



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. 2557/2016

In the matter between:

DISTELL LIMITED

**APPLICANT
(Respondent in the interlocutory application)**

and

CHRIS NAIDOO

FIRST RESPONDENT

KANTHAKUMARI NAIDOO

SECOND RESPONDENT

PRAVESH RAJKUMAR SINGH

THIRD RESPONDENT

**HEMANTH RAJKUMAR SINGH
RESPONDENT**

FOURTH

(Applicants in the interlocutory application)

ORDER

In the result, the following orders are made:

1. The application is dismissed.
2. The first to fourth respondents are directed to pay the costs of the interlocutory application jointly and severally, the one paying the other to be absolved. Such costs are to be on an attorney and client scale.

J U D G M E N T

Henriques J:

Introduction

[1] This is an opposed interlocutory application in terms of rule 35(12) of the Uniform Rules of Court in which the first to fourth respondents (the respondents) seek, inter alia, an order compelling the applicant (Distell) to produce for inspection and/or copying, the documents referred to in the rule 35(12) notice of 6 May 2016, being the 'unpaid invoices for June 2013 and July 2013' referred to in paragraph 14 of the founding affidavit in the main application marked as annexure "FA10".

[2] For ease of reference, I will refer to the parties as they were cited in the main application. The applicant will be referred to as Distell and the respondents collectively as the respondents, alternatively in their individual capacities.

The relief foreshadowed in the notice of motion

[3] Apart from seeking orders directing the applicant to produce the documents for inspection and copying, the respondents seek the following orders:

- '2. In the event that the applicant fails to comply with the terms of paragraph 1 above, the respondents are granted leave to apply on the same papers, supplemented as far as may be necessary, for an order dismissing the application instituted by the applicant under case number 2557/2016 ("the main application").
3. To the extent necessary the respondents are granted an extension of time to deliver their answering affidavit in the main application and are directed to do so within 10 (TEN) days of the date of the applicant's production of the documents pursuant to paragraph 1 above.
4. The main application enrolled for hearing on 04 August 2016 at the instance of the applicant is struck from the roll, alternatively, adjourned *sine die*.
5. The applicant is directed to pay the costs of this application.

6. The applicant is directed to pay the wasted costs occasioned by the enrolment of the main application for hearing on 04 August 2016.'

[4] It is common cause that Distell instituted application proceedings against the respondents in their capacities as sureties and co-principal debtors of Melody Hills Trading 184 (Pty) Ltd (Melody Hills) for payment of the sum of R2 001 523.24 together with interest and costs (the main application). Prior to instituting the main application, Distell obtained final liquidation orders under case numbers 10404/2013 and 10403/2013 against Melody Hills and 888 Liquor Depot (Pty) Ltd (888) on 24 April 2015 before Ntshangase J as a consequence of Melody Hills' inability to pay the debt owed to Distell in such amount.

[5] A notice to oppose was filed in the main application on behalf of all the respondents on 23 March 2016. After the *dies* for the filing of an answering affidavit had expired, the respondents served a notice in terms of Uniform rule 35(12) on Distell on 6 May 2016. In response to such request, on 27 May 2016, Distell declined to produce the documents as it held the view that the rule 35(12) notice constituted an abuse of process. As a consequence, the respondents instituted a rule 30A application after a rule 30A notice had been served on 7 June 2016.

[6] In the interlocutory application before me, the respondents essentially indicate they require the documents in paragraph 1 to formulate their defence and are relevant to the proceedings. Distell in turn indicates that the documents are irrelevant and the rule 35(12) notice and application constitutes an abuse of process of court.

[7] Prior to dealing with the merits of the interlocutory application, it is necessary to deal with the facts relied on by the parties which form the contextual basis for the submissions of the parties, and the relief sought in the interlocutory application.

Melody Hills' indebtedness

[8] Distell instituted liquidation proceedings against Melody Hills and 888. The basis on which provisional winding up orders were obtained, was as a consequence of Melody Hills as principal debtor being unable to pay its debts to Distell and 888 as guarantor for Melody Hills' liability. It is common cause that Melody Hills would purchase liquor products from Distell, take delivery thereof and would in turn distribute the liquor products to Midmar Liquors Limited (Midmar).

[9] From Ntshangase J's judgment, it is evident that Midmar was placed under business rescue in 2012. Despite this, Midmar continued trading and Melody Hills continued supplying liquor products to it. The third respondent also deposed to affidavits on behalf of Melody Hills' and 888 in opposition to the liquidation proceedings. Although the directors of Melody Hills were reflected as being the first and third respondents, all the respondents save for the second respondent were copied in the email exchanges.

