

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

20/8/14

CASE NO: 33647/2012

In the matter between:

TELFREE COMMUNICATIONS (PTY) LTD

Applicant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD

Respondent

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JUDGMENT

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BREDENKAMP AJ:

INTRODUCTION

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <input checked="" type="checkbox"/>	
(2) OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> YES/NO.	
(3) REVISED.	
20/8/14 DATE	<i>[Signature]</i> SIGNATURE

In this matter the Applicant obtained a *rule nisi* on an *ex parte* basis before Victor J in this Honourable Court on the 8<sup>th</sup> of March 2013. The interim order called on the Respondent to show reasons why it should not restore the call short message system (sms) functionality pertaining to the Applicant over the Respondent's carrier network. A declaratory order was also made recording that the Respondent had already been interdicted from disabling, diminishing or restricting the Applicant's access for sms purposes to the Respondent's carrier network. The Respondent

opposed this order, and filed opposing papers. A reply was filed to that.

## 2.

2.1 In its said Notice in Terms of Rule 35(12)(14) the Applicant states that it requires insight into and copies of the documents "reflecting what amount is involved as is directly mentioned by Karel Pienaar" (referring to the opposing affidavit of which Karel Pienaar deposed to on 26 April 2013) and which indicates how the amounts are calculated, when the amount was alleged to be due and secondly it also requests copies of the agreements referred to above by the deponent Karel Pienaar.

2.2 The relevant statements made by Karel Pienaar in which the Applicant is interested is Paragraphs 34, 35 and 71 of the opposing affidavit deposed to on 26 April 2013.

## 3.

In terms of Rule 35(12), a party can any time before the hearing give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce that document for inspection and permitting it to make a copy of it. This Rule does not qualify the documents and no distinction is made between documents upon which the proceedings are actually founded and documents possessing merely evidentiary value. (**See Magnum Aviation Operations v Chairman NTC 1984 (2) 398 (WLD) on p 400 D**).

4.

The notice in *casu*, does not refer to clearly specified documents, and does not state that these documents are relevant to a reasonably anticipated issue in the action. Rule 35(14), to my mind therefore do not find application. As the notice is too widely worded it cannot fit within the framework of a Rule 35(14) notice.

5.

In its answering affidavit, Respondent stated a number of technical defences regarding the Rule 35(14) application. It is not necessary to consider them, as I have stated above, that Rule 35(14) cannot find application in these circumstances.

6.

6.1 In regard to the Rule 35(12) as well as 35(14) notice, the Respondent firstly states, that this notice amounts to an abuse of the Court processes. However, Rule 35(12) clearly states, that a Rule 35(12) notice [and for that matter also Rule 35(14)] may at any time before the hearing thereof be delivered.

6.2 Documents that are privileged cannot be sought. (**See Harms: Civil Procedure in Superior Courts at D/252**). However this is not a defence of the Respondent, as in paragraph 34 of its answering affidavit of 26 April 2013,

a tender to produce the agreements reflecting fees, was made.

- 6.3 It is also argued in the opposing papers, that the documents required by the Applicant are subject to an on-going arbitration process to the parties and as such are irrelevant for the purposes of determining whether Respondent's conduct of deactivating the provision of telecommunication services to the Applicant boils down to spoliation. As pointed out above, Rule 35(12), does not have a qualification and no distinction is made between documents upon which the proceedings are founded and even documents possessing evidentiary value. Furthermore, a tender was made to produce agreements, which reflect fees as stated above.

## 7.

- 7.1 As stated above Rule 35(12) clearly states, that the Applicant is entitled to any document or tape recording, referred to by the other party (parties in the pleadings or affidavits). He's not entitled to calculations as such, unless those calculations are contained in documents.
- 7.2 I am satisfied that the Applicant has made out a case, in terms of Rule 35(12) and the following order is consequently made.

8.

- 8.1 Respondent is ordered to produce for the Applicant's inspection and to permit Applicant to make copies of the documents and agreements mentioned in paragraphs 23, 34 and 71 of the opposing affidavit of 22<sup>nd</sup> April 2013, within 10 (ten) days of service of this order upon the Respondent.
- 8.2 Respondent is ordered to pay the costs of this application.

A handwritten signature in black ink, appearing to read 'M. Breidenkamp', is written over a horizontal line.

**BREDENKAMP IM  
ACTING JUDGE OF THE HIGH COURT**