HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. Yes

29/7/16 .....
DATE

.....
SIGNATURE

29/7/2016

Case no.: 21573/2014

In the matter between:

ROCLA (PTY)LTD	**Applicant**
and	
BURDEN & SWART ATTORNEYS	**First Respondent**
MARTIQ 1008 CC	**Second Respondent**
J.J.D. PIETERS	**Third Respondent**

JUDGMENT

RABIE, J

1. By agreement between the parties two interlocutory applications have been placed before this court for adjudication. The first is an application by the second respondent to compel the applicant to comply with a Rule 35(14) notice served on it by the second and third respondents on 23 April 2014. The second is an application by the applicant for the amendment of its description in its notice of motion in the main application. Both applications, which were both opposed, related to the main application which was brought by the applicant with a view to recovering an amount of R320 414,10 from the respondent which amount, according to the applicant, was erroneously paid into the trust account of the first respondent on 30 September 2013.

2. The two applications were argued by the parties simultaneously and in my view it is appropriate to give one judgement relating to both the applications. For purposes of convenience I shall refer to the parties as they were referred to in the main application.

3. Before referring to the main application it may be necessary to briefly refer to certain background facts. During October 2014 the second respondent issued summons against the applicant for payment of three sums of money totalling an amount of R320 414,10. All three amounts were for payment of goods sold and delivered by the second respondent to the applicant. In its plea the applicant denied the averments in the second respondent's particulars of claim. The applicant also filed a counterclaim against the second respondent for payment of the amount of R1 800 862,09 as damages resulting from the alleged unlawful conduct of, inter alia, the second respondent.

4. The applicant was in the business of manufacturing and supplying precast concrete products. The second respondent was in the business of manufacturing moulds and related products which could be used by the applicant in its business. By mid-2011 orders to the value of R19 809 482,99 had been placed with the second respondent. According to the applicant it discovered during an internal investigation that two of its employees were in a corrupt relationship with the second respondent, and more particularly its sole member, the third respondent, in terms of which the second respondent would add a 10% surcharge to its ordinary price for products and services ordered by the applicant from the second respondent. Such inflated invoices would be rendered to the applicant and once paid, the amount so added, would be paid to the aforesaid two employees of the applicant. According to the applicant the second respondent also occasionally performed work for one of these employees free of charge and that this employee and the third respondent were business partners in other ventures. According to the applicant the aforesaid actions by both the two employees and the second and third respondents were unlawful and caused the applicant to suffer considerable damages. The applicant reported the matter to the South African Police Services. Under these circumstances the applicant denied being indebted to the second respondent in any amount but in turn claimed to be entitled to payment of damages in the amount claimed in the counterclaim.

5. Initially, and prior to the issue of summons, when demand was made by the second respondent for payment of the amount of R 320 414, 10, which the applicant refused to pay, the applicant's attorney wrote a letter dated 4 September 2012 to the first respondent, who had it all comes been the attorney of the second and third respondents, setting out to the full version of the applicant

relating to the aforesaid corrupt relationship. On 18 October 2012 the second respondent instituted action against the applicant for payment of the aforesaid amount.

6. Subsequent to notice of plaintiff's intention to defend, the second respondent launched an application for summary judgement on 21 November 2012 which was supported by an affidavit deposed to by the third respondent. The applicant resisted the application and presented its aforesaid version of events. On 31 January 2013 leave was granted to the applicant to defend the second respondent's action. The plea and counterclaim was delivered on 28 February 2013. The second respondent pleaded to the applicant's counterclaim on 8 April 2013 and delivered amended particulars of claim on 7 May 2013. A trial date is presently being awaited.

7. During or around June 2013 the applicant's holding company decided to restructure its business and the businesses of some of its subsidiaries. During this process it was decided by the applicant to pay an amount of money equal to the amount claimed from it by the second respondent into the trust account of the applicant's attorneys to be held there pending the final determination of the second respondent's action and the applicant's counterclaim. For this purpose the banking details of the applicant's attorneys were provided to the applicant.

8. However, when the instruction for payment eventually landed on the table of a creditor's clerk in the employ of the applicant's holding company, who was not *au fait* with the facts of the matter, she erroneously paid the amount into the trust account of the first respondent, being the attorneys of the second respondent,

instead of into the trust account of the applicant's attorneys. This amount was electronically transferred to that account on 30 September 2013.

