

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: **8th August 2023** Signature: _____

CASE NO: 3607/2020

DATE: 8th AUGUST 2023

In the matter between:

SB GUARANTEE CO (RF) (PTY) LIMITED

Plaintiff

and

MALOPE, KHOLOFELE PETER

Defendant

Neutral Citation: *SB Guarantee Co (RF) v Malope (3607/2020) [2023]*

ZAGPJHC --- (08 August 2023)

Coram: Adams J

Heard: 01 August 2023

Delivered: 08 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 08 August 2023.

Summary: Practice and Procedure – application to compel further and better discovery – rule 35(14) discussed – application to compel better discovery refused.

ORDER

- (1) The defendant's application to compel the plaintiff to make further and better discovery by replying to his (defendant's) notice in terms of rule 35(14) dated the 21st of June 2021, be and is hereby dismissed with costs.
 - (2) The defendant shall pay the plaintiff's costs of the said application on the scale as between attorney and client.
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JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action, in which the plaintiff applies for judgment against the defendant for payment of the sum of R1 660 628 and for a foreclosure order declaring specially executable the defendant's immovable property over which is registered a first covering continuing mortgage bond in favour of the plaintiff as security for defendant's indebtedness to plaintiff. The plaintiff's action is founded on a mortgage loan agreement concluded on 14 July 2016 between the Standard Bank of South Africa ('Standard Bank') and the defendant in terms of and pursuant to which Standard Bank loaned and advanced to the defendant as a homeloan an amount of R1 500 000, to be repaid by the defendant in 240 monthly instalments, initially amounting to R18 056.68 per month.

[2]. The plaintiff provided a guarantee to Standard Bank in respect of the loan agreement, in terms of which the plaintiff agreed to pay the amount owing in terms of the loan agreement in the event of a default by the defendant under the loan agreement. The defendant signed a written indemnity in terms of which he

indemnified the plaintiff against any claim by Standard Bank under the Guarantee given by the plaintiff to the Bank in respect of all sums then and subsequently due by the defendant to the Bank in terms of the loan agreement. That, in a nutshell, is the plaintiff's case against the defendant in the main action.

[3]. In this opposed interlocutory application before me, the defendant applies for an order compelling the plaintiff to comply with his (the defendant's) rule 35(14) notice.

[4]. On 21 June 2021, the defendant delivered his Rule 35(14) notice, calling upon the plaintiff to make available for inspection further documents 'on the basis that the said documents are relevant to a reasonably anticipated issue of whether or not the plaintiff has fulfilled or is fulfilling its obligations to the Bank in terms of the Guarantee, to enable the defendant herein to plead to the plaintiff's particulars of claim'. The documents listed in the said rule 35(14) notice are the following: - 'Proofs of payments by the plaintiff to Standard Bank of South Africa (the Bank) in fulfilment of the due and punctual payment of sums which are now due and/or which may become subsequently due to the Bank (Creditor).'

[5]. The notice then goes on to read, in conclusion, as follows: -

'TAKE FURTHER NOTICE THAT the notice in respect of the above required documents is premised on "PoC 5" to the particulars of claim in terms of which the Plaintiff (Guarantor) guaranteed the: "due and punctual payment of all sums which are now and which may subsequently become due by the Debtor pursuant to the Home Loan Agreement entered into between the said Debtor (Defendant) and the Creditor (Bank) on 14 July 2016'.

[6]. On 27 July 2021, the plaintiff delivered its 'Reply to the Defendant's Notice in terms of Rule 35(14)', and attached to such Reply two documents, being 'The Common Terms Agreement' between the plaintiff and Standard Bank and the Guarantee Agreement executed by the plaintiff in favour of Standard Bank. These documents had also been attached as annexures to the particulars of plaintiff's claim. Importantly, the plaintiff did not furnish any proof of any payments having been effected by it to Standard Bank pursuant to the guarantee it had provided the Bank in respect of the defendant's indebtedness. The aforesaid reply was subsequently 'retracted' by the plaintiff, whose attitude I understand to be that the defendant is not entitled to the documents requested.

[7]. A further reply dated 22 February 2022 by the plaintiff to defendant's rule 35(14) notice was delivered, in which the plaintiff indicates that the defendant is not entitled to the documents requested because, so the plaintiff contended, the defendant indemnified the plaintiff in favour of Standard Bank and bound himself *inter alia*, as per clause 3.6 of the Indemnity, as follows: -

'3.6. The Borrower will not have the right to refuse to make payment to the Guarantor by reason of the fact that

3.6.1 the Guarantor has not paid the claims of the Bank or the Transferee under the Guarantee; ..."

[8]. Taking the above clause into account, so the reply continued, the defendant (as the Borrower) is not entitled to the proofs of payments for the amounts due to Standard Bank by the plaintiff (as the Guarantor) as the defendant's payments under the home loan agreement are payable regardless of the payment arrangement concluded between the plaintiff and Standard Bank. In sum, it is the case of the plaintiff that the defendant is not entitled to documents requested as those documents are irrelevant for purposes of pleading as envisaged by rule 35(14).

[9]. Not content with the replies furnished by the plaintiff, the defendant launched the present application to compel the plaintiff to furnish the documents requested in the rule 35(14) notice. The plaintiff opposes the said application and it does so on the grounds set out in the paragraphs which follow.

[10]. The plaintiff's securitised claim relies on the provisions of a written indemnity agreement, read with the provisions of a mortgage bond, which was granted in its favour by the defendant.

[11]. Rule 35(14) provides as follows:

'(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to —

- (a) make available for inspection within five days a clearly specified document or tape recording in such party's possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof; or
- (b) 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

- (c) 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.

