

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:2023-058224

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
	
JC UYS SC	7 NOVEMBER 2024

In the interlocutory applications between:

HARAMBE TECHNOLOGIES (PTY) LIMITED

Applicant/Respondent

and

SENTECH SOC LTD

Respondent/Applicant

In re the Rule 53 application between:

HARAMBE TECHNOLOGIES (PTY) LIMITED

Applicant

and

SENTECH SOC LTD

First Respondent

UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA

Second Respondent

MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

Third Respondent

JUDGMENT

UYS AJ

- [1] A number of interlocutory applications have been brought by two of the parties in the aforesaid review application, to wit:
- [1.1] an application by Harambe Technologies (Pty) Limited¹ brought in terms of Rule 30A² to compel the delivery of reasons in terms of Rule 53³;
- [1.2] a striking out application brought by Harambe in terms of Rule 6(15) pertaining to a portion of a paragraph in Sentech's answering affidavit in the Rule 30A application⁴;
- [1.3] an application by Sentech brought in terms of Rule 30⁵ to have a notice by Harambe brought in terms of Rule 35(14) stated to be as read with Rule 35(13) set aside as an irregular step; and
- [1.4] a conditional counter-application brought by Harambe in the Rule 30 proceedings, essentially in the event of Sentech's Rule 30 application being

¹ for ease of reference referred to herein as "*Harambe*"

² of the Uniform Rules of Court referred to herein simply as "*Rules*" or "*Rule*" depending upon context, such application referred to herein as the "*Rule 30A proceedings*" or "*Rule 30A application*" depending on context

³ the Rule 30A notice contained a complaint of non-compliance with the provisions of Rule 53(1)(b) by Sentech SOC Limited (for ease of reference referred to herein as "*Sentech*") in that according to such notice Sentech "... has failed to lodge with the Registrar of the above Honourable Court, the record of proceedings which resulted in the decisions referred to in prayers 1 and 2 of the notice of motion together with such reasons as it is by law required or may desire to give." (CaseLines 12-20 to 12-21). Harambe abandoned seeking of the record in that application

⁴ Rule 6(15) (referred to herein as the "*striking out application*") at CaseLines, pages 12-176 and 177 which seeks to have the following wording of paragraph 7 of Sentech's answering affidavit struck out as well as the two annexures referenced therein: "...the record contains a full record of the decisions taken by the First Respondent including minutes which reflect reasons for the decisions taken as contemplated under Rule 53. Copies of the relevant minutes are annexed as 'AA2' and 'AA3'"

⁵ CaseLines, page 11-1 to 11-3 and wherein it seeks that a notice by Harambe brought in terms of Rule 35(14) stated to be as read with Rule 35(13) (CaseLines pages 02-253 to 02-277) be set aside as an irregular step; referred to herein as the "*Rule 30 proceedings*" or the "*Rule 30 application*" depending on context

upheld, to then grant such directive under Rule 35(13) and in addition thereto ordering compliance by Sentech with Harambe's earlier Rule 35(14) notice⁶.

[2] The foresaid interlocutory applications detailed above followed the launching of a review application by Harambe, which review application so having been launched on or shortly after 15 June 2023, is despite the passing of almost 17 months, still in an infancy phase. According to Harambe, neither a proper record nor proper reasons have as yet been provided by Sentech, which would under Rule 53(4) enable Harambe to file a supplementary affidavit and/or amend or vary the relief sought by it as currently contained in its notice of motion.

[3] In the heads of argument filed in the Rule 30 proceedings⁷ by Mr Edwards (who appeared for Harambe) and as part of the motivation by Harambe why exceptional circumstances ought to be found to exist, the following was stated in a summary of what the review application⁸ entails:

"37. The nature of the review application is of significant public importance. The main review application concerns the review of decisions taken by Sentech in the procurement process, including the cancellation of a tender in respect of the supply of FM transmitters and/or FM re-broadcast receivers for a period of 3 years as well as the supply and delivery of DTH dish kits and set-top boxes to South African homes which are required to ensure indigent homes continue

⁶ CaseLines, page 11-276 to 11-278, referred to herein as the "counter-application"

