

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)**

Case No. 2301/02

In the matter between:

PREMIER FREIGHT (PTY) LTD

Applicant

and

BREATHETEX CORPORATION (PTY) LTD

Respondent

JUDGMENT

PLASKET AJ:

[1] The applicant seeks orders to compel the respondent to pay it R1 987 447.86 and R291 261.78, interest on these amounts and costs. The cause of action is an acknowledgement of debt in the above amounts that the respondent undertook to pay in set instalments. It is common cause that the respondent has not paid these amounts to the applicant. The respondent alleges, however, that it is not required to because it was induced to agree to pay on the basis of a misrepresentation as to how much was owed by it and it alleges too that it has a counterclaim for amounts that it has overpaid.

[2] This judgment does not concern the merits of the matter. It deals instead with an application brought by the respondent, represented by Mr Berridge, for an order to direct that the rules of discovery will apply to these motion proceedings in respect of: all documentation pertaining to the nature of the contractual relationship between the applicant and a Turkish company known

as Bati, as well as correspondence between them relevant to the transactions that underlie the dispute between the applicant and the respondent; all documents evidencing any payments which may have been made by the applicant to Bati that relate to the relationship between the applicant and the respondent; all other documents that may be in the applicant's possession or under its control that relate to Bati's involvement in the matter; and all supporting documentation that substantiates the amounts that the applicants claims from the respondent in this matter. Mr Bham, who appears for the applicant, opposes this application. Counsel are *ad idem* that costs must follow the result in this application. I wish to record my indebtedness to both counsel for their very able arguments on this interesting point.

[3] Before turning to this issue, one other issue must be dealt with briefly. The respondent's answering affidavit was filed late and Mr Berridge brought an application for condonation that was granted. He asked for costs even though the applicant did not oppose the application. The reason why he sought costs was that, when the respondent informed the applicant that it would not be possible to file the affidavit timeously, the applicant refused to give its consent and informed the respondent that it should bring an application for condonation; once that application had been brought, the applicant took the view that it would not oppose the application for condonation. This is an attitude that a party is entitled to take and I see no reason why the applicant should be made to pay the costs of the respondent for relying on its rights by requiring the respondent to apply formally for condonation, considering its position in the light of what is contained in the application and then deciding not to oppose. The costs of the application for condonation will, therefore, be costs in the cause.

[A] DISCOVERY AND APPLICATIONS

[4] As a general rule discovery does not form part of the procedure for

applications. The reason appears to be two-fold. In the first place, the parties in applications are usually in possession of all of the facts necessary to present their respective cases. Discovery is thus, practically speaking, irrelevant as an issue in most applications. Secondly, rule 35(1) of the uniform rules envisages discovery taking place between the close of pleadings and the trial, when evidence will be led: in applications, however, there is no such convenient gap into which discovery can be fitted because the papers are both the pleadings and the evidence.

[5] The drafters of the rules have recognised that there may be circumstances when discovery should be permitted in application proceedings. They made provision for this possibility in rule 35(13). It provides that the 'provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications'.

[6] In this matter, I am accordingly required to decide whether the rules of discovery should be made applicable to these application proceedings and the extent to which the rules should be made to apply.

[7] The cases on rule 35(13) make one thing clear. An order in terms of the rule is not simply there for the asking. It is only in exceptional circumstances that the rules of discovery should be made to apply to application proceedings. I shall deal with this in more detail below.

[8] On the other hand, certain important constitutional values must also be borne in mind. The founding constitutional value of the rule of law, enshrined in s1(c) of the Constitution, and the right of access to court, entrenched in s34 of the Constitution, encapsulate a commitment by the State to make available to the public for the resolution of disputes courts that function according to fair procedures.¹ Secondly, while South Africa could once be described as a

¹ See *Scott v Golden Valley Supermarket* [2002] 3 All SA 1 (SCA), para 9 in which Harms JA held with reference to s34 of the Constitution that the rules of court 'are designed to ensure a

closed and secretive society, that too has been changed by a constitutional commitment to openness, not only in government but also in the private sphere:² s32 of the Constitution provides for access to information held by the State, or by private bodies if it is required for the exercise or protection of a right. Section 39(2) of the Constitution requires me to interpret rule 35(13) in such a way that the spirit, purport and objects of the Bill of Rights is promoted.

[B] THE CASES

[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 make the rules relating to discovery, or some of them, applicable and makes an order to this effect.³ A court has a discretion to allow discovery in applications.⁴

[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

fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right’.

2 See, on the spirit of openness that the right of access to information has heralded, *Phato v Attorney-General Eastern Cape and another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape and others* 1995 (1) SA 799 (E); *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T). See generally Currie and Klaaren *The Promotion of Access to Information Act Commentary* Cape Town, Siber Ink: 2002, especially 2-11. Note that the preamble of the Promotion of Access to Information Act 2 of 2000 provides, inter alia, that it was passed in order to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information’ and to ‘actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights’.

3 *Loretz v MacKenzie* 1999 (2) SA 72 (T), 75B-C; *Afrisun Mpumalanga (Pty) Ltd v Kunene and others* 1999 (2) SA 599 (T), 611G-H. In admiralty matters the same principle applies through the incorporation of rule 35 into the Admiralty Rules by rule 15 of those rules. See *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and others* 1999 (3) SA 500 (C) and *MV Rizcun Trader (2): Manley Appledore Shipping Ltd v Owner of the MV Rizcun Trader and another* 1999 (3) SA 956 (C).

4 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and others* supra, 507J-508A.

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*⁶ 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

⁵ 1979 (2) SA 457 (W), 470D-E. See too *Loretz v MacKenzie* supra, 75G-H.

