



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

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

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DATE

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SIGNATURE

Case no: 15497/2020

In the application between:

BETHUEL ABOSELE KGAMANYANE

First Applicant/ Defendant

MAKOKOBALÉ ESTHER KGAMANYANE

Second Applicant/ Defendant

and

ABSA BANK LIMITED

Respondent/ Plaintiff

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 29 January 2024.

GOODMAN, AJ:

FACTUAL BACKGROUND AND PROCEDURAL CHRONOLOGY

1. In July 2020, the plaintiff, Absa, sued the defendants for an amount of R266 312.42 plus interest – which it says is outstanding under the defendants' mortgage bond – as well as for an order declaring the mortgaged property specially executable. It is common cause that this is the second mortgage bond the defendants have taken out over the property. The first was concluded in 1998 for an amount of R111 000, plus administration fees and interest, repayable over 240 months ("the 1998 bond"). The 1998 bond was novated, in November 2010, by the conclusion of the new mortgage bond, for an alleged amount of R252 095.19, repayable over 240 months from that time ("the current bond"). That is the loan agreement relied upon by Absa to found its claim.
2. The defendants filed a notice of intention to defend the action in August 2020. They then served a notice to remove cause of complaint, which triggered an amendment to the particulars of claim on Absa's part. The amendment was effected in November 2020.
3. During December 2020, when the defendants had failed to file a plea to the amended particulars of claim, Absa served a notice of bar. In response, the defendants filed a further notice to remove cause of complaint. Absa objected to that notice on two grounds: first that, in breach of Rule 23, it was served more than 10 days after the amendment was effected, and second, that it was not followed by a notice of exception, as required.
4. In March 2021, the defendants withdrew the notice to remove cause of complaint and, in May 2021, they caused a notice in terms of Rule 35(14) to be served. It called on Absa to provide them with "*full mortgage bond statements detailing instalments and interest paid*" on their loan account in respect of the property, from 1998 (being inception of the first bond) to April 2021 (the last full month before the notice was served), to enable them to plead to the claim.

5. Absa objected to the notice on the basis that Rule 35(14) permits a party to call for discovery for the purposes of pleading, and the defendants were already barred from pleading as a consequence of the December 2020 notice of bar. The notice also recorded Absa's view that the defendants did not require the mortgage statements for the purposes of pleading. Absa contended that the Rule 35(14) notice was accordingly irregular.
6. The defendants then brought an application to uplift the bar against them, and for leave to file a plea. That matter came before Mr. Justice Vally on 25 April 2022, who uplifted the bar, and granted the defendants leave to file a plea within 5 days of receipt of the order.
7. A plea was delivered on about 4 May 2022. Among others, it denies that Absa loaned the defendants the amount claimed, and avers that Absa, impermissibly and in breach of the National Credit Act, charged the defendants interest in respect of the full 240 month period of the 1998 bond and incorporated that amount into the amount allegedly advanced under the current bond – even though the 1998 bond was novated in 2010, at a stage when the defendants had made 144 months' worth of payments. The defendants consequently dispute both the total amount claimed and the arrears alleged against them.
8. Following the close of pleadings, the parties each pursued their own next steps. Absa applied for summary judgment, and the defendants have filed an affidavit resisting the grant thereof. For their part, the defendants brought an application to compel compliance with their Rule 35(14) notice. It is this latter application that is before me for determination.

THE RULE 35(14) APPLICATION

9. As set out above, the Rule 35(14) notice, and the application to compel compliance with it, seek an order directing Absa to produce full mortgage bond statements, detailing instalments and interest paid, from inception of the 1998 bond to the date of the notice. The defendants allege, in their founding affidavit, that they require these documents in order to particularise and substantiate their

defences that Absa did not lawfully re-calculate the amount owing under the 1998 bond in accordance with the National Credit Act, and/or failed properly to quantify the amounts owing under the current bond. They ask for discovery “*to afford the Applicants/ defendants an opportunity to show that they do not owe the amounts claimed, at least not to the value claimed*”.

10. Absa opposes the application on two grounds:

10.1. First, it says that the application is irregular because the defendants have not complied with Rule 30A in bringing it; and

10.2. Second, they submit that the documents sought are not required for the purposes of pleading. This, they say, is evidenced by the fact that the defendants have in fact pleaded to the claim against them, and have also filed an affidavit resisting summary judgment.

11. In respect of both submissions, Mr. Shamase for the defendant placed particular reliance on the judgment in *Potpale Investments (Pty) Ltd v Mkhize*.¹ The question in that matter was whether a notice delivered in terms of Rule 35(12) and (14) prior to the service of a notice of bar suspended the time period in the notice of bar. The High Court, relying on an earlier decision in *Hawker v Prudential Assurance Co of South Africa Ltd*,² found that it did not. Gorven J (as he then was) found:³

“The plaintiff relies on *Hawker v Prudential Assurance Co of South Africa Ltd* in support of its stance that the rule 35 notice did not suspend the period for delivering the plea. In that matter further particulars were sought for the purposes of delivering a plea, as was allowed at the time. Further particulars were supplied but were inadequate. The defendant then applied, outside of the time within which to deliver his plea but before any notice of bar was delivered, to compel their delivery. It was submitted that the application was out of time. The court reasoned as follows:

¹ 2016 (5) SA 96 (KZP).

² 1987 (4) SA 442 (C) at 447E-H.