⁷ being inclusive of a counter-application by Harambe

⁸ also referred to herein as the "main application"

to have access to broadcasted services as South Africa migrates broadcasting signals from analogue to digital.”⁹

- [4] Save for the question of the presence of and sufficiency of exceptional circumstances in the event that consideration of the conditional counterclaim by Harambe in the Rule 30 proceedings is necessary, it is for purposes of determination of the remainder of the interlocutory applications not necessary to further elaborate upon the factual background that resulted in the review application having been brought.
- [5] It is at the outset necessary to specifically mention that a plethora of authorities were referenced during argument with comprehensive and valued submissions also made by both Mr Edwards (who appeared on behalf of Harambe) as well as by Ms Ngakane (who appeared on behalf of Sentech)¹⁰ and with further authorities also having been referenced in the heads of argument filed by the parties in the respective interlocutory applications. The fact that not all of the authorities so detailed and submissions made by counsel are referenced in this judgment, is not to be deemed indicative of same not having been taken into account. In compilation of this judgment and reaching the conclusions detailed herein and granting the orders that will be referenced below, all submissions made and authorities referenced either in argument or contained in the heads of argument were considered.
- [6] Upon perusal of Harambe’s notice of motion in its main application (the review application), it appears that certain specific decisions and/or the failure to take a

⁹ See CaseLines at page 11-296

¹⁰ Sentech’s heads of argument having been prepared by Mr Nick Ferreira and Ms Zanele Ngakane

decision are sought to be declared unconstitutional, unlawful and invalid and with reference to specific sub-sections under section 6 of the Promotion of Administrative Justice Act 3 of 2000¹¹, sought to be reviewed and set aside. The main application thus in its essence, constitutes what is generally referenced as a PAJA review.

- [7] The long title of PAJA reads as follows *“To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.”*
- [8] Under section 5(1) of PAJA, provision is made that any person whose rights had been materially and adversely affected by administrative action¹²: *“... and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.”*
- [9] Section 6 of PAJA entitles any person to institute proceedings in a court or a tribunal for judicial review of administrative action and then grants the power to a court or tribunal to judicially review administrative action on the specified grounds detailed in that section.

¹¹ referred to herein as “PAJA”

¹² *“administrative action”* as defined under Section 1 of PAJA. The decisions sought to be reviewed and set aside in the main application fall within the ambit of administrative action *inter alia* flowing from Sentech either being an organ of State or exercising a public power or performing a public function in terms of an empowering provision

[10] In *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism and Others*¹³ it was stipulated that:

*“There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself.”*¹⁴

[11] PAJA provides the provisions and prescribes procedures that must be followed in pursuing judicial review and in such process it *inter alia* also provides persons dealing with the administration, with certain rights, inclusive of the right to reasons.¹⁵

[12] It is in light of the aforesaid authorities and legislation that Harambe's Rule 30A application, which is now limited only to the reasons¹⁶ for the administrative action needs to be adjudicated.

[13] Rule 53(1) provides as follows:

“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by

¹³ 2004 (4) SA 490 (CC)

¹⁴ at paragraph [22]. The court continued and held at paragraph [25] : “*The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.*”

¹⁵ *Minister of Defence and Another v Xulu* 2018 (6) SA 460 (SCA) at paragraph [47]

¹⁶ at paragraph 10.2 of the parties' joint practice note it is stated “*Harambe no longer persists with the relief sought for the 'record' of documents in this application because an incomplete record was delivered on 3 November 2023 – the Applicant has delivered a notice in terms of Rule 35(14) read with Uniform Rule 35(13) wherein it seeks the outstanding documents and tape recordings which ought to form part of a complete record, however, this does not form part of the Rule 30A application.*” (own emphasis)

way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and*
- (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.” (own emphasis)*

[14] Despite the record (or possibly a complete record) no longer currently being sought under Harambe’s Rule 30A application to be adjudicated upon herein, mention ought to be made thereof that the filing of an incomplete record in review proceedings under Rule 53 does not constitute compliance with Rule 53(1)(b).