[10] The fourth respondent was the attorney of record in such proceedings as well, and had approached Distell for credit on Melody Hills' behalf. In addition, it would appear that the fourth respondent had a substantial interest in Midmar. It is also apparent from the papers filed in these proceedings and the exchange of email correspondence, that the fourth respondent was engaged in discussions with Distell regarding Melody Hills' indebtedness and the business rescue practitioner.

[11] In the liquidation proceedings, Distell indicated that Melody Hills was indebted to it in the amount of R2 001 523.24 plus interest and costs in respect of liquor sold and delivered on account to Melody Hills. The debt sued on consisted of unpaid invoices for June and July 2013. A statement dated 31 August 2013 reflecting the amount of Melody Hills' indebtedness was put up in the liquidation proceedings, it being common cause that no goods were sold and delivered in August 2013. It is apparent that this amount constituted the balance owed by Melody Hills, it having made several payments towards the capital amount owing.

[12] The basis on which Melody Hills and 888 opposed the confirmation of the provisional winding up orders was to dispute that Distell had made delivery of any liquor to it at its nominated address and that it had a branch in Parow North in the Western Cape. In addition, they submitted that Distell had not proved Melody Hills' indebtedness as it had failed to produce all the invoices and delivery notes it relied on. Melody Hills did not challenge the amount of the indebtedness and sought copies of the suretyship agreements.

[13] Ntshangase J found that Melody Hills had registered premises situated in the Western Cape and that a director of Melody Hills, being the third respondent, had signed minutes of meetings in which Melody Hills had resolved to relocate its

registered premises from Parow North to Bellville in the Western Cape. The court also found that Distell had proved on a balance of probabilities that goods had been sold and delivered as evidenced from the statement of account annexed to the papers.

[14] In addition, the court found Melody Hills request for all the invoices and delivery notes in substantiation of its indebtedness unreasonable and that the failure by Distell to produce all the delivery notes and invoices was not fatal to its case. Although the court indicated that it would have been possible for Distell to provide the invoices for June and July 2013, it found that the third and fourth respondents exchanged correspondence in respect of Melody Hills' indebtedness with the creditors and did not dispute same.

[15] A factor which the court considered relevant to Melody Hills' indebtedness was clause 12 of the agreement concluded between the parties which provided that a certificate would be prima facie proof of Melody Hills' obligations to Distell and that the amount was due and payable together with any interest thereon. Clause 12 of the credit agreement was quoted in the judgment¹ and provided:

'Unless the applicant (respondent) objects in writing within 14 (fourteen) days of date of the statement to any item appearing thereon, the applicant shall be deemed to have accepted the statement as correct.'

The court found that as Melody Hills did not object to the statement, it signified its acceptance of the certificate evidencing the amount of its indebtedness.

[16] In addition, correspondence exchanged by the fourth respondent's firm of attorneys indicated he was liaising with the business rescue practitioner, Juanito Damons to ensure that monies held in trust be paid to Distell in settlement of Melody Hills' indebtedness to Distell. The email correspondence made it clear that liquor was supplied to Melody Hills by Distell, who in turn onward supplied same to Midmar. Consequently, Ntshangase J found that Distell had proved on a balance of probabilities that liquor had been sold and delivered as evidenced from the statement of account annexed to the liquidation papers. The indebtedness to Distell was not disputed on bona fide and reasonable grounds. Melody Hills and 888 were unable to pay their debts, Melody Hills being commercially insolvent as it was unable

¹ Index, page 88, para 38.

to pay its debts when they fell due for payment. It was for these reasons that the court granted final winding up orders.

Submissions of the parties

[17] The respondents submit that they are entitled to the documents as they are relevant to the main application and are necessary to consider their defence and place relevant facts before the court in an answering affidavit. Distell opposes the granting of the order on two grounds, firstly, that the documents are irrelevant to the proceedings and secondly, the rule 35(12) notice constitutes an abuse of court process.

The respondents' submissions

[18] Mr *Alberts*, who appeared for the respondents, submitted that the sureties, certainly three of them, were not intimately involved in the running of the businesses of Melody Hills, 888 and Midmar. Therefore, in order to prepare their defence in the main application, they require access to the invoices which formed the basis of the *causa* between the sureties and Distell. It is for these reasons, he submitted, that relevance had been established. In addition, he indicated, without conceding the point, that certainly in relation to the fourth respondent, that as he was involved in the day-to-day running of the entities, he certainly could not make such a request.

