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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA}

REPUBLIC OF SOUTH AFRICA

,

Case Number: 39597/2015

DATE: 7/9/2016
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES

In the matter between:

STEYNOL (PTY) LTD Applicant

and

OBVOUS CHOICE NVESTMENTS 5 (PTY} LTD First Respondent

EKHURHULENI METROPOLITAN MUNICIPALITY Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The first respondent requests an order in terms of rule 35(14) of the Uniform Rules of court, compelling the applicant to provide it with the documents listed in the application to compel.

[2] The applicant opposes the application.

[3] Rule 35(14) makes provision for discovery prior to the filing of a plea and reads as follows:

"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

[4] The provisions of this rule applies, in terms of the provisions of rule 35(12), *mutatis mutandis* to applications.

[5] In order to apply the rule to the present application, it is necessary to have regard to the relief claimed in the main application and to the documents sought in terms of rule 35(14).

Main application

[6] The applicant claims he following substantive relief against the first respondent:

'That the First Respondent be interdicted from – and ordered to immediately cease all activities relating to the operation of a *brickyard and I or any other activities contrary to the zoning of the property of the Applicant being Portion 21 of the farm Groot Valy, No. [1..], JR."*

[7] The relief is premised on the following allegations in the founding affidavit:

i. the applicant is the owner of the immovable property;

ii. the applicant has obtained a mining right in respect of the property;

iii. portion 22 of the property is zoned for agricultural use;

iv. in contravention of the aforesaid zoning, the first respondent conducts a brickyard business on portion 22;

v. the applicant is in the process of applying for the rezoning of the property to provide for mining activities and the first respondent's continued unlawful conduct might adversely affect the application; and

vi. the applicant does not have an effective alternative remedy.

Rule 35(14) application

[8] The first respondent requests the following documentation:

"1.1 The applicant's application to the second respondent for the rezoning of Portions [2.. & 2… of the farm Grootvaly no 1…], Registration Division IR, Gauteng;

12 All documents relating to the applicant's application and granting of a *mining right to mine for coal and clay on Portions [2.. & 2…] of the farm Grootvaly no [1..], Registration Division IR, Gauteng and* as *referred to in paragraph 8.1 of the applicant's founding affidavit;*

13 The application for the water use license as *referred to in paragraph 8.*5 *of the applicant's founding affidavit;"*

, [9] I pause to mention that paragraphs 8.1 and 8.5 of the founding affidavit deals with the irreparable harm requirement for a final interdict and reads as follows:

> *"8.1 The applicant, as a result of the mining right that has been granted to it, is in the process of compliance with the law as it stands, in that it applied for the rezoning of the property to provide for mining operations to be conducted."*
>
> and
>
> *"8.5 The applicant is ready to commence physical mining activities and is awaiting the final approval of its zoning application and its water use license before the mining activities can actively commence."*

[1O] In support of the relief claimed, the first respondent's attorney of record, Ms Brosens, deposed to an affidavit. Ms Brosens, first all, misinterpreted the relief claimed by the applicant. Ms Brosens refer, throughout her affidavit, to an eviction application whereas the applicant claims an interdict prohibiting the first respondent from conducting unlawful activities on the property.

[11] Be that as it may, according to the affidavit, the two directors and shareholders of the first respondent, C A MacFarlane and M Marion were previously, together with a certain BC Moyle, shareholders of the applicant. During October 2008 and in terms of a written shareholders agreement, MacFarlane, Marion and Moyle sold their shares in the applicant to Umthombo Coal (Pty) Ltd.

[12] The transfer of the shares and the payment therefore was stalled due to a delay in obtaining a mining right licence in respect of the project area as defined in the shareholders agreement. As a consequence, MacFarlane and Moyle entered into a share sale agreement in terms whereof they disposed of their shares for a lesser amount. At the time, mining rights were already granted to either Umthombo Coal or the applicant, a fact that was not disclosed to

McFarlane which constitutes a material non-disclosure entitling him to institute a damages claim against the applicant.

[13] Apparently MacFarlane has declared a dispute with the applicant in terms of the shareholders agreement, which dispute is still pending.

[14] From the attached share sale agreements it appears that neither the applicant nor the first respondent is a party to the agreements. The shares in the applicant are the subject matter of the sale in both agreements.

Discussion

[15] To my mind, rule 35(14), envisages two distinct requirements which an applicant must satisfy in order to succeed with its application, to wit:

i. a reasonably anticipated issue in the application; and

ii. the relevance of the document sought in relation to the reasonably anticipated issue.

[16] In respect of the second enquiry, the document must be essential to enable a respondent to prepare an answering affidavit. If a document is merely useful, the rule does not apply. [See: *Cullinan Holings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 T at 647 F]

[17] The first respondent's affidavit in support of its application to compel is silent on the reasonably anticipated issue in the application. The issues as they appear from the founding affidavit in the main application are:

i. a clear right, in other words, whether the applicant is the owner of the property and whether the first respondent is conducting unlawful activities on the property;

ii. irreparable harm, in other words whether the first respondent's unlawful activities on the property places the applicant's application for rezoning in jeopardy; and

iii. an effective alternative remedy.

[18] *Ex facie* the clearly defined issues, the documents sought by the first respondent are not relevant. Without being informed of the exact further issue the first respondent anticipates in the application, it is not possible to find that the documents are essential for purposes of formulating an answer to the relief claimed by the applicant in the main application.

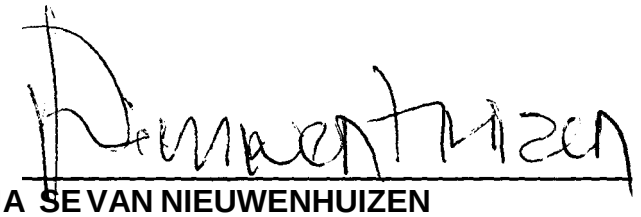
[19] It appears from the application to compel, that there are further disputes between the applicant and parties that are not presently before court. The applicant to the founding affidavit also alluded to further disputes between the parties, but emphasised that the further disputes are not relevant for purposes of the relief sought in this application. I agree.

[20] In the premises, the first respondent has failed to satisfy the requirements for an order in terms of rule 35(14) and the application stands to be dismissed.

ORDER

In the premises, I make the following order:

The application is dismissed with costs.



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D . E OF THE HIGH COURT OF SOUTH AFRICA
UtENG DIVISION, PRETORIA

Appearances

Counsel for the Applicant	: Advocate De Jager
Attorney for the Applicant	: Van Der Merwe Van Den Berg Attorneys
Counsel for the 1st Respondent	: Advocate Kruger SC
Attorney for the 1st Respondent	: Brosens Cochrane Inc