⁶ 1985 (1) SA 146 (W), 149B-H.

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 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd*⁷ 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

⁷ Supra, 513H-J.

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 equity⁸ -- and the constitutional values of openness and transparency.

[14] Applying these principles to the present case, I am of the view that this is a case in which a direction should be made to the effect that the rules of discovery apply. I have arrived at this conclusion on the basis of a consideration of a number of factors outlined below.

[15] First, at issue in this matter is a claim for a substantial amount of money: an order is sought directing the respondent to pay to the applicant over R2 million plus interest. While I do not agree that the mere fact that a final order is to be made renders this matter exceptional, and I do not read the *Saunders Valve Co Ltd* case to be authority for this proposition, it does appear to me that the nature and scope of the relief sought is a factor to be considered when a court is called upon to exercise its discretion in terms of rule 35(13).

[16] Secondly, the respondent has raised a defence that, whatever its merits at the end of the day, does not appear to be frivolous and it claims, again with some justification, that it does not have all of the documentation that it needs

⁸ See *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and another* supra, 462H-463B, in which Botha J spoke of the court exercising its inherent power to act outside of the specific terms of the rules -- a power he held that should be exercised sparingly -- ‘whenever justice requires that it should do so’ or ‘when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant’. See too, perhaps more pertinently, *Loretz v MacKenzie* supra, 75C, in which Southwood J held: ‘There is no need for the Court to exercise any discretion or inherent power or jurisdiction before an order has been sought in terms of Rule 35(13) and refused. All the issues relating to fairness and equity can be considered when such a direction is sought.’ Goldstone J’s reference to the prejudice suffered by the respondent in the *Saunders Valve Co Ltd* case supra, 149F-H if discovery was not directed is, it appears to me, an example of the application of this principle.

to succeed in its defence because the applicant has refused to provide it with those documents despite request. The potential prejudice to the respondent is clear. As in the *Saunders Valve Co Ltd* case, the applicant in the main application from whom discovery is sought bears the onus. The prejudice to the respondent would have been avoided had the applicant instituted action proceedings instead of motion proceedings.

[17] Thirdly, the documents that the respondent seeks are, on the face of it, relevant to its defence and, what is more, they are relevant to a central issue in the litigation. They do not relate, as was the case in *The MV Urgup* matter to an interlocutory application distinct from the central issues: the parties are 'litigating at full stretch' as it was put by Thring J; and the invocation of rule 35(13) cannot therefore be seen as the use of a 'sniping weapon in preliminary skirmishes'.

[18] Fourthly, the respondent's application for a direction that the rules of discovery apply is relatively well directed: it cannot be described as a fishing expedition and discovery is unlikely to result in an extension of the issues.

[19] Fifthly, the issue of discovery cannot be said to have been raised at too late a stage in the proceedings: the application was made as part of the answering papers but foreshadowed in correspondence between the attorneys for the parties in which the respondent requested documentation, the request was refused by the applicant and the respondent was, in effect, advised by the applicant to bring an application if it wanted the documents. In these circumstances and even though further affidavits will have to be filed, that inconvenience is not sufficient, in my view, to persuade me to exercise my discretion against the respondent

[20] Sixthly, the applicant decided to proceed by way of application, thus robbing the respondent of the automatic resort to discovery. The applicant

cannot necessarily be faulted in this regard: there is no suggestion that it abused the process in order to deny the respondent the right to discovery and it, after all, runs the risk of its application being dismissed in the event of the existence of material disputes of fact. That said, however, it cannot be gainsaid that the respondent is at something of a disadvantage. By invoking rule 35(13) in these circumstances, it is not seeking to use discovery in the way that the applicant did in *The MV Rizcun Trader (2)*, namely in order to obtain information that it ought to have had before it proceeded.

[21] Seventhly, in all probability, the documents that the respondent seeks will resolve the matter one way or the other. They will either establish that the amount represented to be the amount owing was, or was not, the correct amount.

[22] Eighthly, it appears to me that there is, without wishing to pre-judge the merits, a reasonable apprehension that not everything is before the court for the just and fair resolution of the dispute between the applicant and the respondent. When such an apprehension exists and a party seeks an order in terms of rule 35(13) which would have the effect of placing every relevant document before the court, one should, in my view, be slow to exercise a discretion against such a party.

[23] When these factors are taken together, the result is that the present is, indeed, an exceptional case in which it is warranted to direct, in terms of rule 35(13), that the rules of discovery apply.

[C] THE ORDER

[24] For the reasons set out above I make the following order as to the applicability of the rules of discovery and the extent of that applicability in this matter:

- a) It is directed that the provisions of rule 35(13) of the uniform rules apply to this matter to the extent set out below.
- b) The applicant is directed to make discovery, in accordance with rule 35 and within 20 days of the date of this order, of –
 - i) all documentation pertaining to the nature of its contractual relationship with the Turkish company, Bati Nakliyat ve Ticaret AS (known as Bati and referred to as such below) as well as all correspondence between the applicant and Bati, that relate to the transactions that underlie the dispute between the parties in this matter;
 - ii) all documents evidencing any payments that have been made by the applicant to Bati that relate to the relationship between the applicant and the respondent;
 - iii) all other documents that are in the applicant's possession or are under the applicant's control that relate to Bati's involvement in this matter;
 - iv) all supporting documentation that substantiates the amounts that the applicant is claiming from the respondent in this matter.
- c) It is directed that the provisions of rule 35 apply to the extent necessary to give effect to the terms of prayer (b);
- d) The matter is postponed sine die.
- e) The applicant is directed to pay the costs of this application.

C Plasket

Acting Judge