[19] However, given that the respondents were sued both as sureties and co-principal debtors, they were entitled to copies of the invoices which formed the basis for Distell saying the amount was due by them. They would, in such capacities, be entitled to copies of the invoices, certainly the invoices of June and July 2013. He denied that the sureties were embarking on a fishing expedition and indicated that all that the sureties were seeking were copies of the invoices relied on by Distell for Melody Hills' indebtedness.

[20] In addition, Mr *Alberts* required me to have regard to the Supreme Court of Appeal judgment in *Centre for Child Law v Hoërskool Fochville & another*² where Ponnann JA writing for the full court held that '... the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case'.

² *Centre for Child Law v Hoërskool Fochville & another* 2016 (2) SA 121 (SCA) para 18.

[21] At the hearing of the matter, I raised with Mr *Alberts* that the rule 35(12) notice contained incorrect references to the affidavit and annexures. He indicated that the references are references to the main affidavit filed in the liquidation application and essentially all that the respondents' sureties required were copies of the unpaid invoices for June and July 2013 to ascertain whether or not these goods were sold and delivered. He also indicated that although the delivery notes may be in the possession of Melody Hills and 888, as both these entities are in liquidation, the respondents are not able to access these documents easily.

Distell's submissions

[22] Mr *van Nieuwenhuizen* who appeared for Distell submitted that Mr *Alberts* had three insurmountable difficulties namely:

- (a) The submissions and argument he raised at the hearing of the application were not canvassed in the affidavits in support of the relief the respondents seek.
- (b) The Supreme Court of Appeal decision of Ponnann J is also to the effect that when exercising such discretion a court must not make an order for the production of documents which cannot be produced, or which are privileged and/or which are irrelevant. The respondents have to satisfy me that the documents are relevant to the relief they seek.
- (c) That this is no more than a fishing expedition adopted by the sureties as the affidavits clearly show all three of them, save the second surety who is the wife of the first surety, were intricately involved in the operation of the businesses.

[23] Mr *van Nieuwenhuizen* submits that the documents are irrelevant to the main application because of the manner in which Melody Hills opposed the winding up application. The respondents' indebtedness arises not from them being sureties, but being co-principal debtors with Melody Hills. In the liquidation application, Melody Hills only challenged the fact that goods were delivered to the address from which it operated its business. The certificate of balance and the amount of the indebtedness were never challenged during the liquidation proceedings.

[24] As such defence was rejected by the court in the winding up applications, and as there was no dispute in relation to the indebtedness, the respondents cannot now

seek to challenge the basis of their indebtedness. Distell further submits that the respondents agreed that any acknowledgement of indebtedness and admission by Melody Hills would be binding on them, that a certificate signed by Distell setting out the amount of the sureties' liability would be '*prima facie* proof for purposes of obtaining judgment' and that the respondents renounced any benefits to which they as sureties might in law be entitled, including the benefits of excussion, division, cession of action, revision of accounts and no value received.

[25] Juxtaposed against this are the respondents' submissions that the invoices are relevant, as being sureties, they are entitled to raise any defence which Melody Hills could have raised in the proceedings specifically in the main application. In consequence thereof, they are in these proceedings, entitled to challenge their indebtedness and the amount allegedly owed by Melody Hills.

Issues for determination

[26] The issues for determination in this application are the following:

- (a) Whether the respondents as sureties are entitled to an order for the inspection and copying of the documents referred to in the rule 35(12) notice dated 6 May 2016? Linked to this is whether the documents are relevant and whether the application is an abuse of process?
- (b) Whether the respondents are entitled to an extension of time within which to deliver their answering affidavit in the main application?
- (c) Whether the respondents are entitled to the orders referred to in paragraphs 4 and 6 of the notice of motion?

[27] Essentially the respondents indicate they require the documents to formulate their defence and are therefore relevant to the proceedings. Distell in turn indicates that the documents are irrelevant and the rule 35(12) application constitutes an abuse of process of court.

Rules 35(12) and 35(14)

[28] The starting point in my view are the provisions of rule 35(12) and (14) which read as follows:

'(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with the 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.

...

(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require from the other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.’

[29] The respondents indicate that they are entitled to deliver a notice in terms of rule 35(12) at any time before the hearing of the matter. The documents requested have been pertinently mentioned by Distell in the main application. They are entitled to rely on rule 35(12) for this. In addition, in terms of rule 35(14) they are entitled to deliver such notice any time after entering an appearance to defend for the purposes of pleading, in this instance for the purposes of filing their answering affidavits and disclosing their defence to the main application. The respondents submit that the documents requested are invoices which relate to the claim in the main application and the correctness thereof. Consequently, there can be no challenge that the invoices are not relevant.

