



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED:

14 June 2024

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DATE


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SIGNATURE

CASE NO: 005559/2023

In the matter between:

MILKOR (PTY) LTD

Applicant

And

EVOTEX ENGINEERING (PTY) LTD

Respondent

JUDGMENT

COWEN J

1. The applicant, Milkor (Pty) Ltd (Milkor) has applied in terms of Rule 30A of the Uniform Rules of Court for an order to compel the respondent, Evotex Engineering (Pty) Ltd (Evotex) to comply with its notice in terms of Rule 35(12).
2. Milkor is the respondent in an application Evotex instituted in January 2023 seeking, *inter alia*, payment of R11 955 850 from Evotex. The dispute arises in relation to a written contract concluded between the parties on 16 March 2019 pursuant to which Evotex was to design an automatic grenade launcher armament system for Milkor, manufacture production units and to deliver them to Milkor within agreed time periods. Milkor ultimately cancelled the contract on 29 September 2022. In its application, it claimed a declaratory order that it had duly cancelled the contract and an order that Evotex must repay the aggregate of prepaid amounts to Milkor.
3. Milkor opposed the application and on 9 May 2023 delivered an answering affidavit and a counterapplication, seeking *inter alia* that the application be referred to trial. On 31 May 2023, Evotex delivered its answering and replying affidavit (the 31 May 2023 affidavit). Milkor delivered its replying affidavit in the counter-application on 8 August 2024.
4. Prior thereto, and on 7 June 2023, Milkor had delivered the Rule 35(12) notice which relates to the 31 May 2023 affidavit. Evotex refused to comply. Furthermore, at a point, Evotex tendered but ultimately failed to supply certain documents.

5. Rule 35(12) provides:

- ‘(a) Any party to any proceeding may at any time before the hearing thereof deliver a notice 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 –
 - (i) Produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or
 - (ii) State in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or
 - (iii) State on oath, within 10 days, that such document or tape recording is not in such party’s possession and in such event to state its whereabouts, if known.
- (b) Any party failing to comply with the notice referred to in paragraph (a) 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.’

6. There are nine items in the Rule 35(12) notice, which is attached to the founding affidavit. What is notably absent from the founding affidavit, however, is any reference to what is canvassed in the 31 May 2023 affidavit. The first time that reference is made thereto is in the replying affidavit. It is trite that a party must make out its case in the founding affidavit. In this case, the applicant’s failure to advance its case in this way limits the extent to which this Court can come to the applicant’s assistance. This is because in most instances, it is not obvious that what is being referred to is in fact a document and counsel for the applicant found himself constrained to seek to draw the Court’s attention to extraneous material in order to ground the submission that the references on affidavit are references to documents, directly or indirectly.

7. In item 1, Milkor seeks *‘any and all documents and / or tape recordings relating to the designs disclosed under the approved signed off samples referred to in 20 thereof’*. Paragraph 20 of the 31 May 2023 affidavit reads, in respect of the counter-claim: *‘The only possible right which the Respondent could assert is the contractual right established by clause 7. Clause 7.2 provides that the Applicant has ‘the sole and exclusive rights and ownership in respect of any of the designs disclosed under the most recent approved signed off samples, in the intellectual property of the Manufacturer [the respondent]. ...’* In my view, while it is indisputable that the clause refers to documents, the documents are not referred to in the allegations relied upon: the reference is to a contractual right. Inasmuch as the reference, viewed contextually, is in truth a reference to the ‘most recent approved signed off samples’, the founding affidavit (and indeed the replying affidavit) did not explain that context. The Court is therefore unable to conclude that the reference is to a document.
8. In item 2, Evotex requests ‘All documents, decisions and related documents in respect of the development of Applicant’s own AGL as referred to in paragraph 17 thereof. There is no dispute that the reference is intended to be a reference to paragraph 25, which states: ‘In conclusion on this point, I should point that after the failure of the contract, the applicant has commenced development its own AGL.’ In my view this does not entail a reference to a document, but to a process and in this case that is insufficient to trigger the Rule.¹

¹ *Potch Boudienste CC v FirstRand Bank Ltd* [2016] ZAGPPHC 335 at para [23]; *Traga Logistics CC v Concargo Supply Chain (Pty) Ltd* 2023 JDR 3110 (WCC) at para 16.

