IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 25253/2009

ABSA BANK LIMITED Applicant

and

XCD PROPS (PTY) LTD Respondent

CASE NUMBER: 25234/2009

ABSA BANK LIMITED Applicant

and

GR AND RJ PROPERTIES (PTY) LTD Respondent

JUDGMENT DELIVERED ON 18 MARCH 2010

OLIVIER AJ:

1. These are two liquidation applications which raise the same question and which can conveniently be considered together.

2. On 9 December 2009 the applicant commenced liquidation proceedings against XCD Props (Pty) Ltd. On the same date the applicant also commenced liquidation proceedings against GR & RJ Properties (Pty) Ltd.

3. The applications were enrolled for 26 January 2010 on which date Schippers AJ, by agreement between the parties, postponed the applications for hearing on 16 February 2010, and ordered the respondents to file their opposing affidavits, if any, by 5 February 2010, and the applicant to file its replying affidavits by 12 February 2010.

4. On 4 February 2010 the respondents filed identical "*notice(s) to produce documents in pleadings*" wherein they both sought the applicant to produce for inspection the following documents referred to in the applicant's founding affidavits, deposed to by Mr du Buisson, a manager of the applicant's corporate and business bank department:

(a) All "*data and records relating to the claims against respondent*" as referred to in paragraph one of Mr du Buisson's affidavits;

(b) The mortgage bond which gave rise the respondent's indebtedness, referred to in paragraph 4.2 of the founding affidavit; and

(c) The "*demand*" referred to in paragraph 4.4 of the founding affidavits.

5. Mr du Buisson responded to the notices by way of two identical affidavits. Therein he contended that the applicant did not have a general duty to discover, and as the notices were irregular, did not require a response, particularly where the respondent have failed to comply with a court order granted by agreement. He further contended that the requests were totally unreasonable and *"nothing more than a fishing expedition. The documents, but for the mortgage bond(s), that are required are not set forth with any particularity in order to enable the applicant to identify such document and the written demand(s) on which the applicant relies is(are) annexed to my founding affidavit."*

6. Accordingly, only the documents set out in paragraph 4(a) above remain in dispute between the parties.

7. I pause to point out that Mr du Buisson does not say that the *"data and records"* are not constituted by documents, that such documents are irrelevant, privileged, or no longer in the possession of the applicant.

8. It was submitted on behalf of the applicant that the notice had been served without any direction having been obtained from the court, and that the applicant was not required to comply with it. Discovery of documents in application proceedings is governed by Rule 35(13). The aforesaid Rule provides as follows:

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

9. On behalf of the applicant, reliance was placed on Loretz v Mackenzie 1999 (2) SA 72 (T) for the proposition that though Uniform Rule of Court make provision for the provisions of Rule 35 relating to discovery to apply to applications, this was subject to the proviso stated in Rule 35(13) namely that the Court direct this to be so. The applicability of the provisions of Rule 35(1), (2) and (3) of the Uniform Rules of Court to application proceedings clearly depends upon a direction in terms of Rule 35(13) to that effect (Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (T)).

10. On behalf of the respondents it was argued that Rule 35(12) applies and that the respondents were entitled to demand those documents Mr du Buisson had referred to in his affidavit(s) as follows

> *"I am a Manager of the applicant, employed by the Corporate and Business Bank Department of applicant. All the data and records relating to the claims against the respondent are under my control and I have acquainted myself therewith."*

11. Accordingly, it is necessary to have regard to the provisions of Rule 35(12). It reads as follows:

> *"Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the Court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."*

12. Form 15, in turn provides as follows:

> *"TAKE NOTICE that the plaintiff (or defendant) requires you to produce for his inspection the following documents referred to in your ... (declaration or plea, or affidavit). (Describe documents required)."*

13. I pause to point out that Rule 35(12) applies to *"any proceeding"* – which would include applications – and to any *"pleadings or affidavits"* – which is also a clear reference to application proceedings.

14. The notices followed the wording of Form 15, and the question, accordingly is whether the respondents were entitled to seek inspection in terms of Rule 35(12) these documents. Van Loggerenberg and Farlam, in Erasmus, Superior Court Practice, comment that the sub-rule creates a *prima facie* obligation on a party who refers to a document in a pleading or affidavit, to produce such document when called upon to do so in terms of the sub-rule.

15. Rule 35(12) of the Uniform Rules of Court had as predecessors the similar Transvaal Rule 53, Cape Rule 31(4), Orange Free State Rule 53, and Natal Order of Court 14 Rule 1.