[30] In addition, the respondents submit that once Distell referred to the invoices in the founding affidavit, there was an obligation on Distell to produce such documents when called upon to do so in terms of rule 35(12). In support of this submission the respondents rely on the decision in *Magnum Aviation Operations v Chairman, National Transport Commission, & another*³ in which Vermooten J in dealing with a rule 35(12) application held the following:

‘In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document, you must produce it. . .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

³ *Magnum Aviation Operations v Chairman, National Transport Commission, & another* 1984 (2) SA 398 (W) at 400B-E.

other, qualification. I am consequently of opinion that, having made reference to the financial statements, Operations is obliged to produce them for inspection.’

[31] The respondents further submit that the provisions of rule 35(12) entitle them to the invoices in order that they consider their position. They can therefore exercise their rights in terms of rule 35(12) before they disclose their defence in any answering affidavit in the main application. The respondents draw on the decision in *Unilever plc & another v Polagric (Pty) Ltd*,⁴ where Thring J concluded as follows:

‘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), a defendant or respondent does not have to wait until the pleadings have been closed or his opposing affidavits have been delivered before exercising his right under Rule 35(12): he may do so at any time before the hearing of the matter. It follows that he may do so before disclosing what his defence is, or even before he knows what his defence, if any, is going to be. He is entitled to have the documents produced “for the specific purpose of considering his position”. . . .’

[32] In reaching this conclusion, Thring J referred to the dictum of Marais J in *Protea Assurance Co Ltd & another v Waverley Agencies CC & others*⁵ where he said the following:

‘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.’

⁴ *Unilever plc & another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 336G-J.

⁵ *Protea Assurance Co Ltd & another v Waverley Agencies CC & others* 1994 (3) SA 247 (C) at 249B-D.

[33] The respondents indicate that Distell has not indicated it is unable to produce the documents requested and once Distell delivers the invoices, they will be in a position to consider their defence and place the relevant facts before the court in their answering affidavits in the main application. In addition, in answer to the submission by Distell that the court in the liquidation proceedings did not deem it necessary for Distell to produce the documents, the respondents submit that the liquidation proceedings have no bearing on this application and further that they are entitled to raise any defence which Melody Hills and 888 could have raised in such proceedings.

[34] There appears to be a difference of opinion as to whether or not an onus arises in terms of rule 35(12) either on an applicant seeking those documents to show that they are relevant, alternatively, on a party declining to produce those documents to show that they are not relevant. This emanated from the decisions of the various courts.⁶

[35] Although the effect of the decision in *Magnum Aviation* was that the court held, albeit *obiter*, that relevance was not a requirement for the production of documents in terms of rule 35(12), in *Universal City Studios v Movie Time*,⁷ the court held that such application could be opposed on grounds of privilege or irrelevance. Booysen J held as follows:⁸

'It being an application, I would say that the *onus* is to be discharged on the usual basis, ie that the applicant bears the overall *onus* of satisfying the Court that the respondent is obliged to produce the document or portion in question, ie that the document has been referred to and that it is relevant to the issues which have arisen (where the issues have been identified by the delivery of opposing affidavits) or that the applicant proposes to raise (where no opposing affidavits have been delivered). Where the respondent files an opposing affidavit in Rule 30 (5) proceedings and either denies relevance or avers that he is on the ground of privilege not obliged to produce a document referred to by him, it would seem to me that the applicant would, in order to succeed, have to satisfy the Court on a balance of probabilities that the document is indeed relevant or not privileged.'

⁶ See in this regard *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) and *Unilever plc & another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C).

⁷ *Universal City Studios* at 748A-C.

⁸ *Ibid* at 748A-D.

[36] In *Unilever*, Thring J also considered whether the question of onus arises. In referring to *Universal City Studios*, he was of the view that if a party files an opposing affidavit relying on privilege or irrelevance as a ground for not producing a document, then the onus lies on his opponent to satisfy the court on a balance of probability that the document is relevant or not privileged.⁹ In this regard, he quoted from the decision of Friedman J in *Gorfinkel v Gross, Hendler & Frank*,¹⁰ where he held the following:

‘There are undoubtedly differences between the wording of Rule 35(12) and the other subrules relating to discovery, for example subrules (1), (3) and (11) of Rule 35. The latter subrules specifically refer to relevance whereas subrule (12) contains no such limitation and is *prima facie* cast in terms wider than subrules (1), (3) and (11).

It is nevertheless to my mind necessarily implicit in Rule 35(12) that there should be some limitation on the wide language used. One such limitation is that a party cannot be compelled under Rule 35(12) to produce a document which is privileged.