9. On 14 November 2013 the first respondent acknowledged to the applicant's attorneys the receipt of the aforesaid payment. It was on receipt of this letter that the applicant and it's attorneys realised that something had gone horribly wrong and on establishing what had happened, commenced with steps to recover the monies erroneously paid into the first respondent's trust account.

10. All attempts to recover the money came to nought and it in fact appeared that the first respondent had paid out the amount to the second respondent or the third respondent without recourse to the applicant or its attorneys. It would seem that the respondents regarded the payment as payment of the amount claimed and to which, according to them, the second respondent was entitled. The respondents consequently refused to pay back the money to the applicant or its attorneys and after much correspondence between the respective attorneys, the applicant launched the main application during March 2014 claiming back the amount of R230 414,10 from the respondents. The respondents opposed the application.

11. The disputes between the parties in terms of the action and in terms of the main application respectively, are thus not the same. In the action the disputes turn mainly on the fraud perpetrated on the applicant and in the main application the dispute is whether the payment of the amount of R320 414,10 was paid to the first respondent's trust account in error and can be reclaimed.

12. I shall now refer to the two interlocutory applications which have to be decided by this court. Although the second respondent's application to compel was launched

prior to the applicant's application for an amendment, it is appropriate to refer to the applicant's application first.

13. The application to amend the applicant's notice of motion commenced with a Notice of Intention to Amend dated 22 July 2014. Notice was given that the applicant intended to amend its notice of motion in the main application by "substituting the description of the applicant therein, presently being 'Rocla (Pty)Ltd', with 'Rocla SA (Pty)Ltd'". On 5 August 2014 the second and third respondents filed a notice of objection to the proposed amendment. The grounds upon which the objection was based, where the following: According to the second and third respondents the proposed amendment constituted a substitution of parties and that the procedures referred to in Rule 28 (1) do not allow for such substitution of parties. In the alternative it was submitted that the amendment would result in the notice of motion being in conflict with the founding affidavit wherein it was stated that the applicant was Rocla (Pty) Ltd, and also in conflict with the documentation attached to the founding affidavit which also refers to Rocla (Pty) Ltd, and that the amendment would therefore have the consequence of the notice of motion being in conflict with the founding affidavit and that Rule 28(1) does not make provision for the amendment of the founding affidavit. Thirdly, it was stated that the first respondent had already filed its answering affidavit and will thus be prejudiced by the proposed amendment as the rule makes no provision for the first respondent to file a further answering affidavit.

14. From the evidence before this court it appears that after receipt of the main application the first respondent conducted a search of companies registered under the name of the applicant. Apparently it found two companies with the

same name, Rocla (Pty) Ltd, one being a company which was apparently registered in 1980 but which had subsequently been deregistered, and the second being a company registered during October 2013.

15. Since the second company was only registered after the parties had stopped doing business with each other, the respondents in all probability thought that the applicant was the first company which had been deregistered and was thus a non-entity who could not have launched the main application. Whatever the respondents' thoughts were, the aforesaid prompted the second and third respondents to serve a notice in terms of Rule 35(14) on the applicant's attorneys in which the production of certain documents was called for. The notice was served on 23 April 2014.

16. A number of documents were called for but two sets of documents clearly related to the identity and status of the applicant. The applicant refused to disclose the documents mentioned in the notice. In reaction, the respondents adopted different courses of action. The first respondent delivered an answering affidavit in the main application and the second respondent, but not the third respondent, brought an application to compel compliance with the rule 35(14) notice.

17. The applicant opposed the application to compel and filed an answering affidavit on 23 July 2014. In the answering affidavit the applicant, inter alia, fully addressed the issue of the identity of the applicant. One of the factors which came to the fore was that there was an error in the description of the applicant in the main application. This resulted in the applicant filing a Notice of Intention to Amend on the day prior to the filing of the answering affidavit in the application to compel, namely on 22 July 2014. In the notice it was stated that the applicant

intends to amend its notice of motion in the main application "by substituting the description of the applicant therein, presently being 'ROCLA (PTY) LIMITED', with 'ROCLA SA (PTY) LIMITED (registration number 1973/013163/07) (formerly Rocla (Pty) Limited)'".