9. Items 3 and 4 of the Rule 35(12) notice relate to paragraph 42 of the 31 May 2023 affidavit which reads: ‘Mr Hennie Ehlers, who is an employee of the Applicant, previously performed freelancing work for the Respondent. The Applicant advertised a research and development position and Mr Ehlers applied. He was appointed by the Applicant.’ In items 3 and 4 of the Rule 35(12) notice, Evotex seeks, respectively, ‘[a]ny and all documents and / or tape recordings relating to the advertised research and development position referred to in paragraph 42 thereof’ and ‘[a]ll documents relating to the application for the position delineated above together with the employment of Mr Ehlers, including but not limited to the employment contract concluded between the applicant and Mr Ehlers.’ In my view, while more finely balanced, these references also entail reference to processes not documents.²
10. Item 6 relates to paragraph 66 of the 31 May 2023 affidavit, which reads: ‘The Applicant is presently in the process of developing an AGI. It will be one of the handful of companies internationally with such a product and it is therefore a leader in this field of development.’ Evotex requests, in item 6, ‘[a]ny and all documents and / or tape recordings relating to the development of an AGL by the applicant as referred to in paragraph 66. In my view, paragraph 66 does not refer to any document or tape recording. It refers to a process of product development, insufficient to trigger the Rule.’³

² Id.

³ See cases cited at n 1 above.

11. Item 7 refers to paragraph 80 of the affidavit which states: 'When it became clear that the Respondent could not design or procure such a spring, the Applicant, at its own cost and with no contractual obligation to do so, sent representatives to search for recoil springs locally and internationally.' In item 7, Evotex requests: [a]ny and all documents and / or tape recordings relating to the instructions given to the representatives of the applicant by the applicant to search for recoil springs locally and internationally as referred to in paragraph 80 thereof. In my view, the paragraph does not refer to the documents requested. Indeed, this was conceded and the applicant was constrained to rely on the Court's inherent jurisdiction to order discovery.
12. Item 8 refers to paragraph 92 of the 31 May 2023 affidavit which states: 'The 'Tyron' to whom reference is made is Mr Tyrol Lafferty. He is a marketer, not an engineer. He could not be a project manager on an engineering venture, and he was merely a liaison person between the applicant and the respondent.' Evotex requests in this regard '[a]ny and all documents and / or tape recordings relating to Mr Tyron Lafferty's role at the applicant, including but not limited to his employment contract as referred to in paragraph 92 thereof.' In my view, there is no reference in paragraph 92 to the documents sought. Again, this was conceded that the applicant was constrained to rely on the Court's inherent jurisdiction to order discovery.
13. In item 9, Evotex seeks *'any and all documents and / or tape recordings relating to the specifications displayed in the marketing material provided to the end user*

at IDEX 2023 insofar as same relates to the AGL(s) which is the subject matter of dispute as referred to in paragraph 124 thereof.' In my view, this is a reference to documents and is covered by the Rule both inasmuch as it relates to the marketing material referred to and any other specifications as may have been provided to the end user at IDEX.

14. Inasmuch as the applicant relied on the Court's inherent jurisdiction, I agree with the respondent that no proper case was made out for its exercise in the founding affidavit.
15. The applicant cannot be said to have achieved substantial success, its success has been narrow and limited. For the most part the respondent was required to defend an unmeritorious application which has served to delay the hearing of the main application, which may entail a referral to trial. In my view the circumstances are such that each party should pay its own costs.

I make the following order:

1. The respondent is ordered to comply with item 9 of the applicant's rule 35(12) notice within five court days of the date of this order.
2. Each party shall pay its own costs.



S J COWEN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for applicants: Adv A Booysen; Adv N Mathe

Attorney for applicants: Weavind & Weavind Inc

Counsel for respondents: Adv J H F Le Roux

Attorney for respondents: Van Der Merwe Van Den Berg Attorneys

Date heard: 17 May 2024

Date of Judgment: 14 June 2024