...

With regard to relevance there must also, in my view, be some limitation read into Rule 35(12). To construe the Rule as having no limitation with regard to relevance could lead to absurdity. It would be absurd to suggest that the Rule should be so construed that reference to a document would compel its production despite the fact that the document has no relevance to any of the issues in the case. It is not difficult to conceive of examples of documents which are totally irrelevant. Booyesen J in the *Universal City Studios* case gave one such example. What is more difficult to decide is where the line should be drawn. A document which has no relevance whatsoever to the issues between the parties would obviously, by necessary implication, be excluded from the operation of the Rule. But would the fact that a document is not subject to discovery under Rules 35(1), 35(3) or 35(11) render it immune from production in terms of Rule 35(12)?

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 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

⁹ *Unilever plc* at 337C-E.

¹⁰ *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) at 773H-774I.

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.'

[37] However, the SCA in *Centre for Child Law v Hoërskool Fochville* held that it may not be correct to refer to an onus but rather more appropriate to speak of a 'burden to adduce evidence'.¹¹ In para 18 of the judgment, it was held that the court has a general discretion to strike a balance between conflicting interests of parties:

'In my view the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.'

[38] Mr *van Nieuwenhuizen* quite correctly acknowledged that the decision of Booysen J has not been overturned. The comments of Ponnan JA in *Centre for Child Law* were *obiter* but the legal position remains unchanged.

¹¹ *Centre for Child Law* at 122G.

[39] Consequently, it would appear that having regard to the decisions in *Universal City Studios* and *Gorfinkel*, the onus is on Distell to show on a balance of probabilities that they do not have to produce the documents in terms of the rule 35(12) notice served by the respondents. Relevance or the irrelevance of the documents to the proceedings is a valid defence to the production of same.

[40] What then is meant by relevance? The test for relevance was laid down by Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co*¹² which has been applied and accepted by our courts with approval. The test enunciated is the following:

‘It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* - not which *must* - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly” because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.’¹³

[41] In its submissions as to why the invoices are irrelevant, Distell submits that during the course of the liquidation proceedings, the third and fourth respondents deposed to affidavits on behalf of Melody Hills and raised only two defences which are relevant for the purposes of the interlocutory applications. These defences are firstly, that Distell delivered goods to Melody Hills in the Western Cape at an address which was not the nominated address of Melody Hills and that Melody Hills did not have a branch situated in the Western Cape at Parow North and secondly, that the fourth respondent had no authority to acknowledge Melody Hills’ indebtedness to Distell.

[42] Ntshangase J rejected these defences but more importantly also caused to consider the request by the respondents on behalf of Melody Hills for copies of the invoices which were referred to in the statement annexed to the founding affidavit in the liquidation proceedings evidencing the amount of Melody Hills’ and 888’s indebtedness.

¹² *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* 1882 (11) QBD 55.

¹³ *Rellams (Pty) Ltd v Jamie Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A-C.

[43] Ntshangase J found that the fourth respondent was intimately involved in the day-to-day running of both Melody Hills and 888 and had acquired Midmar at the end of 2012 when he made the application for credit from Distell on behalf of Melody Hills. In fact, email correspondence was put up in the liquidation proceedings between the fourth respondent and Distell's credit account manager in relation to Melody Hills' and 888's indebtedness to Distell. Such correspondence went so far as to also include the exchange between the fourth respondent and the business rescue practitioner Damons who dealt with Midmar whilst it traded in business rescue. The email acknowledged that Distell had supplied liquor to Melody Hills who had then onward supplied same to Midmar. The fourth respondent had requested the business rescue practitioner to pay the monies Melody Hills owed to Distell from income received from the sale of liquor products by Midmar. No dispute was raised regarding the amount owed.

[44] Distell indicates that despite demand addressed to the respective sureties in their personal capacities as appears from the founding affidavit in the main application, they did not raise any dispute in respect of their or Melody Hills' indebtedness to Distell. It is for this reason the documents are not relevant.

[45] In addition, Distell indicates that because there has never been any bona fide dispute regarding the money owed to it and the respondents have not challenged such material allegations and have merely indicated that those affidavits and proceedings are irrelevant to the current one, Distell submits that its version therefore stands uncontradicted.¹⁴

[46] It is for these reasons that Distell submits that as no facts have been placed in issue and no contrary evidence presented by the respondents there are no matters in issue between the parties and consequently the production of these invoices are irrelevant. This court cannot make an order against Distell to produce the invoices which are irrelevant to the facts as they stand presently on the papers.¹⁵

¹⁴ *South African Breweries Ltd v Rygerpark Props (Pty) Ltd & others* 1992 (3) SA 829 (W) at 834B-C; *National Director of Public Prosecutions v Kyriacou* 2004 (1) SA 379 (SCA) at 391D-E; *Standard Bank of SA Ltd v Sewpersadh & another* 2005 (4) SA 148 (C) at 159G, 161D and 161H.