18. As stated before, the second and third respondents objected to the applicant's notice to amend its Notice of Motion. This resulted in the applicant filing an application to amend its notice of motion on 18 August 2014. This application was, however, not opposed by the third respondent but only by the second respondent who filed an answering affidavit on 3 October 2014. It is to this application which I shall now turn my attention.

19. It is trite that the object of allowing an amendment is to obtain a proper ventilation of the disputes between the parties and to determine the real issues between them, so that justice may be done. See Erasmus et al, Superior Court Practice at B1-178. In Moolman v Estate Moolman 1927 CPD 27, at p29, Watermeyer J stated that "the practical rule adopted seems to be that amendments will always be allowed unless the application to amend would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".

20. A court accordingly considers prejudice or injustice to the other side but the fact that an amendment may cause the other party to lose its case against the party seeking the amendment is not, however, the kind of prejudice which will dissuade the court from granting it. It is in the light of these principles that the applicant's application for amendment must be considered.

21. In its founding affidavit the applicant explained that at the time of the filing of the pleadings in the action, the applicant, as defendant in the main claim and plaintiff in reconvention in the counterclaim, was Rocla (Pty)Ltd. Subsequent thereto and as part of a reconstruction process, the applicant's name was changed, on 1 November 2013, to Rocla SA (Pty)Ltd. It would be recalled that the amount of R320 414,10, which was according to the applicant erroneously paid over to the respondents' attorneys, was paid on 30 September 2013, *i.e.* approximately one month prior to the applicant undergoing a name change. However, the name change was effected prior to the launching of the main application on 14 March 2014. Although it remained the same company who had done business with the second respondent and who defended the second respondent's claim and had instituted the counterclaim, the main application should have been instituted citing the applicant by its new name of Rocla SA (Pty)Ltd.

22. According to the applicant it unfortunately neglected to inform the applicant's attorneys before and at the time of the main application was drafted and issued, that the name of the applicant had in the meantime been changed. It was as a result of this omission that the applicant was erroneously described in its founding papers by its old name, Rocla (Pty) Ltd, instead of by its new name, Rocla SA (Pty) Ltd. According to the deponent to the applicant's founding affidavit in the main application, it also did not occur to him at the time that he signed the affidavit, that it contained the aforesaid mistake. The error only came to the knowledge of the applicant's attorneys when the respondents alluded in their affidavits to the two other companies referred to above.

23. The applicant explained that the company who had defended the action and instituted the counterclaim was incorporated under the name Rocla (Pty) Ltd in 1973. It was also this company which made the erroneous payment into the first respondent's trust account in 2013. According to the applicant the respondents could never have been in any doubt that it was this company who launched the main application for the repayment of the amount erroneously paid.

24. According to the applicant the first company mentioned by the respondents which was registered in 1980 and which had since been deregistered, was completely unknown to it. The second company referred to by the respondents which was registered during October 2013 was known to the applicant. The applicant explained that during the restructuring process in 2013 the applicant, Rocla (Pty) Ltd, which was registered in 1973 under registration number 1973/013163/07, sold its business to a shelf company Newshelf 1261 (Pty) Ltd. In terms of a series of further agreements this company was subsequently substituted as purchaser by Newshelf 1265 (Pty) Ltd, which became a wholly-owned subsidiary of Newshelf 1261 (Pty) Ltd. After the conclusion and implementation of the said agreements the name of Newshelf 1265 (Pty) Ltd was changed to Rocla (Pty) Ltd. It was also during this time that the name of the original Rocla (Pty) Ltd which was registered in 1973, was changed to Rocla SA (Pty) Ltd.

25. It seems clear that the opposition by the second and third respondents was mainly prompted by the fact that their investigations failed to uncover the name change of Rocla (Pty) Ltd which was registered in 1973, into that of Rocla SA (Pty) Ltd during 2013. Instead it uncovered a company which had long been deregistered and which has nothing to do with the applicant and the name

change of the shelf company into Rocla (Pty) Ltd, which was not the entity which originally did business with the second respondent and which was a party to the action instituted by the second respondent.

26. Consequently, it appears clearly from the evidence before this court that the sole purpose of the amendment was simply to rectify the applicant's description so as to ensure that its true identity is reflected in the main application. The purpose or the fact of the amendment is not to substitute one party with another party, as the respondents would have it and which, according to the respondents, is not permitted. Firstly a substitution can be effected by way of an amendment under Rule 28 but such circumstances need not be referred to in the present case. It is clear from the applicant's founding affidavit that the entity which brought the main application is the same entity which had been sued by the second respondent and which had made the erroneous payment. The application to amend is simply a correction of the misdescription of the correct applicant. Such misdescriptions are routinely rectified by way of amendments in terms of Rule 28.

