

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 046219/2023

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>22/8/2024</u> DATE	

In the matter between:

ENGAGED BUSINESS TURNAROUND (PTY) LTD

1st Applicant

ELIOTT ATTORNEYS t/a BLACKBOX LAW

2nd Applicant

And

CP CRANE HIRE (PTY) LTD

1st Respondent

ATOOMIC TRANSPORT CC

2nd Respondent

FLAKE ICE SERVICES (PTY) LTD

3rd Respondent

TSOMA TRADING CC

4th Respondent

JUDGMENT

MAKUME J:

INTRODUCTION

- [1] This is an application by the Respondent in terms of Uniform Rules 35(12) read with Uniform Rule 30 for an order compelling the Applicants to produce certain documents which the Applicants have made reference to in their founding affidavit.
- [2] The Respondents also seek relief in terms of Rule 27 to extend the time period within which to file their answering affidavit.

BACKGROUND FACTS

- [3] It is common cause that during or about the 24th February 2021 the first, second, third and fourth Respondents were placed under business rescue in terms of Section 129 of the Companies Act 71 of 2008. The appointed business rescue practitioners were Messrs Johan Du Toit and Ian Flemming.
- [4] On the 14th May 2021 the business rescue practitioners concluded a remuneration agreement with the Respondents of relevance in that agreement are the following clauses:

"Clause 8

8.2 In addition to the BRP's Remuneration the Entities shall reimburse the BRP's for any reasonable costs, expenses and disbursements incurred by either of them in the discharge of their duties and responsibilities such as

8.2.1 travelling costs and expenses.

8.2.2 accommodation costs and expenses where any meeting or matter falls outside a 60km radius of the offices of Engaged and only if reasonably necessary.

8.2.3 legal and professional advisory fees and costs.

- 8.2.4 any other costs and expenses reasonably incurred by the BRP's to the extent required in order for the BRP's to discharge their duties and responsibilities.

Clause 9

9.4 Should there be a dispute in regard to an attendance, entry and/or disbursements charged in an invoice, the Entities will be entitled to raise such dispute with the BRP's before and/or after payment of such invoice. If the parties are unable to resolve the dispute, the Entities will be entitled to have such dispute determined by a Cost Consultant acceptable to both parties for the avoidance of any doubt, a dispute raised by the entities will not preclude their obligation to make payment of the relevant invoice in accordance with the provisions of this clause."

[5] In the remuneration agreement the second Applicant Elliot Attorneys t/a Blackbox were appointed as legal advisors by the first Applicant in the furtherance of their duty as BRP's of the Respondent.

[6] On the 15th June 2022 the second Applicant billed the business rescue practitioners with an amount of R77 004.00 which amount the practitioner passed on as a disbursements to the Respondent.

[7] On the 14 September 2022 the Respondents attorneys Messrs Lowndes Dlamini addressed a letter to the second Applicant which *inter alia* read as follows:

" you have already been informed that our clients have had regard to a number of your invoices rendered and are of the opinion that our client has been grossly overcharged. We are instructed that a preliminary analysis of your invoices indicate *inter alia*:

(a) Duplicate entries.

(b) Wrong rates having been used.

(c) An incorrect total amount in respect of invoice 318.

(d) Excessive billing.”

- [8] In that same letter the attorneys proposed that the dispute about the billed amount be referred to a cost consultant and lamented that the proposal was rejected. They then called on the Applicants to draw a bill of costs for taxation.
- [9] The disputed amount is the amount of R77 004.00 due to the second Applicant. It is this amount which is the subject of dispute. The Respondents paid that amount into their Attorneys' Trust Account on the 13 September 2022.
- [10] On the 10th May 2023 the Applicants launched the main application in which they claimed payment of the sum of R77 004.00.
- [11] On the 19th June 2023 the Respondents served on the Applicants a notice in terms of Rule 35(12) in which they required the Applicants in terms of that rule to produce certain documents mentioned in the Applicants' Founding Affidavit. Such documents to be made available within 10 days from date of service.
- [12] It is significant to point out that when the Respondents served the notice they had not as yet filed their answering affidavit.
- [13] On the 17 August 2023 the Applicants responded to the Rule 35(12) notice. In the reply the Applicants refused to produce some documents citing irrelevance in certain instances the Applicants said that such requested documents does not fall within the ambit of Rule 35 (12) or that such documents were in the possession of the Respondents.