[15] A party entitled to the filing of a record should, in the event of non-compliance with Rule 53(1)(b) through non-filing of the record or filing of an incomplete record, through utilisation of Rule 30A call for filing of a proper and/or complete record or where applicable for filing of such documents, recordings, etc., which ought to have formed part of the record (to be distinguished from discovery proceedings where all

relevant documents, etc., may be called to be discovered), thus all of the documents and material before the relevant organ of State or administrator when the decision was taken and/or which have influenced the decision one way or the other.

[16] In *Helen Suzman Foundation v Judicial Service Commission*¹⁷ the court in its judgment answered its own question as to what ought to form part of a Rule 53 record:

*“The current position in our law is that — with the exception of privileged information — the record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker.”*¹⁸

[17] It is common cause that in the main application a record has been filed, albeit alleged by Harambe that same is “*incomplete*”. As Harambe is no longer persisting in calling for the filing of the record in its Rule 30A application and given my conclusions reached in respect of the Rule 30 application and Harambe’s counter-application, I need not make any finding herein on the adequacy or not of the record so filed.

¹⁷ 2018 (4) SA 1 (CC)

¹⁸ at paragraph [17]. In paragraph [13] the Constitutional Court held:

“The purpose of rule 53 is to ‘facilitate and regulate applications for review’. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.”

[18] The Supreme Court of Appeal has, with approval, referred to what was stated by Woodward J sitting in the Federal Court of Australia concerning what would constitute adequate reasons:¹⁹

"The passages from judgments which are conveniently brought together in Re Palmer and Minister for the Capital Territory (1978) 23 ALR 196 at 206 - 7; 1 ALD 183 at 193 - 4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation."

[19] The court in the *Phambili* judgment continued²⁰ and with reference to Hoexter indicated that the position was summarised as follows by Hoexter:

¹⁹ *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Limited; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Limited* 2003 (6) SA 407 (SCA) at paragraph [40], judgment referred to herein as the "*Phambili*" judgment or matter

²⁰ See footnote 19 above

"It is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information."

[20] In *Rèan International Supply Co (Pty) Limited v Mpumalanga Gaming Board*²¹, it was held that:

"On the one hand it is not necessary for an administrative body to spoon feed an aggrieved party seeking reasons; on the other hand the administrative body cannot expect an aggrieved party to seek justification for the reasons from a myriad of documents where such reasons cannot reasonably be determined."

[21] In the answering affidavit to the Rule 30A application so deposed to by Ms Moser, an adult female legal practitioner with Sentech's attorneys of record and there with regard to Harambe persisting with its Rule 30A application in respect of reasons, she stated:

"7. Notwithstanding compliance with Rule 53, the Applicant persists with this application on the basis that it requires reasons, however, as stated above, the record contains a full record of the decisions taken by the First Respondent including minutes which reflect reasons for the decisions taken as contemplated under Rule 53. Copies of the relevant minutes are annexed as "AA2" and "AA3"."

²¹ 1999 (8) BCLR 918 (T) at 927

- [22] It is the latter part of this paragraph (as already quoted earlier herein²²) which forms the subject matter of Harambe's striking out application.
- [23] Ms Moser has not stated any facts on the basis of which she would have personal knowledge of the record filed being "... *a full record of the decisions taken by First Respondent including minutes which reflect reasons for the decisions taken as contemplated under Rule 53*". These allegations constitute inadmissible hearsay evidence which is to be disregarded. In absence of facts alleged on the basis of which such allegations could be made by Ms Moser, at the very least a confirmatory affidavit of the correctness of such statements by an employee of Sentech with personal knowledge thereof and in a position to confirm same, was necessary. I return to the striking out application later herein.
- [24] The attachments to the affidavit appear to be extracts from the record filed (criticised by Harambe as incomplete) and simply attaching same to the affidavit does not constitute the provision of reasons nor do the attachments *per se* constitute the provision of due and proper reasons which accords with the principles detailed above.²³
- [25] Consideration needs to be given to the specific stipulation under Rule 53(1)(b) pertaining to the provisions of reasons, to wit those that: "... is by law required or *desires to give or make*". (own emphasis)
- [26] Mindful of what has already been stated above pertaining to PAJA now being the essential source and starting point of any review application of administrative

²² see footnote 4 above

²³ see paragraphs [16] to [20] above

action²⁴ and specifically the provisions under Section 5 of PAJA as to an entitlement to reasons, the question arises whether in absence of a request for reasons under Section 5(1) of PAJA and in circumstances where an organ of State wishes not to give reasons, it can in respect of PAJA reviews be said that such reasons “*is by law required*”. In my view it can in absence of a Section 5(1) of PAJA request, not be so said, as the common law can in respect of PAJA reviews no longer be relied upon in this regard.