¹⁵ *Centre for Child Law* at 133E-F.

[47] I agree with the submissions of Distell in this regard. There can be no doubt that the sureties are aware of the amount of the indebtedness of the principal debtor and this was not challenged. There can thus be no dispute concerning the amount of the principal debtor's indebtedness and the documents are thus not relevant. In addition, *Mr Van Nieuwenhuizen* is quite correct that the submissions made in argument at the hearing were not dealt with the affidavits the respondents filed in the application.

[48] A further challenge, which has been directed at the allegations contained in the interlocutory application, is that the founding affidavit and replying affidavit have not been deposed to by any of the sureties but by their former attorney of record. No confirmatory affidavits have been filed on behalf of any of the respondents and Distell submits that any suggested version proffered in the interlocutory application is admissible hearsay evidence. They rely on the following authorities for this submission, namely *S v Ndhlovu & others*;¹⁶ *Freedom Under Law v National Director of Public Prosecutions & others*.¹⁷ I agree with these submissions of Distell and the principles enunciated in the authorities referred to.

Abuse of process

[49] The second basis of opposition to the relief sought is that Distell submits that if the court were to order the production of the invoices it would give effect to 'an abuse of process'. In *Western Assurance Co., v Caldwell's Trustee*¹⁸ the court held that every court has inherent jurisdiction to stay any action that is shown to be an abuse of court process.

[50] The basis on which Distell submits the interlocutory application is an abuse of process and ought not to be countenanced by this court is that it is nothing more than a 'fishing expedition' and that neither the sureties nor Melody Hills have ever advanced a bona fide defence to Distell's claim nor has one even been suggested by the sureties. In this regard, the sureties have failed to propose any issues which they intend to raise in defence in the main application and consequently ought not to be allowed to be advanced.

¹⁶ *S v Ndhlovu & others* 2002 (6) SA 305 (SCA) at 317G-318A.

¹⁷ *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP) at 313A-B.

¹⁸ *Western Assurance Co., v Caldwell's Trustee* 1918 AD 262 at 271-272 and 274-275.

[51] There is no dispute and there cannot be a dispute about the debt owed by Melody Hills and 888. Consequently, the respondents do not have a defence to the main application. In support of this, Distell submits the following having regard to the contents of the founding affidavit in the main application, together with the affidavits filed by Melody Hills and 888 in opposition to the liquidation applications:

- (a) The fourth respondent acting on behalf of the remaining respondents only requested a copy of the suretyship agreements.
- (b) In the supplementary affidavit deposed to on behalf of Melody Hills in the liquidation application, the third respondent submitted that the court required further evidence from Distell to substantiate its claim. This is incorrect as the judgment of Ntshangase J alluded to the fact that one would have expected Melody Hills to dispute delivery, which did not occur, but in this instance Melody Hills, represented by the fourth respondent, sought invoices of all transactions between Distell and Melody Hills dating back to October 2012.
- (c) In the liquidation application, the court was of the view that a request of such magnitude was not justifiable and no explanation had been proffered by Melody Hills as to why such information could not be extracted from its own records. A statement was put up evidencing the amount due, owing and payable as a consequence of the unpaid invoices for June and July 2013.
- (d) The fourth respondent had engaged in an exchange of correspondence with Distell in relation to Melody Hills' indebtedness as well as the business rescue practitioner of Midmar, Juanito Damons. Such correspondence in no way indicates that Melody Hills sought to dispute the amount of its indebtedness to Distell.
- (e) The fourth respondent was the attorney of record for all the respondents, Melody Hills and 888 in the winding up applications. In addition, he was the attorney of record for the respondents in the main application instituted by Distell against the respondents based on their suretyship agreements. It is also apparent that he was intimately involved in Midmar, as he acquired Midmar at the end of 2012. New attorneys represented the respondents in these proceedings but no confirmatory affidavits were filed by any of the respondents in support of the allegations made by attorney Selva Naicker in support of the relief sought in the interlocutory application.

[52] Having regard to the affidavits filed in the main application, at all material times the first and third respondents were directors of Melody Hills and the fourth respondent acted as the duly authorised representative of Melody Hills in the exchange of correspondence between Distell and Melody Hills. All the respondents, save for the second respondent (whose liability arises as a consequence of her marriage in community of property to the first respondent), were copied in the emails sent by the fourth respondent.

