[3] The respondents filed an answering affidavit along with a counter-application to the applicant's notice of motion. The applicant has not yet filed a replying affidavit, which will serve also as its answering affidavit to the counter-application.

[4] The applicant contends that it cannot file its answering affidavit until the respondents have produced for inspection certain documents referred to in the respondents' answering affidavit. The respondents were served with a rule 35(12) notice, but have not fully complied, according to the applicant. The respondents contend that there was compliance by them.

[5] The answering affidavit was served on 11 March 2015. On 17 March, the applicant served its rule 35(12) notice, followed by the rule 30A notice on 27 March 2015. The reply of the respondents to the 35(12) notice was served on 2 April 2015. The application to strike out, which now serves before the court, was served on 15 April 2015. The inspection of the documents made available by the respondents occurred on 13 April 2015.

[6] The respondents raise a number of points in limine. I shall with them to the extent that they arise during the course of the judgment. With regard to the point that premature notice had been given in terms of rule 30A, applicant argues that 35(12) specifies no time period and that there is nothing to prevent a party from sending out notice immediately. I do not consider it necessary to deal with this point extensively. For purposes of this application I shall assume that notice was not premature, in order to consider the actual merits of this rule 35(12) application.

[7] Applicant conveniently divided the responses of the respondents to the rule 35(12) notice into 5 categories. For the sake of convenience I shall use these categories for the ensuing discussion.

Documents which the respondents claim are privileged and which have no bearing on the case

[8] The relevant documents are the bank statements and management accounts of the second respondent, which it claims are privileged and of no relevance to the case.[1] The applicant submits that this is not a defence, and that the documents are relevant as it is the case of the applicant in the main application that money from the business is being diverted to the second respondent – a so-called "hijacking of funds".

[9] Privilege depends on the reason for the communication and the existence of a legal relationship between the client and the legal adviser.

[10] The applicant contends that the bank statements are not privileged, as they are not a private communication between attorney and client. But even if there existed some sort of privilege, it was waived because of the answering affidavit.

[1] See paragraph 25 of the rule 35(12) notice.

Documents which are not in the possession of the respondents[2]

[11] Two documents are at issue here: the alleged judgments against the applicant's representatives Blacher and Craig Edmonson, and the resignation of the first respondent as a director of the applicant.

[12] It is claimed by the respondents that the consent of both parties will be necessary to obtain the judgments from the credit bureaus. No explanation is offered why this is so, says the applicant.

[13] Regarding the resignation letter, respondents' attorney in the resisting affidavit said that it was produced for inspection, but applicant contends that it was not.

[14] The applicant argues that if the respondents are not in possession of a document, it is not sufficient for them to merely state that they are not in possession of the document. The must give reasons.

Documents which are in possession of a named third party[3]

[15] The respondents claim that the documents referred to in paras 10, 13, 14, 17, 18 and 19 of the notice are in the possession of the third respondent, and that the applicant can obtain these from the third respondent itself. The applicant says that the respondents should have filed an affidavit explaining why they cannot produce the documents.

[16] The respondents claim that the documents referred to in paras 22 and 23 are in the possession of Craig Edmonson. Again, there is no explanation why these documents cannot be obtained by the respondents from him, says the applicant.

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[2] Documents referred to in paras 8 and 12 of the 35(12) notice.
[3] Documents referred to in paras 10,13,14,17,18,19,22 and 23 of the 35(12) notice.

Documents that do not exist[4]

[17] Respondents simply stated that these documents do not exist, except in respect of documents 15 and 21 which they said were not concluded. In the resisting affidavit the attorney stated that the documents do not exist. The applicant once again questions why no affidavit was filed.

Documents which respondents advised were available for inspection but which were not

[18] The applicants claim that the documents referred to in paras 2, 4 and 7 of the rule 35(12) notice were not made available, even though the respondents said they would be.

[19] The essence of the applicant's case seems to be is that all documents referred to in the answering affidavit must be produced, if requested. This obligation arises as soon as it is referred to in the affidavit and its annexures. If a party refuses to produce the document, it must provide facts to relieve if of this obligation, plus provide cogent reasons for the refusal. If the party claims that the document is not relevant, the party must prove that the document is irrelevant.

[20] The documents can be requested to allow the applicant to consider its position even before the respondent has disclosed its defence or even knows its defence. Even if a document is not in its possession, a party is under an obligation to produce it. If it cannot, the party must set up facts to support why the document is not in its possession, facts why the document cannot be obtained and facts why it is unable to produce the document.

[21] In support of its arguments, the applicant relied on a variety of case law. Of relevance is ***Gorfinkel v Gross, Hendler & Frank*** 1987 (3) SA 766 (C) at 774G-I:

[4] Documents referred to in paras 11,15,16,20 and 21 of the 35(12) notice.

> [T]he rule should, to my mind, be interpreted as follows: prima facie there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12). That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. (See the Moulded Components case supra at 461D-E.) Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within the limitations which I have mentioned, the onus would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document."