- [14] As a result of the responses the Respondent then proceeded with an application to compel on the 12th December 2023 in the notice the Respondents ask for the following relief:

“That the first and second Applicants be ordered to within 10 days from date of service produce all correspondence settlement offers draft settlement agreements and settlement agreements referred to in annexure FA 17.”

- [15] Annexure FA 17 is the invoice dated the 15 June 2022 from the second Applicant to the BRP's. The documents were requested in paragraph 32 of the notice and to which the Applicants responded in the following words:

“The request is bald and sketchy, vague and *embarrassing inter alia* in that it refers in general terms to a collection of unspecified and unREFERRED documents. The Respondents request accordingly falls outside the ambit of Rule 35(12).”

THE RESPONDENTS' CASE

- [16] The Respondents make the case that the second Applicant is an attorney who seeks money judgement against the Respondent in the total amount of R77 004.00 being legal fees as reflected in invoice 578 dated the 15 June 2022.

- [17] when the Respondents received that invoice, they raised a dispute indicating not only excessive billing but also duplication. The invoice thus became a disputed item hence the request to be furnished various documents stated in that invoice.

THE APPLICANTS' CASE

[18] In refusing to discover the requested documents which appear on invoice 578 (Annexure FA 17) the Applicants raise the following as their defences namely:

18.1 That the compelling application is late and there is no condonation application.

18.2 Secondly that the Respondents have failed to specify which documents in Elliot's disputed invoice they seek.

18.3 Thirdly that the Respondents requests does not fall within the ambit of Rule 35(12).

18.4 That the documents being sought are in any event not relevant to the relief sought by the Applicant or the defence proffered by the Respondents.

18.5 That the Respondents have not raised a justiciable genuine and bona fide dispute on the merits of the Applicants claim.

18.6 Lastly that the Respondents have repudiated the dispute resolution provisions set out in clause 9.4 of the Remuneration agreement.

[19] In the reply to the notice the Applicants alleged that the request was "bald and sketchy, vague and embarrassing in that it refers in general terms to a collection of unspecified and unreferenced documents and that the request does not fall within the ambit of Rule 35 (12).

LEGAL PRINCIPLES PERTAINING AND APPLICABLE TO UNIFORM RULE 35 (12)

[20] Uniform Rule 35(12) provides as follows:

"(12)(a) Any party to any proceedings 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 transcript thereof, or
- (ii) State in writing within 10 days whether the party receiving the notice objects to the production of the documents or tape recording and the grounds thereof, or
- (iii) State on oath within 10 days that such documents or tape recording is not in such party's possession and in such event to state its whereabouts if known."

[21] The SCA in **Caxton and CTP Publishers and Printers Ltd v Novus Holdings Ltd [2022] 2 ALL SA 299** pointed out the difference between Rule 35(12) and Rule 35 (1) and demonstrated the wide ambit of Rule 35 (12) in the following words at paragraph 26:

"[26] Unlike the other rules relating to discovery generally, rule 35(12) is designed to cater for a different set of circumstances. Its provisions are generally deployed to require the production of

documents or tape recording before the close of pleadings or the filing of affidavits.”

- [22] In **Unilever PLC and Another vs Polagric (Pty) Ltd 2001 (2) SA 329 (c) at 336 G-J** the objective of rule 35 (12) was explained as follows:

“A Defendant or Respondent does not have to wait until the pleadings have been closed or his opposing affidavit has been delivered before exercising his right under rule 35(12) he may do so at anytime 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.”