16. In Erasmus v Slomowitz (2) 1944 TPD 242 at 244 Murray J, commented on the similarly worded Transvaal Rule 53[1]

> *"An essential is, of course, a reference by the opponent, in his pleading or affidavit, to the documents whereof such production is required, but the terms of the rule do not require a detailed or, descriptive reference to such documents nor is any distinction made between documents upon which the action or other proceeding is actually founded and documents possessing merely evidentiary value."*

17. And at 235 – 6:

> *"It was also argued that an order for production at this stage would compel the respondent to disclose the basis of his intended action in its entirety. I am not satisfied that this is so; ex facie the respondent's affidavit of 13th December, other material incidents of the loan transactions between the parties were effected in manner not reflected in the cheques which passed between them. But even if it were so, there is to my mind no reason why a party who refers in his pleadings or affidavits to the documents upon which is based his cause of action can avoid the necessity of production cast upon him by*

[1] Rule 53 provided as follows: *"Every party to an action or other proceeding shall be entitled at any time before the hearing of the same by notice in writing, to give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, and to permit him to take a copy thereof.. "*

Rule 53 as a consequence of such reference. It need hardly be indicated that Rule 53 does not require production at any time of all documents relating to the matter in question; it is restricted to those which the party has deemed fit to include by reference in his pleading or affidavit."

18. In Nxumalo v First Link Insurance Brokers (Pty) Ltd 2003 (2) SA 620 (T) a defendant objected to the particulars of claim as being vague and embarrassing. These contained the allegation that

"... Viljoen (het) mondeling aan eiser die voorstelling, alternatiewelik voorstellings gemaak dat dit noodsaaklik is dat die eiser die dokument wat as aanhangsel tot die besonderhede van vordering aangeheg is, alternatiewelik ander dokumente moet onderteken ten einde eiser se beleggingsgelde te kan kry..."

19. Moseneke J (as he then was) held as follows at paragraphs [8] and [9]:

"[8] The question, however, is whether the mere reference to 'ander dokumente' is sufficient to render the pleading vague and embarrassing. Put otherwise, is the imprecision that arises from reference to 'ander dokumente' one which cannot be cured, alternatively one which would embarrass the pleader to such an extent that he or she would be prejudiced in a bid to plead?

[9] In my view, not. Firstly the defendant has several procedural remedies. The first such remedy is that whilst the defendant may not rely on the provisions of Rule 18(6) because such documents are not characterised as a contract,

the defendant could indeed rely on the provisions of Rule 35(12) and Rule 35(14) both of which entitle a litigant to call for such documents as may be referred to in a pleading, before pleading. It seems to me, that no real prejudice would arise from whatever vagueness may arise from reference to 'ander dokumente', since such may be readily cured by relying on the provisions of Rule 35(12) and Rule 35(14) of the Uniform Rules of Court. There is consequently no substance in that objection."

20. Thring J held as follows in Unilever plc and Another v Polagric (Pty) Ltd 2001 (2) SA 329 (C) at 337A –

> "*Rule 35(12) is cast in very wide terms. It does not contain the requirement mentioned in Rule 35(1) or Rule 35(11) that the document concerned must be one 'relating to any matter in question', nor the requirement mentioned in Rule 35(3) that the document must be 'relevant to any matter in question': see Gorfinkel v Gross, Hendler & Frank 1987 (3) SA 766 (C) at 771D. In Magnum Aviation Operations v Chairman, National Transport Commission, and Another 1984 (2) SA 398 (W) the Witwatersrand Local Division may have gone as far as to hold (obiter) that relevance is not a requirement for documents of which production is sought under Rule 35(12). In Universal City Studios v Movie Time 1983 (4) SA 736 (D) it was held by the Durban and Coast Local Division at 748A - C that, where a party in an application such as this files an opposing affidavit in which he relies on privilege or irrelevance as a ground for not producing a document, the onus lies on his opponent to satisfy the Court on a balance of probability that the document is indeed relevant or not privileged as the case may be.*"

21. Friedman J (as he then was) held as follows in Gorfinkel v Gross, Hendler & Frank 1987 (3) SA 766 (C) at 771C – H

"*Support for the view that Rule 35(12) is unqualified is to be found in the Magnum Aviation*[2] *case. That was an application by Magnum Aviation Operations ('Operations') for the review of a decision of the National Transport Commission. In the main application the deponent to an affidavit on behalf of Operations referred to the financial statements of Operations and Comair (second respondent) and pointed out that the National Transport Commission had made its decision without looking at these documents. Comair applied for the production of the financial statements of Operations contending that it was 'very relevant' for them to be produced. Vermooten J in granting an order for their production, stated in regard to Rule 35(12):*

