

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



Case number: 2021/21896
Date of hearing: 8 August 2022
Date delivered: 7 September 2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

07/09/2022

DATE

.....

SIGNATURE

In the application between:

EVRIKARD (PTY) LTD
RONDO (PTY) LTD

First Applicant
Second Applicant

and

SELECT PPE (PTY) LTD
NLG GLOVES (PTY) LTD
PETRI-JS PIETERSE
SIBANYE RUSTENBURG PLATINUM

First Respondent
Second Respondent
Third Respondent

JUDGMENT

SWANEPOEL AJ:

[1] In the main application in this matter applicants have sought interdicts against first to third respondent ("respondents") on the grounds of alleged unlawful competition. Upon respondents delivering their answering affidavit, applicant delivered two rule 35 (12) notices, calling upon respondents to discover certain documents referred to in the answering affidavit.

[2] Respondents took the view that the notices constituted an irregular step, and delivered notices in terms of rule 30 of the Uniform Rules. The notices raise the following complaints:

[2.1] Respondents say that a party to motion proceedings may not rely on rule 35 (12) unless a court has granted it leave to do so, when exceptional circumstances have been shown to exist.

[2.2] Respondents also contend that applicant should have attached all documents required to make its case in the founding papers, and it cannot now ask for the documents hoping to use the documents in reply.

[2.3] The third ground for objection is that discovery is only allowed once pleadings have closed, or, in the case of motion proceedings, when the replying affidavit has been delivered.

[2.4] Respondents say that applicants should have exhausted other remedies to find the documents.

[2.5] Finally, respondents say that the second notice is *lis pendens* in that it repeats some of the demands for documents included in the first notice.

[3] Respondents have now brought two applications, which they have informally consolidated, to have the rule 35 (12) notices set aside.

[4] Rule 35 (12) reads as follows:

"Any party to any proceeding may at any time before the hearing there of 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, without 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. "

[5] Respondents rely on the provisions of rule 35 (13) which makes rule 35 applicable to applications "in so far as the court may direct", and, they argue, in the absence of a prior direction of court, the rule 35 (12) notices were irregular.

[6] The wording of rule 35 (12) is unambiguous. It applies to any AQ ceedjng, and it specifically refers to affidavits. It is therefore applicable to motion proceedings and actions. It says that a party may at any time before the hearing deliver a rule 35 (12) notice. The wording is clear

enough: It is not necessary for a party to obtain an order in advance, authorizing the giving of notice in terms of this rule.

[7] In this interpretation I am supported by the case of *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*¹. Rule 35 (13) is of application to normal discovery in terms of rule 35 (1) (2) and (3), and is not applicable to rule 35 (12).¹

[8] Consequently, I hold that the notices were not irregular by virtue of respondents not having applied in advance for leave to file them.

[9] The second ground of complaint is that applicants may try and make out a case in reply. Whether that may or may not happen is not for me to decide. If applicants do so, then they will have to justify their papers

¹ 1979 (2) 457 (WLD) at page 461 B- D
before the Court hearing the matter. This is not a ground for finding that the notices themselves are irregular.

[10] Respondents also contend that the second notice is *lis pendens*. *Lis alibi pendens* is a defence raised where more than one action has been instituted between the same parties in respect of essentially the same cause of action and for the same relief. It has nothing to do with filing two notices that overlap in certain respects.

[11] The contention that applicant should have exhausted other remedies to obtain the documents is equally without merit. Once a party refers to a

¹ *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA)

document in its affidavit, the other party is entitled to see that document, and to call for it in terms of rule 35 (12).³

[12] It follows, therefore, that the applications must fail.

[13] I make the following order:

[13.11 Both applications in terms of rule 30 are dismissed with costs.

Protea Assurance Co Ltd v Waverley Agencies CC and Others 1994
(3) SA 247 (CPD)

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH
COURT,
JOHANNESBURG

COUNSEL FOR APPLICANT: Adv. Harrison

ATTORNEY FOR
APPLICANT: Paul Friedman and
Associates

COUNSEL FOR RESPONDENT: Adv Marriot
ATTORNEYS FOR
RESPONDENT: McNaught and Co.
Inc.

DATE HEARD:

12 August 2022

DATE OF JUDGMENT:

7 September 2022