

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

21/8/15
CASE NO: 24301/14

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
2015/08/21	
DATE	SIGNATURE

In the matter between:

GERT BOTHMA VERVOER & GRONDWERKE (PTY) LTD

Applicant

and

ACTIVE POWER TRADING 67 CC

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LEGODI, J

[1] This is an application for leave to appeal against the judgment and order made by this court on the 9 June 2015 in terms of which an application to compel in terms of Rule 30A was dismissed with costs.

A handwritten signature in black ink, appearing to be 'M. J. Legodi'.

[2] The first issue raised is whether the order by this court is final and therefore appealable. I do not think it is. Even if I was to be wrong in this regard, I do not think that there are reasonable prospects of success on appeal.

[3] Subrule 13 of Rule 35 provides that the provisions of this rule relating to discovery shall *mutatis mutandis* apply, insofar as the court may direct, to applications. Subrule (3) of the rule, provides that if there are in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in possession of any party thereto, the former may give notice to the latter requiring him to make same available for inspection in accordance with subrule (6) or to state on oath within ten days that such documents are not in his possession, in which event, he shall state their whereabouts, if known to him.

[4] The parties will be referred to as in the main application. The application to compel discovery in terms of Rule 30A was brought by a respondent in an application for the provisional liquidation launched against it. On 1 October 2014, the respondent delivered a notice in terms of Rule 35(12) in that application. On 6 February 2015 the applicant delivered its reply to the notice in terms of Rule 35(12).

[5] The notice in terms of Rule 30A was delivered on the 6 March 2015 and coached as if there was no reply at all to the notice in terms of Rule 35(12). The prayers in the notice in terms of Rule 30A are quoted in paragraph 9 of the main judgment and I do not find it necessary to repeat them herein.

[6] If the respondent was not satisfied that the applicant had fully disclosed and supplied documents referred to in paragraph 14.2 and 14.3 of the applicant's replying affidavit, it was at liberty to invoke the provisions of subrule (13) referred to in paragraph 3 of this judgment. It did not, instead, it contended that it was not necessary to do so.

[7] The essence of this court's judgment and order was that the applicant did not fail to comply with notice in terms of Rule 35(12). It did comply on the 6 February 2015. If the respondent felt that there were documents in addition to those disclosed and provided on the 6 February 2015, it could have approached the court in terms of subrule (13) to invoke the provisions of subrule (3) read with subrule (6). For this reason, it



cannot be said that the ruling by this court is final and that it left the respondent with no other remedy.

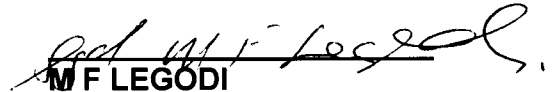
[8] As correctly pointed out by counsel on behalf of the applicant, the respondent could also have approached this court on the basis that it has inherent jurisdiction to deal with the alleged non-compliance with the provisions of Rule 35(12). The court has an inherent power to order a party to produce for inspection of documents not referred to in that party's pleadings or affidavits, and also to order a party to produce for inspection items of machinery, i.e. objects which are not documents (see *Moulded Components and Rotomoulding SA (PTY) Ltd v Concourakis* 1979 (2) SA 457 (W) at 461 F-H). Such inherent power will not, however, be exercised as a matter of course, and only when the court can be satisfied that justice cannot otherwise be properly done. (see *Moulded Components and Rotomoulding* supra at 462 H-463 B).

[9] Therefore the suggestion that the order or decision by this court has final effect and not susceptible to alteration by the court of the first instance, that is definitive of the rights of the parties and that it has the effect of disposing at least a substantial portion of the relief claimed in the main proceedings, should be seen in context. The context is that the applicant has in terms of Rule 35(12) demanded production of the documents to which reference is made in paragraph 14.2 and 14.3 of the applicant's replying affidavit in the main application and that such documents were provided or produced on 6 February 2015. However, if the respondent so believed that there were other documents in addition to those produced, he should have resorted to invoke the provisions of Rule 35(13) or relied on the inherent powers of the court instead of resorting to Rule 30A. Simply put, for his relief, he followed the wrong procedure and therefore the dismissal of his application cannot make the decision and or order final.

[10] Even if was to be wrong in this regard, there are just no reasonable prospects of success. I dealt with this aspect in the main judgment and I do not find it necessary to repeat myself. The applicant complied with notice in terms of Rule 35(12) by providing documents to which reference is made in paragraphs 14.2 and 14.3 of the applicant's replying affidavit. However, and I do this at the risk of repeating myself, if the respondent was of the view that other documents have not been disclosed or produced and are relevant to its counterclaim, Rule 30A is not in the circumstances, the mechanism to employ in getting those documents if they are there.



[11] Consequently, the application for leave to appeal is hereby dismissed with costs.


M F LEGODI
JUDGE OF THE HIGH COURT

HEARD ON: 06 AUGUST 2015

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