[27] Apart from the annexures now attached to Sentech’s answering affidavit in the Rule 30A proceedings, Sentech earlier on or about 19 May 2023, advised Harambe in answer to a request for a detailed explanation by Harambe as to why that tender was cancelled²⁵, responded by stating that it was cancelled “*due to irregularities found in the tender processes*”.²⁶ The above in my view constituted a request by Harambe for reasons for Sentech’s administrative action in respect of at least that particular tender.²⁷ Section 5(1) of PAJA allows a request for reasons where rights have been materially and adversely affected, that this was so, was made clear in Harambe’s e-mail to Sentech dated 11 May 2023.

[28] A further letter was also subsequent to the above request addressed to Sentech by Harambe’s attorneys requesting additional time for launching of the review application and despite not pertinently phrased as a request or referencing Section 5 of PAJA, it included the following paragraph:

²⁴ see paragraphs [10] and [11] above

²⁵ see CaseLines 01-193

²⁶ see CaseLines 01-192

²⁷ As was held in *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at paragraph [27]:

“Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative.”

“13. The aforementioned time period will provide you with a further opportunity to shed light on the aforementioned decisions and omission, including the provision of adequate reasons.”²⁸ (own emphasis)

[29] To the extent that the referencing under Rule 53(1)(b) to reasons to be provided as *“by law required”* is now in respect of PAJA reviews to be regarded as a reference to Section 5 of PAJA, as in my view it is, I am satisfied that Harambe’s request for reasons for the administrative action now sought to be reviewed and set aside by it, was a request within the ambit of Section 5 of PAJA²⁹ and which Sentech was obliged to provide, but has failed to do properly in accordance with the principles already detailed herein.

[30] As for the aforesaid striking out application, a common sense practical approach is required.³⁰

[31] As already indicated above, no factual basis has been stipulated for the deponent’s personal knowledge of the allegations that the annexures so attached contain *“... a full record of the decisions taken by the First Respondent”* and that the minutes *“reflect reasons for the decision taken as contemplated under Rule 53”*. As aforesaid, what had so been attached to the affidavit, falls foul of the applicable principles pertaining to reasons to be provided. The allegations made by Ms Moser in this regard stand, for reasons already stated to be disregarded as hearsay

²⁸ Letter dated 12 June 2023, CaseLines pages 01-222 to 01-225. In such letter extensive referencing had been made to PAJA; see also footnote 27 above

²⁹ *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism supra*) at paragraph [27]

³⁰ *Drift Supersand (Pty) Limited v Mogale City Local Municipality* [2017] 4 All SA 623 (SCA) at paragraph [10]; see also *Lagoon Beach Hotel (Pty) Limited v Lehane NO and Others* 2016 (3) SA 143 (SCA) at paragraph [16]

evidence insofar as any inference is sought to be drawn by her that it as a fact constitutes the “full” record or “reflect reasons for the decision”.

[32] The documents attached to Sentech’s opposing affidavit as Annexures “AA1” and “AA2” constitute extracts from the record already filed with inferences sought to be drawn therefrom as stated by Ms Moser in her affidavit constituting inadmissible hearsay evidence. On a practical common sense approach, no need exists for same to be struck out, but the aforesaid hearsay evidence of Ms Moser will be disregarded.

[33] In the result, I am of the view that Harambe has on a balance of probabilities shown that Sentech has failed to provide proper and adequate reasons for Sentech’s decisions and actions sought to be reviewed and set aside by Harambe in the review application and what had so been provided by Sentech, do not constitute proper and sufficient reasons in accordance with the applicable legal principles pertaining to the provision of reasons as detailed above.