[22] The most recent authority is ***Governing Body, Hoërskool Fochville and Others v Centre for Child Law*** 2014 (6) SA 561 (GJ) where Sutherland J conveniently summarised the relevant law (par 25):

> 25.1 There is clear authority that confidentiality does not trump the rule.
> 25.2 There is some authority for the proposition that rule 35(12) must be literally interpreted, and irrelevant and privileged documents must be disclosed. I am in firm disagreement with such a view.
> 25.3 There is some authority, which is nevertheless obiter, to support the idea that an irrelevant or privileged document, if referred to in a pleading or affidavit, cannot be subjected to compulsory disclosure in terms of rule 35(12). I am in firm agreement with this view.
> 25.4 Therefore, I hold that, upon a proper interpretation of rule 35(12), a party called upon to comply with rule 35(12) is excused from so doing, if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but cannot be refused on the grounds of confidentiality."

[23] Sutherland J's decision was appealed to the Supreme Court of Appeal, which gave judgment in October 2015, shortly before this matter was argued

before me. See ***Centre for Child Law v The Governing Body of Hoërskool Fochville and Another*** Case no 156/2015, as yet unreported. It overturned the order of the court a quo. After referring to ***Gorfinkel***, Ponnan JA stated the following about the 35(12) enquiry and the use of onus (par 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 of 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.

[24] From this it is clear that court has a discretion which should be exercised in such a way as to attempt to strike a balance between the interests of the various parties. In my view the court should be guided in the exercise of this discretion by the justifications given by the party for resisting the delivery of the particular document. In other words, if a party resists the delivery of a particular document, he should adduce evidence why he is resisting. It is only with this evidence that the court would be in a position to exercise its discretion properly and appropriately. But it is important that neither party should be prejudiced unfairly in this process.

[25] Aside from expressing itself on the use of onus itself as a test, the court did not expressly disagree with the summary of the law given by Sutherland J. In fact, the judgment seems to me to support the principle that a court

should not order a party to deliver up for inspection a document which he cannot produce (as it is likely not in his possession), which is privileged or which is irrelevant.

[26] I align myself fully with the view expressed by Sutherland J in par 25.4 of his judgment that a party need not produce a document which he has shown to be irrelevant or privileged. However, confidentiality is not a defence. And in line with ***Gorfinkel's case***, a document that the party can show is not in its possession also need not be produced.

[27] Dealing with the specifics, in respect of the alleged privileged documents, it would have been of benefit to the court had there been more extensive legal argument on this point. Mindful of the need for balance, I think the release of these documents could potentially be of relevance, but there is also the need to consider privilege. I am of the opinion that they need not be released. They are not essential to the applicant to prepare his case at this stage.

[28] In respect of the documents that the respondents claim are not in their possession, they need to set up facts to support this claim. If they know who else is in possession of the requested document, they should reveal who this is. But this raises the other issue of whether the party should obtain the requested document from this other party.

In ***Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*** 1979 (2) SA 457 (W) Botha J dealt with the situation where a document is referred to, but not in possession of the party:

> Counsel for the applicant contended that the answer should be positive, on the basis that the working of the Rule is wide enough to cover such a situation, but conceded that if it should appear that the party was unable to produce a document not in its possession, the Court would obviously not make an order against that party in terms of the Rule. Counsel for the applicant suggested further that the situation was analogous to the case of the production of objects alleged to have

> been in the possession of a party, as dealt with in [the Claude Leon case]. On that basis counsel urged that when once a document is referred to in an affidavit there is liability to produce that document when production is called for in terms of the Rule, unless the party in question can show that he is unable to comply with the notice in terms of the Rule, *in the sense that he cannot produce the document*. I go along with this argument, in principle. It seems to me that it is easy to conceive of cases where a document is not in the actual physical possession of a party, but where the Court would nevertheless not hesitate to make an order in terms of Rule 35(12). I agree also with the qualification expressed by counsel for the applicant, namely that where the party in question cannot produce the document, it is obvious that the Court will not make an order against him in respect of such a document. (my emphasis)

I think at least a reasonable attempt should be made to find the document and produce it. If such an attempt was made, but unsuccessfully, this should be confirmed by affidavit. Where a document is simply not in possession of the party and he has no knowledge of where it can be found, a court would not be able to force compliance. But if the party knows where the document can be found, it must at least make an attempt to find it.

[29] If a document does not exist, this needs to be stated in an affidavit. I am satisfied that this is sufficient. I do not think that more than this is required.

[30] The respondent argued that an application for striking out was premature and there should first have been an application to compel discovery. In no case has an order of striking out been granted. The applicant argued that rule 30A does not require an order to compel first, but it was conceded that it is within the discretion of the court to make such an order. The more appropriate relief would be an order to compel.

ORDER

[31] In the result I make the following order:

1. The first and second respondents are ordered to produce for inspection the following documents as stipulated in the rule 35(12) notice:

   All documents which are referred to in paras 8, 10, 12, 13, 14, 17, 18, 19, 22 and 23 of the notice which the respondents have identified as being in the possession of a third party. In the event of the respondents not being able to produce these documents after making a reasonable effort to do so, the respondents shall furnish the applicant with an affidavit setting out their inability so to produce and the reasons for such inability.

2. Respondents are ordered to comply with paragraph one of this order within 14 days.

The respondents are to pay the costs of the application.

OLIVIER, AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA