

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 2009/53039

In the application between

BAX GLOBAL (PTY) LTD

APPLICANT

And

TECMED (PTY) LTD

RESPONDENT

JUDGMENT

EF DIPPENAAR AJ

[1] This is an interlocutory application in which the Applicant seeks an order in terms of Rule 35(13) that the provisions of Rule 35 be made applicable to this application. In addition, the Applicant seeks an order that the Respondent provides certain documents set out in paragraphs 1 to 3 of the Applicant's notice in terms of Rule 35(14) as well as the documents set out in paragraphs 6, 7, 8 and 10 of the Applicant's notice in terms of Rule 35(12) .

- [2] The main application is one in which the winding-up of the Respondent is sought at the instance of the Applicant. One of the grounds upon which the Applicant seeks the winding-up of the Respondent is in terms of Section 344(c) of the Companies Act, 61 of 1973 contending that the Respondent has suspended its business for a period of a whole year. In the founding affidavit the Applicant asserts the Respondent is dormant, does not trade and has not traded for more than two years based on various reasons not relevant to the current application. In the answering affidavit the Respondent asserts various technical and other defences and denies that it no longer trades.
- [3] The Respondent's response to the Applicant's Rule 35(12) notice was that the documents sought in, *inter alia*, paragraphs 6, 7, 8 and 10 (being the paragraphs relevant to this application) fall outside the ambit of the Rule 35(12) as no reference was made to a document in the paragraphs in issue. The response to the Rule 35(14) notice was that the rule applied only to actions and not to applications.
- [4] In the Rule 35(14) notice the Applicant requests, *inter alia*, the Respondent's VAT returns, balance sheets and income statements as these financial documents will demonstrate whether or not the Respondent has ceased trading.
- [5] The Applicant contends that the production of these documents is to the advantage of the Respondent if indeed it continues to trade as they will demonstrate that the Applicant is wrong in its assertion that the Respondent

has ceased trading. The Respondent resists disclosure of the said documents on the technical grounds that the rule does not apply to applications.

[6] The documents requested in the Rule 35(14) notice appear to be relevant if not decisive of the issue in the main application as to whether the Respondent is dormant or continues to trade.

[7] The Respondent has raised four points *in limine*, which I will deal with in turn.

[8] First, the Respondent contends that the Applicant does not have *locus standi* in the winding-up application and accordingly also does not have *locus standi* in this application. The Respondent contends that it is *res judicata* that the debt alleged by the Applicant is being contested on *bona fide* grounds because Respondent's application for a rescission of judgment in respect of the same debt was successful and further relies on the so-called Badenhorst rule. Therefore the Respondent contends that the Applicant cannot rely on the debt and is accordingly not a creditor with *locus standi* in the main application. The main application is however not before me and I am not inclined to predetermine the issues which are to be debated in the main application.

[9] In essence, the Respondent wants this Court to determine the Applicant's *locus standi* in the main application and in this application first and as a separate issue before making a decision on the merits of the application.

[10] The Applicant contends that its *locus standi* in the main application is not an issue in this application and cannot be decided in this application whether as a separate issue or not.

[11] I agree with the Applicant's contention that I cannot decide on an issue in the main application which is not before me as a procedural step to determine whether the Applicant has *locus standi* in this interlocutory application and that whilst the main application is pending, I must accept that the Applicant has *locus standi* for purposes of this interlocutory application.

[12] The Respondent secondly contends that the order sought is defective as the application in terms of Rule 35(13) should be framed as seeking relief that the discovery procedure set forth a Rule 35 applies to the main application as opposed to the present application and that the service of the Rule 35(14) notice was accordingly premature.

[13] The Applicant contends that this application is interlocutory to the main application. The effect of making an order in terms of Rule 35(13) in this application would clearly result in it being applied also in the main application.

[14] In my view the route proposed by the Respondent is highly technical and it is formalistic to require the Applicant to obtain an order in terms of Rule 35(13) and thereafter to be required to serve a further Rule 35(14) notice requesting the same documents as in my view this would be a waste of time and result in unnecessary costs being incurred. Such formalistic approaches have been

strongly condemned by our Courts. See for example **Federated Trust v Botha**, 1978 (3) SA 645 (AD) at 654D-F.

[15] The third point in *limine* raised by the Respondent is that the Applicant has failed to set out exceptional circumstances that justify the relief sought.

[16] It is trite that a Court will only in exceptional circumstances make an order in terms of Rule 35(13) in application proceedings. See: **Premier Freight (Pty) Ltd v Breathtex Corporation (Pty) Ltd**, 2003 (6) SA 190 (SE) at paragraph 7.

[17] The Applicant contends that the following facts and circumstances constitute such exceptional circumstances:-

[17.1] Relying on the Premier Freight case referred to above, the Applicant contends that Section 39(2) of the Constitution of the Republic of South Africa, 108 of 1996 requires a Court to interpret Rule 35(13) in such a way that the spirit purport and objects of the bill of rights is promoted. The founding constitutional value of the rule of law enshrined in Section 1(c) of the Constitution and the right of access to a Court entrenched in Section 34 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. Section 32 of the Constitution provides for access to information held by the State or private bodies, if it is required for the exercise or protection of a right.

- [17.2] The notion of exceptional circumstances does not exist in a vacuum. It is to be gauged within the rules themselves are based namely, ideas of fairness and equity and the constitutional values of openness and transparency.
- [17.3] The debt due to the Applicant by the Respondent is substantial and is an amount of R3 433 483,30.
- [17.4] The main application is for the winding-up of the Respondent. If an order were to be granted in the main application, it would affect the Respondent's status. The matter is therefore of cardinal importance to both parties.
- [17.5] The documents that the Applicant seeks are, on the face thereof, relevant to the defence raised by the Respondent in the main application and would probably be decisive of such defence.
- [17.6] The application for a direction that the rules of discovery apply is circumscribed and well directed. It is not sought to serve a discovery notice in terms of Rule 35(1). It is only sought to have the rule extended to the documents sought in terms of the Rule 35(14) notice. It cannot therefore be described as a fishing expedition and the limited discovery that is sought is unlikely to result in an extension of the issues to be determined in the main application.

- [17.7] The issue of discovery has been raised timeously and not at a late stage in the proceedings. *Prima facie* the documents sought are necessary to enable the Applicant to settle its replying affidavit.
- [17.8] The Applicant is not seeking to invoke Rule 35(13) to obtain information that it ought to have had before it launched the Main Application. The documents it seeks are directly relevant to the issues raised by the Respondent in the Answering Affidavit and could not have been anticipated by the Applicant, bearing in mind the grounds upon which it relied for its contention that the Respondent had ceased trading.
- [17.9] The documents sought by the Applicant would in all probability resolve the matter one way or the other. They will either establish that the Respondent has traded during the period it contends it did or they will establish that it has not traded.
- [17.10] There is a reasonable apprehension that not everything is before the Court for the just and fair resolution of the dispute between the parties. Where such an apprehension exists and a party seeks an order in terms of Rule 35(13) that would have the effect of placing all relevant documents before the Court, the Court should be slow to exercise a discretion against such a party.
- [17.11] In any event, even if an order is not made in terms of Rule 35(13), the Applicant places reliance on the discretion afforded a Court in terms of the Rule 35(11) to order production of the documents. Reliance is

placed for this contention on **Seale v Van Rooyen NO & Others**, 2008 (4) SA 43 (SCA) at 48G, paras 11 – 14.

[18] There appears to be merit in the Applicant's contentions and I do not agree with the Respondent that no exceptional circumstances exist.

[19] Fourthly, the Respondent contends that the replying affidavit in the main application was due before the date on which the Rule 35(12) and (14) notices were served. It contends further that because the notices were not served prior to the date on which the answering affidavit was due, the notices were out of time and that there was no requirement to respond thereto.

[20] The Applicant submits that if the Respondent was of the view that the Rule 35(12) and (14) notices were served out of time, then it had the right to serve a notice in terms of Rule 30(2) requiring the Applicant to remedy what it contended was an irregular step. It failed to do so and instead responded to both notices. Having taken a further step in the cause without knowledge of the alleged irregularity, the Respondent was precluded from raising the irregularity thereafter. Moreover, the Rule 35(12) notice could be served at any time before the hearing. From the papers it does not appear that the Respondent had placed the Applicant's contention that it required the documents for the purposes of settling its replying affidavit in issue. The Applicant contends that its request accordingly falls within the ambit of pleading as envisaged by Rule 35(14).

[21] I am of the view that the Applicant's submissions have merit and that this point in limine similarly falls to be dismissed.

[22] I have also considered the specific objections raised against the production of each of the documents the Applicant requires to be produced and make the following general comments.

[23] The main objections raised by the Respondent to the production of the documents are that the documents are not specifically referred to in the said paragraphs or are not relevant to the issues in dispute. In my view these contentions are without merit as the documents are referred to in a document that is referred to in the affidavit and which is annexed as an annexe thereto and in respect of which no proper basis has been laid for them not to be relevant. As such, in my view, the Applicant is entitled to the production thereof. See **Universal City Studies v Movie Time**, 1983 (4) SA 736 (D) at 760D.

[24] The Applicant is further entitled to production of the whole of a document referred to and not just the portion upon which the Respondent has chosen to rely as enunciated in **Protea Assurance Co Ltd v Waverley Agencies CC**, 1994 (3) SA 247 (C) at 249B.

[25] After considering in detail the documents sought by the Applicant, I make the following order:

- 1 It is directed that the provisions of Rule 35(13) shall apply to this and the main application;
- 2 The Respondent is directed to provide the documents set out in paragraphs 1, 2 and 3 of the Applicant's notice in terms of Rule 35(14) dated 26 February 2010 within five (5) days of service of this order;
- 3 The Respondent is directed to provide the documents set out in paragraphs 6, 7, 8 and 10 of the Applicant's notice in terms of Rule 35(12) dated 25 February 2010 within five (5) days of service of this order;
- 4 The Respondent is directed to pay the costs of this application.

EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	13 May 2010
Date of judgement	:	4 November 2010
For applicant	:	Adv J F Roos SC
	:	Adv S S Cohen
	:	Wertheim Bekker Inc
For respondent	:	Adv M Nowitz
	:	Schindlers Attorneys