- [23] Friedman J put it succinctly in the matter of **Gorfinkel v Gross, Hendler & Rank 198(3) SA 766 (C) at 773 G-J** in the following words:

“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 the relevance whereas subrule (12) contains no such limitation and is *prima facie* cast in terms wider than subrule (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 that is privileged.”

- [24] Finally the Court in **Mangum Aviation Operations v Chairman National Transport Commission and Another 1984 (2) SA 398 (W)** at 400 B – D conclude as follows:

"In my opinion the ordinary grammatical meaning of the word is clear, once you make reference to a document you must produce it. Even more is it so in this case where the implication in paragraph 19.4 and 19.6 is that if NTC had called for and looked at the financial statements of Operation, it might well have come to a different conclusion."

- [25] It is against this background that this Court must now examine whether indeed the Applicant is justified in refusing to produce and discover the documents required in the application. The documents requested are those referred to in annexure FA17 being the statement of account by Elliot Attorneys.

- [26] In carrying out their mandate as instructed by the BRP's the second Applicant held consultations with various stakeholders and interested parties in the business rescue operation of the Respondent. It also generated correspondence and made telephone calls besides settling agreements all aimed at and directed at achieving a successful business rescue operation.

- [27] The Court in **Benson vs Walters 1984 (1) SA 73 (A)** held that unless the fees of an attorney have been agreed the client has the right to call

for taxation. In this matter there is no separate remuneration or fees agreement between Elliot attorneys and the Respondents. The remuneration agreement is between the BRP's and the Respondents. Clause 8.2.4 of that agreement refers to "costs and expenses reasonably incurred by the BRP's. This in my view also refer to fees raised by Elliot Attorneys for legal work which means they must be proved to have been reasonably incurred.

[28] The Applicant in its answering affidavit opposing the Rule 30A application has set out the following as its ground of opposition namely:

- 28.1 The application has been brought late without seeking or obtaining condonation.
- 28.2 That the Respondents have failed to specify which documents in annexure FA17 they seek.
- 28.3 That the documents sought by the Respondents are not relevant for the relief sought by the Applicants or the defence proffered by the Respondent.
- 28.4 That the Respondent have not raised a justiciable, genuine and bona fide dispute on the merits of the claims of either Applicant.
- 28.5 That the Respondents have repudiated the dispute resolution provisions of the Remuneration Agreement.

IS THE RULE 30A NOTICE OUT OF TIME

[29] The Applicants are clearly conflating issues and adopt a wrong interpretation of Rule 35(12) read with Rule 30A. Rule 30A provides that if after having been served with a notice a party fails to comply then after a period of 10 days the aggrieved party is permitted to apply to court to compel compliance. On the other hand Rule 35(12) does not have such a limitation it expressly provides that any party to any proceedings may at any time before the hearing deliver a notice to compel.

[30] In the result I find that, that defence has no merits and falls to be dismissed.

HAS THE RESPONDENT FAILED TO SPECIFY WHICH DOCUMENTS IN ANNEXURE FA17 THEY SEEK

[31] The Applicants basis for this argument is set out in paragraph 90 of the Applicants heads of argument namely that the requested documents are unspecified. This argument is a fallacy firstly subrule 35(12) authorities the production of documents and tape recording which are referred to in general terms in a party's pleadings or affidavits. The terms of the subrule do no require a detailed or descriptive reference to such documents or tape recording. See in this regard **Business**

Partners v Trustees, Riaan Botes Family Trust 2013 (5) SA 514 (WCC) at 519 C-D; Erasmus v Slomowitz (2) 1938 TPD 242 at 244

- [32] The request is for all correspondence, settlement offers, draft settlement agreements referred to in Annexure FA17. Annexure FA17 is specifically mentioned in paragraph 103 of the founding affidavit and in Annexure FA17 reference is made to correspondence, settlement offers and settlement agreement wherein Craig, Alex were involved including various telephone discussions. In my view it is clear that Elliot the Attorney knew exactly what documents are being sought and where same are to be found. This defence is also without merits and falls to be dismissed.