> *'In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document, you must produce it. Even more is it so in this case where the implication in paras 19.4 and 19.6 is that, if the NTC had called for and looked at the financial statements of Operations, it might well have come to a different conclusion. It is significant that, while in Rule 35(1), the notice calling for discovery, it is said that discovery must be made of documents "relating to any matter in question in such action", in Rule 35(12) there is no such, nor indeed any other, qualification. I am consequently of opinion that, having made reference to the financial statements, Operations is obliged to produce them for inspection.'*

22. And at 774 C – I

> *"In my view the parameters governing discovery under Rules 35(1), 35(3) and 35(11) are not the same as those applicable to the question whether a document is irrelevant for the purposes of compliance with Rule 35(12). A party served with a notice in terms of Rule 35(1) is obliged to make discovery of*

[2] Magnum Aviation Operations v Chairman, National Transport Commission, and Another 1984 (2) SA 398 (W)

documents which may directly or indirectly enable the party requiring discovery either to advance his own case or to damage that of his opponent or which may fairly lead him to a train of enquiry which may have either of these consequences. Documents which tend merely to advance the case of the party making discovery need not be disclosed. As Rule 35(12) can be applied at any time, ie before the close of pleadings or before affidavits in a motion have been finalised, it is not difficult to conceive of instances where the test for determining relevance for the purposes of Rule 35(1) cannot be applied to documents which a party is called upon to produce under Rule 35(12), as for example where the issues have not yet become crystallised. Having regard to the wide terms in which Rule 35(12) is framed, the manifest difference in wording between this subrule and the other subrules, ie subrules (1), (3) and (11) and the fact that a notice under Rule 35(12) may be served at any time, ie not necessarily only after the close of pleadings or the filing of affidavits by both sides, the 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. Cf Quilter v Heatly (1883) 23 ChD 42 at 51."

23. Having referred to the records and data, the applicant *prima facie* became obliged to produce these for inspection if called upon to do

so. None of the limitations, such as privilege, irrelevancy or that the record or data subsequently were lost, were raised before me.

24. The respondents are not required to depose to or deliver their opposing affidavits before they have been afforded an opportunity of inspecting and copying the documents referred to in Rule 35(12). This is clear from the following *dictum* of Marais J, as he then was, in Protea Assurance Co Ltd and Another v Waverley Agencies CC and Others 1994 (3) SA 247 (C) at 249B - D:

> *'Applicant's desire that second respondent should first have to file his affidavit in response to the allegations made by Roberts as to what second respondent said to him during the telephone conversations which were recorded on the tape before being allowed to listen to the tape is understandable as a forensic strategy, but to gratify it would be to defeat the object of Rule 35(12). That Rule plainly entitles a litigant to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely. That entitlement, unlike the entitlement to general discovery for which Rule 35(1) provides, does not arise only after the close of pleadings in a trial action, or after both answering and replying affidavits have been filed in motion proceedings: it arises as soon as reference is made in the pleading or affidavit to a document or tape recording. It is inherent in that that a litigant cannot ordinarily be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleading or affidavits.'*

> See also Erasmus v Slomowitz (2) 1938 TPD 243 at 244.

25. It is clear from these decisions that, otherwise than is the case with discovery under Rule 35(1) and (2) read with Rule 35(13), the respondents do not have to wait until their opposing affidavits have been delivered before exercising their right under Rule 35(12): they may do so at any time before the hearing of the matter. It follows that they may do so before disclosing what their defences are, or even before they know what their defences, if any, are going to be. They are entitled to have the documents produced '*for the specific purpose of considering his(their) position*' (Erasmus v Slomowitz (2) (*supra* at 244; see also Unilever plc and Another v Polagric (Pty) Ltd, *supra,* at 336D – H; Gehle v McLoughlin 1986 (4) SA 543 (W) at 546D - E). I conclude that the applicant could not refuse to produce the documents sought.

26. In the premises the respondents were entitled to demand inspection of these documents before filing their answering affidavits.

27. Accordingly I make the following order:

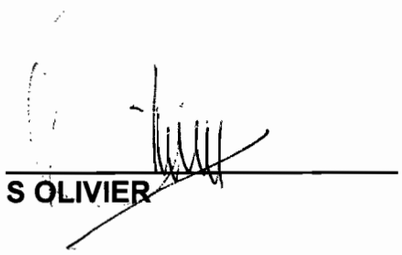
(a) The applicants are to comply with the notices filed in terms of Rule 35(12) by not later than 1 April 2010.

(b) The respondents are to file their answering affidavit by not later than 8 April 2010.

(c) The applicant is to file its replying affidavits by not later than 15 April 2010.

(d) The applications are postponed to 28 April 2010 on the third division roll.

(e) Costs are to stand over for later determination.



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