27. There is also no merit in the respondents' second ground of objection that the amendment will result in the applicant' description in the notice of motion being at variance with that contained in the founding affidavit. An affidavit constitutes evidence and it is not possible to amend an affidavit in terms of Rule 28. Evidence may be rectified by the making of a further affidavit, such as the applicant had done *in casu*. The discrepancy which might initially exist can cause no prejudice. The respondents knew at all times that the main application was brought by the defendant party in the action and by no other entity and it is clear that the correct description of that entity, which was caused by a formal name

change, was sought by way of the amendment. Apart from being the correct procedure to have been followed, there can be no prejudice whatsoever to the respondents if the amendment were to be allowed.

28. The respondents' third ground of objection was that the first respondent will be prejudiced by the amendment because it had already delivered its answering affidavit and would not have an opportunity to file further affidavits if the amendment is allowed. I agree with the submission on behalf of the applicant that this objection is also simply frivolous. Firstly, the first respondent did not oppose the amendment and it does not lie in the mouth of the second respondent to complain about prejudice that the first respondent may allegedly suffer. Secondly, it is simply not correct to say that the first respondent would not have an opportunity to supplement its answering affidavit if the amendment is allowed. Rule 28(8) expressly provides for such a right and the court can in any event allow such a party to supplement its papers.

29. It is further difficult to envisage any prejudice or injustice the proposed amendment can possibly cause to the respondents. The sole purpose of the amendment was to rectify the applicant's description so as to ensure that the respondents can be under no misapprehension as to its true identity and to facilitate the proper ventilation of the disputes between the parties. The respondents can at this point have no doubt that the applicant is in fact the entity with which the second respondent had done business all along and against which it had issued summons. The amendment does not seek to introduce a new unknown entity in substitution of an existing party.

30. I agree with the submission on behalf of the applicant that the grounds of objection were so devoid of any merit that it cannot be said that anything else was intended but to confuse the issues and to inconvenience the applicant. Consequently the applicant's application for amendment should succeed.

31. In respect of costs both the second and third respondents objected to the proposed amendment and thus resulted in the applicant being forced to file a substantive application for the aforesaid amendment. The third respondent was the deponent of the answering affidavit filed on behalf of the second respondent. The fact that the third respondent did not file his own answering affidavit does not change the fact that they have made common cause by both objecting to the proposed amendment. Consequently, in my view, the second and third respondents should be ordered jointly and severally to pay the costs of the amendment application.

32. This brings me to the second interlocutory application to be decided. The second respondent served a notice in terms of rule 35 (14) on the applicant requiring the applicant to make available for inspection and copying a large number of documents for purposes of drawing and filing an answering affidavit. The notice followed the wording of rule 35 (14) except inasmuch as same was modified to apply to an application proceeding as opposed to an action proceeding.

33. The notice did not specify why the documents called for were required for purposes of drawing and filing the second respondent's answering affidavit.

34. It is trite that rule 35 (14) does not apply to motion proceedings unless and until a direction to that effect has been issued in terms of rule 35 (13). Rule 35 (13)

provides that "The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications." A direction by the court in terms of rule 35 (13) is an essential prerequisite for a notice in terms of rule 35 (14) and the failure to obtain such a prior direction is fatal to an application to compel. I agree with the submission on behalf of the applicant that the second respondent's application to compel should be dismissed for this reason alone.

35. The second respondent neither sought nor obtained any direction in terms of rule 35 (13) and the provisions of rule 35 (14) are consequently not applicable and not available for the second respondent in respect of the main application. If the second respondent wished to rely on rule 35 (14) to obtain the discovery of the documents referred to in the rule 35 (14) notice, it first needed to bring an application for a direction in terms of rule 35 (13). It is immaterial at this stage whether such an application would have been successful but it may be pointed out that such a direction is not available for the mere asking. See Moulded Components and Rotomoulding South Africa Pty Ltd v Coucourakis and Another 1979 (2) SA 457 (W) at 470 D-E. Over and above this difficulty, rule 35 (14) can in the case of an action procedure only be relied on when documents called for are essential, and not merely useful, for purposes of pleading.