ARE THE REQUESTED DOCUMENTS RELEVANT OR NOT AND RAISED A BONA FIDE DISPUTE

- [33] The Applicants contend that the requested documents are not relevant to the relief sought by the Applicants or to the defence proffered by the Respondents. This the Applicants say even before they have been informed what the Respondents defence is.

- [34] The issue is simple the Respondents says that items in Annexure FA17 indicate double charges and incorrect billing and requested that a cost consultant be appointed to adjudicate on the disputed items and when this was refused the Respondents asked the Applicants to submit the attorneys account to taxation again this was refused on flimsy grounds.

[35] Once again the Applicants clearly misconstrue the concept of relevance when documents are sought in terms of Rule 35(12). The writer Herbstein and Van Winsor in *The Civil Practice of the High Courts Fifth Edition* at page 789 write as follows:

“There is some conflict in case law as to whether a party who receives a notice in terms of Rule 35(12) to produce documents or tape recordings to which he has referred in pleadings or affidavits may object to the production on the ground that they are not relevant. In **Magnum Aviation Operation vs Chairman National Transport Commission 1982 (2) SA 398 (W)** Vermooten J held that Rule 35(12) is not qualified by the requirements of relevance and that once a document has been referred to, it must be produced.”

[36] Friedman J in *Gorfinkel* (supra) pointed out that the wording of rule 35(12) differs from the other subrules such as (1) (3) and (11) in that the latter subrules specifically refer to relevance whereas subrule (12) contains no such limitation.

[37] The question to be addressed is whether the documents sought might have evidentiary value and assist the parties in their defence to the relief claimed. As far back as September 2022 the Respondent raised dissatisfaction about the invoice. It is therefore incumbent that the

invoice be debated at trial to determine the reasonableness of the fees charged. In the result the documents referred to in Annexure FA17 are relevant to the outcome of the hearing. The Respondent have in my view raised a justifiable, genuine and *bona fide* dispute on the merits.

HAVE THE RESPONDENTS REPUDIATED THE DISPUTE RESOLUTION PROVISIONS OF THE REMUNERATION AGREEMENT

[38] At the centre of this argument is the proper interpretation and understanding of clause 9.4 of the Remuneration Agreement. The Applicants argue that the Respondents should raise detailed issues in relation to annexure FA17. They do so in their answering affidavit but do not deal with this defence in their heads of argument.

[39] Clause 9.4 envisaged a three-stage process. Firstly, it is the raising of the dispute, secondly such a dispute can be raised before or after payment of such an invoice and thirdly if the parties themselves are unable to resolve the dispute then the dispute is to be referred to a cost consultant acceptable to both parties whose decision will be final.

[40] It is not the Applicants case that the Respondent did not raise dissatisfaction about the invoice their case is that Respondent should have raised specific items of discontent on the invoice. Clause 9.4 does not say so once more it is the Applicants own self-serving interpretation. Once the Respondent raised the issue of exorbitant fees this was a dispute already. The Applicants seem to forget that in terms

of clause 8.2.4 the costs and expenses must be reasonable. When Mr Parsons called for a cost consultant to be appointed or the invoice be taxed it is because he was of the view that the costs and fees were unreasonable. This defence has no merits and falls to be dismissed.

CONDONATION

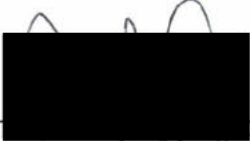
[41] The legal principle narrated above and in other case law are instructive it is that a litigant is not to be compelled to file his or her plea or answering affidavit if the information sought in terms of rule 35(12) is still outstanding or until a court has pronounced on that application.

[42] The granting of condonation is at the discretion of a court on good cause shown. In this matter good cause is the fact that a litigant is authorised by Rules to withhold the next procedural step pending finalisation of the Rule 35(12) application.