[12]. My reading of the plaintiff's reply to the defendant's rule 35(14) notice is that the plaintiff in essence objects to the production of the documents on the basis that they are irrelevant. In addition, the plaintiff avers that the documents are not required for purposes of pleading, in addition to not being 'a clearly specified document' in the plaintiff's possession 'which is relevant to a reasonably anticipated issue in the action'.

[13]. In my view, the latter ground of objection has merit. As pointed out by the learned Authors of *Erasmus: Superior Court Practice; Volume 2: Uniform Rules and Appendices*, in their commentary on the rule, this subrule was designed for the situation where a party to an action requires, for the purposes of pleading, the production of a specific document or tape recording of which he has knowledge and which he can describe precisely. The test is whether the document or tape recording in question is essential, not merely useful, in order to enable a party to plead.

[14]. As regards the requirement in subrule 14(a) of a 'clearly specified document ... which is relevant to a reasonably anticipated issue', the learned authors point out that:

'This subrule does not provide a mechanism whereby a party, by making use of generic terms, can cast a net with which to fish for vaguely known documents. In this respect, the subrule differs markedly from subrule (12) and its ambit is much narrower than that of subrule (12).'

[15]. In that regard, see *Cullinan Holdings Ltd v Mamelodi Stadsraad*¹; *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd*². And, as was held by this court (per Maier-Frawley J) in *Bennett Attorneys Inc v Pro-Prop Construction & Civils (Pty) Ltd*³, 'there are four features that strike one about the provisions of Rule 35(14). First, to invoke the rule, the document sought to be produced must be required for the purposes of pleading. Second, such

¹ *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F

² *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C-I;

³ *Bennett Attorneys Inc v Pro-Prop Construction & Civils (Pty) Ltd* 2022 JDR 0932 (GJ);

document must be clearly specified. Third, such document must be in the other party's possession. Fourth, such document must be relevant to a reasonably anticipated issue in the matter'.

[16]. *In casu*, none of these requirements are met. Importantly, it cannot be said that the documents which the defendant requested are 'clearly specified', nor could it be said with any conviction by the defendant that these documents are in the plaintiff's possession. The defendant's request is nothing more than a 'shot in the dark', in the hope that something may turn up. Most importantly, and this requirement deserves particular emphasis, is the fact that it cannot possibly be suggested that the required documents are relevant to a reasonably anticipated issue in the matter. Accordingly, and for these reasons alone, the defendant's application should be dismissed.

[17]. That brings me back to the main ground of the objection, namely the contention that the documents requested to be inspected by the defendant are not relevant to the matters in the action. The defendant contends that it is clear that the documents are relevant to matters in question in the action and that the plaintiff's reasons for its failure to make the documents available for inspection are without merit. In terms of the Guarantee, so the defendant argues, the plaintiff had guaranteed due and punctual payment of all monies owed by the defendant to Standard Bank. The guarantee in question, so Mr Baloyi, Counsel for the defendant submitted, is a conditional guarantee, performance in terms of which is dependent on performance by the Guarantor to principal debtor – Standard Bank in this case. It in fact takes the form of a Surety, so the submission goes.

[18]. I disagree. The defendant's contentions fly in the face of the wording of the Indemnity executed by him in favour of the plaintiff in terms of which he had agreed that he will not have the right to refuse to make payment to the plaintiff by reason of the fact that it may not have paid the claims of Standard Bank. The point is simply that the plaintiff is liable to make payment to Standard Bank because the defendant has defaulted on the loan agreement. The defendant is liable to indemnify the plaintiff in respect of such liability and it matters not that the claim by Standard Bank has not been paid by the plaintiff.

[19]. For all of these reasons, I conclude that the documents requested by the defendant are not relevant to the plaintiff's claim in the main action. In *Governing Body of Hoërskool Fochville and Another v Centre for Child Law; In re: Governing Body of Hoërskool Fochville and other* [2014] 4 All SA 204 (GJ) at paras 22 to 25, this court held that in the context of Rule 35(12) a party is excused from disclosing a document if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but that party cannot refuse to discover a document on the grounds of confidentiality.

[20]. I am therefore of the view that the defendant is not entitled to the documents requested in terms of his rule 35(14) notice, his application to compel better discovery should therefore fail.

Costs

[21]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*⁴.

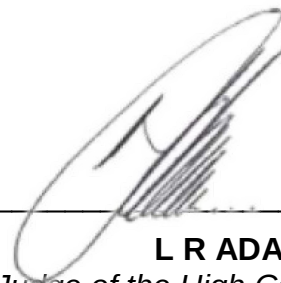
[22]. I can see no reason to deviate from this general rule and I therefore intend granting costs in favour of the plaintiff against the defendant.

Order

[23]. In the result, I make the following order:

- (1) The defendant's application to compel the plaintiff to make further and better discovery by replying to his (defendant's) notice in terms of rule 35(14) dated the 21st of June 2021, be and is hereby dismissed with costs.
- (2) The defendant shall pay the plaintiff's costs of the said application on the scale as between attorney and client.

⁴*Myers v Abramson* 1951(3) SA 438 (C) at 455;

A handwritten signature in black ink, appearing to read 'L R Adams', is written over a horizontal line.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON: 1st August 2023

JUDGMENT DATE: 8th August 2023 – handed down electronically

FOR THE PLAINTIFF: Advocate Wendy Isaaks

INSTRUCTED BY: Van Hulsteyns Attorneys, Sandown, Sandton

FOR THE DEFENDANT: Advocate R Baloyi

INSTRUCTED BY: Motimele Incorporated, Hatfield, Pretoria