[34] That brings to the fore Sentech’s Rule 30 application and Harambe’s counter-application therein.

[35] As already indicated above, provision of an incomplete record constitutes non-compliance with Rule 53(1)(b) and would ordinarily be met with a Rule 30A notice and if necessary, an application under that rule. Harambe opted not to do so, but to effectively call for discovery of certain further documents through an extensive Rule

35(14) notice consisting of 25 pages. It is stated that the notice is brought in terms of Rule 35(14) “[AS READ WITH RULE 35(13)]”.³¹

[36] Mr Edwards on behalf of Harambe in argument relied heavily on the decisions in *Pieters v Administrateur, Suid-Wes Afrika en 'n Ander*³² and *Makate v Joosub NO and Another*³³.

[37] I am in agreement with Ms Ngakane who on behalf of Sentech argued that the decision in *Pieters* was not of assistance to Harambe as that decision concerned the provisions of Rule 35(11) relevant to certain orders pertaining to documents that could be made in the course of “any proceedings”, thus in that instance not then limited to action proceedings.

[38] Of critical importance pertaining to the *Pieters* judgment is further that it was held therein that :

“Reël 35 (13) bepaal dat die bepalinge in Reël 35 wat blootlegging betref, en vir sover die Hof mag voorskryf, mutatis mutandis ook vir aansoeke geld. In hierdie verband is twee opmerkings nodig. Reël 35(11) gaan oor voorlegging en nie blootlegging van dokumente nie. En dan is dit verder betekenisvol dat waar die Afrikaanse teks die woorde 'enige geding' gebruik die Engelse teks verwys na - 'any action or proceeding'”

[39] The current Rule 35(11) is now differently worded and provides that:

³¹ CaseLines page 02-253 to 02-277

³² 1972 (2) SA 22 (SWA)

³³ (57882/19) [2020] ZAGPPHC 248 (30 June 2020)

"11. The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in such party's power or control relating to any matter in question in such proceeding as the court may deem appropriate, and the court may deal with such documents or tape recordings, when produced, as it deems appropriate."

[40] The current rule thus, even though the *Pieters* matter dealt with the erstwhile Rule 53(11) and not with Rule 35(14) in any event reads different to what it did when *Pieters* was decided.

[41] It is of importance to note that in the *Makate* judgment³⁴, it was held that *"...while I conclude that the provisions of Rule 53 would be applicable to the decision under review, the documents sought would not fall into the purview of what would constitute the record of the decision."*³⁵ and the court then continued and stated *"Whether the applicant has the right to access the documents sought outside of Rule 53 is another matter which I now proceed to deal with."*³⁶ (own emphasis) The documents concerned in the *Makate* judgment related not to a record of proceedings, but to documents falling outside of that ambit. The current application concerns documents alleged to fall within the ambit of Rule 53.

[42] In *Makate* specific reference was also made to Rule 35(13) and the fact that it finds application insofar as the court may direct, with it expressly stipulated that *"... our Courts have cautioned that the use of the rule in applications should only be ordered in exceptional circumstances."* The court in *Makate* considered certain

³⁴ See footnote 33 above

³⁵ at paragraph [49]

³⁶ at paragraph [51]

deemed exceptional circumstances and by necessary inference thus found same to be sufficient and applied the Rule.

[43] I am alive to it having been stated in *PFE International and Others v Industrial Development Corporation of South Africa Limited*³⁷ that the rules are made for courts to facilitate the adjudication of cases with superior courts enjoying the power to regulate their processes, taking into account the interests of justice³⁸ and that “*In some cases a mechanical application of a particular rule may lead to an injustice*”.

[44] Mindful of what I have already stated above pertaining to the availability of Rule 30A in instances where there has not been proper compliance with the provisions of Rule 53(1)(b), also pertaining to the filing of a complete record, I am of the view that compelled adherence to the provisions of Rule 35(13) in the current instance, will not lead to an injustice.