[53] In September 2012, when the approach for credit from Distell was made by the fourth respondent on behalf of Melody Hills, presumably after submission of a credit application, Distell through its customer accounts manager Carol Wiese, raised a query concerning the fourth respondent's capacity as the documentation submitted indicated that he was not a director of Melody Hills. In response, the fourth respondent indicated that he could not be an active director of Melody Hills but would sign any 'surety/personal surety/cross company notarial bonds' in order to secure the credit granted by Distell to Melody Hills.

[54] It is not disputed that the first, third and fourth respondents were actively involved in the running of Melody Hills and that the fourth respondent was the attorney of record for Melody Hills in the liquidation application and in these proceedings until the firm withdrew as attorney of record. It therefore cannot be said that the fourth respondent was not intimately involved in the litigation between Distell and all these entities being Melody Hills, 888 and Midmar.

[55] In support of the application for credit by Melody Hills, all the respondents signed agreements in which they bound themselves as co-principal debtors and sureties with Melody Hills for its indebtedness to Distell. The second respondent, also provided written consent in terms of s 15(2) of the Matrimonial Property Act 88 of 1984 as evidenced from annexure "FA4" to the main application.

[56] At all times when engaging with Distell in relation to Melody Hills' indebtedness, the fourth respondent's firm corresponded with Distell on behalf of the remaining sureties. At no stage was the indebtedness of Melody Hills to Distell disputed, but rather copies of the suretyship agreements concluded between the respondents and Distell were requested.

[57] Neither of the party's counsel referred to the decision of Chetty J in this division in the matter of *Savithree Samuel & Vinay Jayantilal Vallabh Gosai & 1 other*, Case No. 10732/2013, delivered on 22 January 2015.

[58] Although the facts in that judgment differed from the present matter, the legal principles were the same. The basis on which the copies of bank statements were sought in that matter are on all fours with the current matter. I indicated to the parties' legal representatives at the hearing of the matter that I was of the view that I am bound by the decision of Chetty J as I share the sentiments expressed therein, specifically in relation to the prevailing legal position.

[59] Having regard to the above and the authorities referred to in this judgment, I agree with Distell's submission that the application constitutes an abuse of process.

The relief sought in prayer 3 of the notice of motion

[60] In paragraphs 14 and 15 of the respondents' founding affidavit, they submit the following in relation to the relief sought in paragraph 3 of the notice of motion, namely:

- (a) The enrolment of the main application by Distell for hearing on 4 August 2016 was irregular and constituted an abuse of process.
- (b) The time period for the delivery of the answering affidavit was suspended by the rule 35(12) notice until the finalisation of the interlocutory application.
- (c) The respondents are entitled to have sight of the documents requested in the rule 35(12) notice, prior to delivering their answering affidavit in the main application.

[61] It is common cause that the main application was issued by Distell on 15 March 2016, served on the third and fourth respondents on 19 March 2016, on the first respondent on 7 April 2016 and on the second respondent on 15 April 2016. The notice to oppose the main application by all the respondents was served and filed on 23 March 2016 by attorneys Hemanth Singh and Company. It would appear that the notice to oppose was filed on behalf of certain of the respondents being the first and the second respondents prior to them even being served with the application papers.

[62] The rule 35(12) notice was served on Distell on 6 May 2016 and a reply thereto provided on 27 May 2016. On 7 June 2016, a rule 30A notice was served on Distell. The interlocutory application was issued on 12 July 2016 and enrolled for hearing on 4 August 2016. Distell filed a notice to oppose such application on 21 July 2016.

[63] Having regard to the notice of motion in the main application, the respondents were required to file their answering affidavits within 15 days after giving notice of their intention to oppose the application, that is 15 days from 23 March 2016.

[64] The notice in terms of rule 35(12) was served outside of the time period envisaged in the rules and after the *dies* had expired for the filing of an answering affidavit. No correspondence was annexed to the founding affidavit in this application indicating any request by the respondents for an extension of time for the late filing of their answering affidavit.

[65] The respondents' rule 30(A) notice served on 7 June 2016 read as follows:
' . . .whereas the applicant has refused to produce the documents requested in the respondents' Rule 35(12) Notice dated 6th of May 2016, the respondents intend, in the event that the applicant fails to deliver a response within ten (10) days of the date of service hereof, tendering the inspection and copying of the documents requested in the respondents' Rule 35(12) Notice, to apply to court for appropriate relief, including an order compelling compliance and/or that the applicant's claim be dismissed.'