[43] In my view the facts and circumstances in this matter justify an order extending the time limits in terms of Rule 27 of the Uniform Rules of Court. One other aspect is that it is not that the Respondent is refusing to pay it has demonstrated this by paying the disputed amount to be held in trust by its attorneys which means once the Applicant has agreed to subject their account for taxation the taxed amount will be readily available.

[44] In the final result I am satisfied that the application should succeed and
I make the order attached hereto marked "X"

DATED at JOHANNESBURG this the 22nd day of August 2024.


M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	01 August 2024
DATE OF JUDGMENT	:	22 August 2024
FOR 1 st & 2 nd APPLICANTS	:	Adv G Amm SC
INSTRUCTED BY	:	Messrs Elliot Attorneys
FOR 1 ST RESPONDENT	:	Adv Kromhout
INSTRUCTED BY	:	Messrs Lowndes Dlamini Inc.

Ref: A Lowndes/ith/MAT31757

22/8/2024

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

**HELD AT JOHANNESBURG ON THIS THE 1st DAY OF AUGUST 2024, BEFORE
THE HONOURABLE JUSTICE MAKUME.**

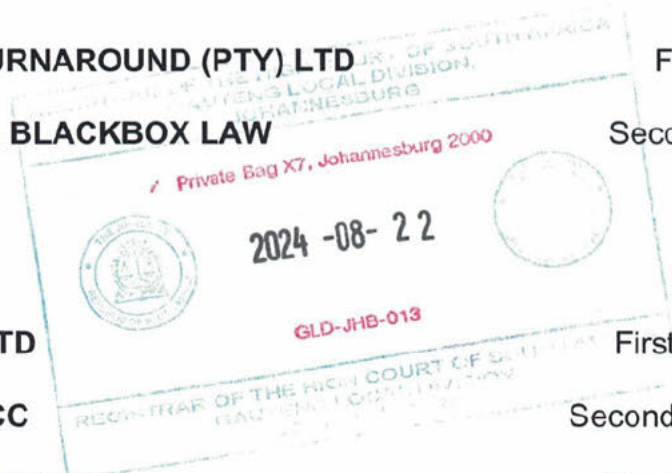
Case No: 2023/046219

In the matter between:

ENGAGED BUSINESS TURNAROUND (PTY) LTD First Applicant
ELIOTT ATTORNEYS T/A BLACKBOX LAW Second Applicant

and

CP CRANE HIRE (PTY) LTD First Respondent
ATTOMIC TRANSPORT CC Second Respondent
FLAKE ICE SERVICES (PTY) LTD Third Respondent
TSOMA TRADING CC Fourth Respondent



This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This order is further uploaded to the electronic file of this matter on Caselines by the Judge or his Secretary. The date of this Order is deemed to be _____ 2024.

COURT ORDER

HAVING considered the matter and having heard counsel, the following order is hereby made:

1. The first and second applicants are ordered to, within than 10 (ten) days from

date of service of this order on the second applicant, produce the under-mentioned documents to which reference is made in annexure "FA17" to the first and second applicants' founding affidavit, for the respondents' inspection and to permit the respondents to make copies thereof:

- 1.1. All the correspondence, settlement offers, draft settlement agreements and settlement agreements referred to in annexure "FA17";
2. The time period for delivery of the respondents' answering affidavit(s) to the first and second applicants' founding papers is hereby extended, and the respondents' answering affidavit(s) shall be delivered within 15 (fifteen) days from the date on which the applicants have duly complied with the above order;
3. The applicants are ordered to make payment of the costs of this application on the attorney and client scale, including counsel's fees on Scale C.

BY ORDER

REGISTRAR



Respondents' counsel: Adv E Kromhout; Member of Johannesburg Bar & Pretoria Bar; 082-898-0889; kromhout@law.co.za; Instructed by Lowndes Dlamini Inc; (011) 292-5600; allan@lowndes.co.za; allanpa@lowndes.co.za; greg@lowndes.co.za

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