[45] In *Investec Bank Limited v Blumenthal NO*³⁹ (a judgment by Sutherland J as he then still was) brought certainty in this regard within this division, where the law pertaining thereto was stated to be as follows:

“[24.1] *The primary rule is that discovery is available to a party after the legal issues have been set out, not before.*

[24.2] *In application proceedings the Courts’ specific authorisation is required before a demand can be made under Rule 35(14).*

³⁷ 2013 (1) SA 1 (CC)

³⁸ at paragraph [30]

³⁹ 2012 JDR 0362 (GSJ)

[24.3] *The condition for such an order to be justified is exceptionality; this means:*

[24.3.1] *If the discovery is wanted before the completion of the filing of all affidavits, prejudice must be shown of a nature that cannot be cured without discovery.*

[24.3.2] *If the discovery is sought after the filing of all affidavits, it must be demonstrated that it is necessary, not merely useful, to achieve a fair hearing.”*

[46] It is common cause that Harambe’s Rule 35(14) notice was brought prior to authorisation thereto having been granted by the court. The reference to Rule 35(13) in the heading thereof is of no consequence at all.

[47] The difference between the Rule 53(1)(b) process concerning the filing of record and the discovery process under Rule 35 was aptly and in detail summarised in *Mamadi v Premier, Limpopo and Others*⁴⁰ where it was *inter alia* held:

“[33] *The High Court's conclusion that rule 53 is not peremptory, and that review proceedings can be brought by way of action proceedings, is therefore correct. This much was correctly conceded, in oral argument before this court, by counsel for the applicants. This, however, provides no support for the High Court's crucial further finding that because a litigant can bring review proceedings by way of summons where disputes of fact, irresolvable on the papers, are reasonably foreseeable, she must do so.*

⁴⁰ 2024 (1) SA 1 (CC)

[34] *The applicants contended that this finding impermissibly requires litigants, in circumstances where disputes of fact are reasonably foreseeable, to forgo the advantages of the rule 53 record. The opposing respondents offered two answers to this contention. First, they contended that in trial proceedings, all relevant documents can be obtained by way of discovery. Second, that s 173 of the Constitution — which vests the courts with the power to regulate their own process — enables litigants in action proceedings to obtain the documents that would otherwise be obtained under rule 53.*

[35] *The short answer to the opposing respondents' first contention is this: the process under rule 53 is different from that under rule 35. Rule 53 provides access to a far greater ambit of documents than normal discovery under rule 35. As this court explained in Helen Suzman Foundation:*

'(T)he rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.'

[36] *The rule 53 record contains 'all information relevant to the impugned decision or proceedings' which includes 'every scrap of paper throwing light, however indirectly, on what the proceedings were' and the record of the deliberations of*

the relevant decision-maker. The fundamental importance of the rule 53 record was explained by this court in *Turnbull-Jackson*:

'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.'

[37] *It is therefore no answer that a litigant will not be disadvantaged if she is required to institute review proceedings by way of summons because she can call for discovery in terms of rule 35."*

(own emphasis)

[48] The question arises whether exceptional circumstances are present for this court to direct that Rule 35(14) should *mutatis mutandis* apply to Harambe's review application.

[49] In *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd*⁴¹ the following was held:

"[9] The starting point in the enquiry as to the application of Rule 35(13) is that there is no discovery in applications: it is only possible for discovery to apply in applications if, in terms of Rule 35(13), a Court has been approached to

⁴¹ 2003 (6) SA 190 (SE)

make the Rules relating to discovery, or some of them, applicable and makes an order to this effect. A Court has a discretion to allow discovery in applications.

[10] *As stated above, the cases make it clear that an order in terms of Rule 35(13) is not simply there for the asking. There must be a good reason to justify a departure from the usual procedure for the launching, hearing and completion of application proceedings. Indeed, if orders are made as a matter of course in terms of Rule 35(13), much of the efficacy of motion proceedings would be lost. It was, no doubt, for reasons such as this that Botha J, in Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another [5] held that :*

'(i)n application proceedings we know that discovery is a very, very rare and unusual procedure to be used and I have no doubt that that is a sound practice and it is only in exceptional circumstances, in my view, that discovery should be ordered in application proceedings'.