[66] Rule 30(A) provides for a party affected by another party's non-compliance with the rules of court to serve a rule 30(A) notice requesting that there be compliance, failing which the claim or defence is struck out. Failing compliance within ten days of service of such notice, an aggrieved party may apply on notice to court for an order dismissing the claim or striking out the defence. It is common cause that after service of the rule 30(A) notice, Distell enrolled the main application for hearing on the unopposed roll. Such notice of set down also made reference to the fact that the respondents, despite serving a notice of opposition, failed to comply with the rules of court and failed to file their answering affidavits.

[67] Despite the notice of set down pertinently drawing the respondents' attention to the fact that the answering affidavit had not been filed and would be out of time,

they failed to bring any application to extend the time period in terms of rule 27 of the rules of court. There appears to be a suggestion by the respondents that there was no need to do so as the rule 35(12) notice suspended the *dies*.

Does the delivery of the rule 35(12) notice suspend the 15 day period in which the respondents are to file an answering affidavit?

[68] There appears to be no authority on this issue apart from a reference in the judgment of Gorven J in *Potpale Investments (Pty) Ltd v Mkhize*.¹⁹ A reading of rule 35(12) and (14) does not indicate that delivery of such notice suspends the period referred to for the filing of an answering affidavit. In addition, although rule 35(12) imposes sanctions for non-compliance, it does not indicate that delivery of any pleadings and/or any affidavits is suspended pending compliance with the rule. A litigant can utilise the provisions of rule 27 to ask for an extension of any time period not provided for in terms of the rules.

[69] Having regard to the judgment of Gorven J in *Potpale*, it would appear that he was of the view that the delivery of the rule 35 notice did not suspend the period in which the defendant was obliged to deliver a plea. Consequently, the enrolling of the default judgment was not an irregular step in terms of rule 35(12). A document referred to in an affidavit may also fall within the ambit of the rule. However, the obligation of a party to produce such a document is subject to limitations such as relevance. I agree that the filing of the rule 35(12) notice did not suspend the *dies* and that the respondents ought to have utilised the provisions of rule 27 to request an extension of the *dies*.

The relief sought in paragraphs 2, 3, 4, and 6 of the notice of motion

[70] In respect of paragraph 2 of the notice of motion, given the conclusion reached there is no need for the court to grant this relief as the application is dismissed with costs. In respect of paragraph 3, the court dealing with the main application is best placed to deal with any substantive application for condonation that the respondents may elect to bring. In any event, insufficient facts have been placed before me to decide this issue. As regards the relief in paragraphs 4 and 6 of the notice of motion, there are no annotations endorsed on the court file in respect of

¹⁹ *Potpale Investments (Pty) Ltd v Mkhize* 2016 (5) SA 96 (KZP).

proceedings for 4 August 2016. In the absence of any submissions being made in this regard, I am of the view the court dealing with the main application is best suited to deal with same.

Costs

[71] It is trite that this court has a discretion in awarding the costs occasioned by an application. The usual rule in relation to costs is that a successful party is entitled to such costs unless there is a reason through conduct to deprive such party of costs. In Distell's heads of argument, it seeks a punitive costs order, an attorney and client costs order as against the respondents given the manner in which they have litigated in these proceedings, but more so arising from the submission that the interlocutory application constitutes an abuse of court process.

[72] I see no reason to depart from the usual rule in relation to costs and I am satisfied that the award of costs on the punitive scale is warranted in the circumstances of this matter.

Conclusion

[73] In the result, the following orders are made:

1. The application is dismissed.
2. The first to fourth respondents are directed to pay the costs of the interlocutory application jointly and severally, the one paying the other to be absolved. Such costs are to be on an attorney and client scale.

Henriques J

CASE INFORMATION

APPEARANCES

Counsel for the Applicant	:	Mr H P van Nieuwenhuizen
Instructed by	:	Van Nieuwenhuizen, Kotze & Adam Attorneys c/o Thorpe & Hands Inc 4 th Floor, 6 Durban Club Place Durban Ref: Mr Richard Pearton/cp/04/V004/158 Tel: 031 305 3641 Fax: 0866 361 562 Email: richard@thorpeandhands.co.za
Counsel for the Respondents	:	Mr S Alberts
Instructed by	:	Asmal & Asmal Attorneys 69 Mahatma Gandhi Street KwaDukuza Ref: Tel: 032 552 1245 Fax: 032 552 1112 Email: asmalx2@telkomsa.net
Date of Hearing	:	31 July 2018 and 24 August 2018
Date of Judgment	:	4 December 2019