36. During argument counsel on behalf of the second respondent only moved for an order in respect of the documents referred to in paragraphs 3, 8, 12 and 13 of the Notice. I have considered the submissions in respect of the reasons offered why the documents in these paragraphs should be discovered but have not been convinced that even if rule 35 (14) were to have been applicable, the second

respondent would have been entitled to discovery of the documents mentioned in those paragraphs.

37. Upon refusal by the applicant to accede to request in the Rule 35 (14) notice, the second respondent filed an application to compel the applicant to comply with the said notice. However, in the notice of motion of the application to compel the second respondent added a reference to rule 35(12) in the first prayer which reads as follows: "Directing the applicant to comply with the respondent's Rule 35(14) Notice (read with Rule 35(12)) dated 22 April 2014, excluding item 11 thereof;". This reference to rule 35 (12) is an attempt by the second respondent to also rely on this rule for purposes of discovery of the documents referred to in the Notice in terms of rule 35 (14). This attempted reliance in the application to compel on rule 35 (12) is misplaced and unjustified. An application to compel the production of documents in terms of rule 35 (12) has to be preceded by a notice in terms of rule 35 (12). There was no such a notice *in casu*. Consequently rule 30A, which governs an application to compel, cannot be complied with for it requires a failure by a party to comply with a notice given pursuant to the rules. The applicant couldn't comply to a notice in terms of rule 35 (12) if same had not been given to it. There was thus no obligation on the applicant to make documents available to the second respondent without it having been properly called upon to do so in terms of an applicable rule on which the second respondent chose to rely. Since the second respondent chose to rely on rule 35 (14) it was not entitled to bring an application to compel compliance with rule 35 (12), even if rule 35 were applicable to the proceedings.

38. In the light of the aforesaid it is not necessary to deal with the submissions by the applicant that rule 35 (12) is in any event not applicable since no reference was made to documents in the applicant's affidavit and furthermore since the listed documents are wholly irrelevant to the real issues in the main application.

39. During argument the second respondent also relied on rule 35 (11) and the court's inherent power to order the production of documents even if they are not discoverable in terms of rule 35 (12) or (14). The court has an inherent power to order the production of documents in appropriate cases. However, the relief sought by the second respondent in its application was one compelling the applicant to comply with the second respondent's rule 35 (14) notice and no case was made out why the court should exercise its discretion in terms of rule 35 (11).

40. If the second respondent wished any of the rules pertaining to discovery to apply to the main application, it should have given the required notice, where applicable, and brought a properly motivated application. Different principles govern the different procedures envisaged in rule 35 and a respondent party is entitled to know what it faces when confronted with a particular application. A party cannot be allowed, such as which the second respondent is asking this court to allow, to jump from one rule to another as and when the shoe pinches. Consequently, the second respondent's application should be dismissed.

41. As far as costs are concerned, there is no reason why costs should not follow the event in respect of the application to compel.

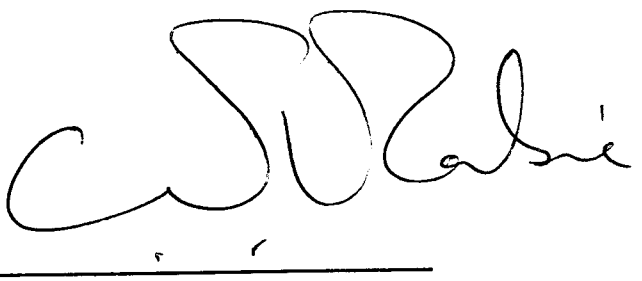
42. In the result the following order is made:

1. Leave is granted to the applicant to amend its notice of motion in the above matter by substituting its description, being "Rocla (Pty) Limited" with "Rocla SA (Pty) Limited (registration number 1973/0131 63/07) (formerly Rocla (Pty) Limited)".

2. The second and third respondents are ordered jointly and severally to pay the costs of the application for leave to amend.

3. The application to direct the applicant to comply with the second respondent's Rule 35 (14) Notice is dismissed.

4. The second respondent is ordered to pay the costs of the application to direct the applicant to comply with the second respondent's Rule 35(14) Notice.



C.P. RABIE

JUDGE OF THE HIGH COURT