[11] *In Saunders Valve Co Ltd v Insamcor (Pty) Ltd Goldstone J dealt with an application to make discovery applicable to a copyright dispute in motion proceedings. He approached the exercise of his discretion as follows:*

'The presence of exceptional circumstances arises by reason of the fact that an interdict of a permanent nature is being sought in these proceedings on motion. That itself is unusual, especially in relation to a copyright matter where drawings are relied upon which go back over almost half a century of time. In motion proceedings the affidavits constitute both the pleadings and

the evidence. If this matter had proceeded by action, pleadings would have been filed and the applicant would have had to have alleged, in those pleadings, both originality in respect of the drawings upon which it relies for its claims of infringement and also ownership of the copyright in question. It would have been open to the respondent (which would have been a defendant in such proceedings) to have joined issue on those two matters and, after the close of pleadings, the present applicant would be required to make discovery. At that stage the respondent would have been entitled to have its experts investigate the question of originality and ownership and so prepare for trial. On the basis of those investigations it would have decided what evidence should be led in answer to the applicant's claims.

Because of the fact that motion proceedings have been instituted, the respondent is called upon now, not only to plead to the claim as set out in the founding affidavits and the notice of motion, but also to place before the Court its evidence. In my opinion, having regard to the circumstances to which I have referred, the respondent would be prejudiced if discovery were not to be made at this stage and so give the respondent the opportunity of deciding what evidence should be placed before the Court in answer to the matters upon which the onus will ultimately rest upon the applicant. It follows too, in my judgment, that it would be unfairly prejudicial to the respondent if it were called upon to file answering affidavits prior to such discovery having been made by the applicant. I would add too that this is obviously a matter where technical evidence may well be vital. The evidence which the respondent wishes to obtain will, no doubt, include matters of a technical nature which will

of necessity relate to documents which should properly be discovered by the applicant.'

[12] *The notion of exceptional circumstances appears to encompass two aspects: the first is that, by the very nature of applications and the discovery procedures, as a matter of practice, it is only rarely that a party seeks an order directing the Rules of discovery to apply; secondly, even then, a case in which a party seeks an order to make the Rules of discovery applicable must have special features that render the making of such a direction necessary. In re MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd Thring J held that, while discovery was, generally speaking, an important tool for determining where the truth lies,*

'it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased. It seems to me that, generally speaking, its employment should be confined to cases where parties are properly before the Court and are litigating at full stretch, so to speak. It is not intended to be used as a sniping weapon in preliminary skirmishes, such as the main application in this matter is, unless there are exceptional circumstances present.'

[13] *Apart from this, however, the notion of exceptional circumstances does not exist in a vacuum: it is to be gauged within the broader context of the foundational values upon which the rules themselves are based, namely ideas of fairness and equity - and the constitutional values of openness and transparency."*

[50] It has also been held that further factors to be taken into consideration to determine whether exceptional circumstances exist are *inter alia* the nature of a Defendant's defence, the relevance of the documentation requested, whether the application is a fishing expedition, the timing of the application, a reasonable apprehension that not all documentation was before the court for the just and fair resolution to the dispute.⁴²

[51] The issue of relevance of documents is difficult to determine at this juncture as same will essentially (at this juncture) only be relevant should it relate to the grounds of review which Applicant would still be entitled to expand upon through a supplementary affidavit. Relevancy being a vastly different question to that of what constitutes a record, as already addressed before.

[52] The exceptional circumstances relied upon and raised in Harambe's heads of argument in this regard⁴³ in essence relate to allegations concerning:

[52.1] the fact that Sentech is a State owned company and largest broadcasting signal distributor in South Africa;

[52.2] that the review relates to procurement which involves expenditure of public funds and "*allegations of exposure to corruption which have been made*";

[52.3] that a need for transparency and openness where a State owned company's exposure to corruption exists especially where such allegations affect the

⁴² *Erasmus Superior Court Practice*, Volume 2 at D1-482 C

⁴³ at paragraphs 34 to 40 thereof

South African public at large with a concern pertaining to potentially fruitless and wasteful expenditure of public funds;

[52.4] that the subject matter of the application affects millions of households and that it requires determination whether Sentech's expenditure constitutes fruitless and wasteful expenditure;

[52.5] that the review application is of significant public importance regarding its subject matter being the procurement process;

[52.6] that constitutional invalidity following non-compliance with certain sections of the Constitution is sought; and

[52.7] that the subject matter of the review relates to decisions taken in respect of tenders of significant value.

[53] I am unpersuaded that what is so stated and relied upon by Harambe constitutes exceptional circumstances to direct the application of a discovery process. Not only has the battle lines not been fully drawn as yet in the review application, in fact the drawing of battle lines is essentially in its infancy. Furthermore, a far more appropriate process was and still is available, to wit that of Rule 30A, to compel proper compliance with the provisions of Rule 53(1)(b) in the event of the record (alleged by Harambe to be incomplete) indeed being incomplete. I need not currently make a finding as to the adequacy of the record, mindful of the conclusion reached and orders to be granted by me herein.

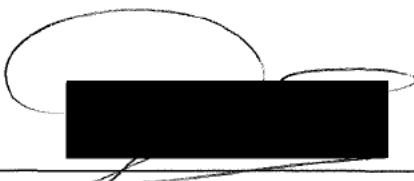
- [54] With regard to costs, both parties have sought costs of their respective interlocutory applications with Harambe in its Rule 30A application for provision of reasons having sought costs on the scale as between attorney and client, whilst in respect of Sentech's Rule 30 application, Sentech seeks costs of its application including costs of two counsel on scale C as well as dismissal of Harambe's counter-application similarly with costs of two counsel on scale C. Harambe in turn seeks dismissal of Sentech's Rule 30 application with costs on an attorney and client scale and the granting of its counter-application with costs and in the event of same not being granted, then under the so-called *Biowatch* principle⁴⁴ that no order of costs be awarded against Harambe in the Rule 30 proceedings.
- [55] Harambe in respect of the punitive costs sought relies in its Rule 30A application on the decision in *In re Alluvial Creek Limited*⁴⁵
- [56] I am in agreement that Harambe has in respect of its Rule 30A application pertaining to the reasons sought, indeed been put to extra costs which it ought not to bear.
- [57] I hold the view that the *Biowatch* principle, given the facts and circumstances set out herein, mindful also of the interlocutory nature of the current applications, independent and irrespective of the constitutional character of the main application, ought not to find application herein and that in respect of the Rule 30 application and Harambe's counter-application therein, costs ought to follow the result.

⁴⁴ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at paragraphs [21] and [22]

⁴⁵ 1929 CPD at 535

[58] In the result, I grant the following orders:

1. The application by Harambe Technologies (Pty) Limited ("*Harambe*") against Sentech SOC Limited ("*Sentech*") brought in terms of Rule 30A of the Uniform Rules of Court limited to Sentech being compelled to provide such reasons as Sentech is in law required or desires to give or make, relating to the decisions set out under paragraphs 1, 2 and 3 of Applicant's notice of motion in its review application dated 15 June 2023, is granted with costs, such costs to be paid by Sentech on a scale as between attorney and client;
2. Harambe's application in terms of Rule 6(15) dated 27 December 2023 for striking out is dismissed with no order as to costs;
3. Sentech's application in terms of Rule 30 of the Uniform Rules of Court for Harambe's notice in terms of Rule 35(14) [as read with Rule 35(13)] to be set aside as an irregular step is granted and Harambe's notice in terms of Rule 35(14) [as read with Rule 35(13)] is set aside as an irregular step, with costs of Sentech's Rule 30 application to be paid by Harambe on a party and party scale, including the costs of two counsel (where so employed) on scale C;
4. Harambe's counter-application dated 29 January 2024 in the Rule 30 proceedings is dismissed with costs, such costs to include costs of two counsel (where so employed) on scale C.


J C UYS SC
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 15 August 2024
Judgment: 7 November 2024

Appearances

For Harambe Technologies (Pty) Limited: Adv B R Edwards
On instructions: MVMT Attorneys

For Sentech SOC Limited: Adv Z Ngakane (Ms)
On instructions: Cliffe Dekker Hofmeyr Inc