³ *Potpale* at paras 21-23.

'It is implicit in Rule 21(1) that the pleading in respect of which further particulars may be requested is incomplete, in the sense that it is envisaged that further particulars are necessary to enable the party requesting the particulars to plead and/or to tender an amount in settlement. Where the words the particulars are used in Rule 21(3), this must be construed as meaning the particulars envisaged in Rule 21(1) for, until such particulars are furnished, the party who requested the further particulars must be regarded as being unable to plead and/or to tender an amount in settlement.'

Applying this reasoning to the application at hand, the court went on to hold:

'It follows from the foregoing that in my view a defendant is not obliged to take any further step when particulars have been refused or inadequate particulars have been furnished and the particulars are strictly necessary for the purposes envisaged by Rule 21(1). Should the plaintiff in such circumstances, and upon expiration of the 14-day period I mentioned in Rule 21(3), deliver a demand for plea in accordance with the provisions of Rule 26, the defendant has an election. He can either attempt to plead, or he can make application in terms of Rule 21(6) for an order compelling the plaintiff to furnish the particulars requested. A The latter application would naturally be coupled with an application for an order extending the barring period.'

The reasoning, accordingly, is that without the requested necessary particulars it was not possible to plead. In other words the defendant was entitled to the particulars before being required to plead. This mirrors the submission in the present matter that the defendant was entitled to inspect and copy the documents before being obliged to plead. Hawker, however, held that if the defendant were placed on bar, he was obliged either to plead or to apply to compel the particulars. Where he did plead, the bar would not fall. Where he did not do so, but brought an application, the court considered that it was axiomatic that an application to extend the time to plead would accompany the application to compel. If this were not done, the clear implication is that the defendant would find himself barred from delivering a plea and subject to a default judgment. It is clear that the court did not regard the bringing of the application (let alone the request for further particulars) as suspending the time period under rule 26.

This reasoning commends itself to me as applying equally to the present matter. The delivery of the rule 35 notice did not suspend the period in which the defendant was obliged to deliver a plea or other document referred to in rule 22. When he was confronted with a rule 26 notice, he was put to an election. He could either have done his best to plead and so have defeated the bar or he could have applied to extend the time within which to plead and to compel production of the documents for that

purpose. If he had pleaded, it would have been open to him to apply to compel delivery of the documents and, if so advised, to thereafter seek to amend his plea. Since he did not plead or apply to extend the period in which to do so, he was ipso facto barred on 2 June 2015. There is therefore no basis for contending that setting down the application for default judgment amounted to an irregular step. The interlocutory application must be dismissed as regards that relief.” [emphasis added]

12. Mr. Shamase submitted that *Potpale* was authority for the proposition that the defendants could file a plea in order to defeat a bar against them (and, in this case, to comply with the order of Vally J), and thereafter to proceed to compel delivery of the documents sought, with a view to potentially amending their plea. It meant, he suggested, that an application to compel could be brought, without more, and that such application remained competent under Rule 35(14) even though the defendants had already pleaded.

The procedural objection

13. As to the first submission: I do not agree that an application to compel discovery can be brought in terms of Rule 35(7) where a party has failed to comply with a notice in terms of Rule 35(14).
14. Rule 35(7) permits a party to apply for an order compelling discovery where its counter-party has failed to discover “*as aforesaid*” – that is, in terms of the earlier provisions of Rule 35 – or pursuant to a notice in terms of Rule 35(6). It does not, on its terms, apply to discovery sought in terms of Rule 35(14). A party seeking to compel compliance with a Rule 35(14) notice must do so by invoking Rule 30A.⁴ That requires it to serve a notice calling for compliance with the Rules and, if it is not forthcoming within 10 days, thereafter to apply to court to compel its production. The defendants’ application to compel ought properly to have been preceded by a notice in terms of Rule 30A(1), calling upon Absa to comply with Rule 35(14) and their notice issued under it.

⁴ See, by analogy, *Centre for Child Law v Hoërskool Fochville and Another* Z2016 (2) SA 121 (SCA) at paras 15-17.

15. That said, I am not minded to non-suit the defendants on that basis. The object of the court rules is to regulate the court process, and to promote orderly, expeditious and appropriate litigation. Compliance with the rules is not an end in itself.⁵ The purpose of a Rule 30A(1) notice is to afford a party an opportunity to remedy any non-compliance with the rules and thereby to avoid unnecessary litigation. In this case, Absa's opposition to the application demonstrates that service of a Rule 30A notice would not have secured a different outcome or avoided the present proceedings. Neither Absa nor the Court has been prejudiced by the defendants' failure to deliver it.
16. I am accordingly amenable to condoning the defendants' non-compliance with the provisions of Rule 30A and to entertaining the merits of the application to compel.

The merits of the application to compel

17. Rule 35(14) permits a party to call for discovery after they have entered appearance to defend "*for the purposes of pleading*". Such documents must be necessary for pleading, not merely useful or relevant.⁶
18. In this instance, the defendants have pleaded their defence that Absa has failed lawfully and properly to calculate the capital amount owing under the current mortgage loan. That suggests, at least *prima facie*, that they do not require the documents in order to plead. The matter is put beyond doubt by the terms of the founding affidavit in support of the application to compel. In it, the defendants record that they seek the documents in order to "*show*" that their defence is sound – that is, for evidentiary reasons rather than to plead. They consequently do not meet the requirements of Rule 35(14).
19. What then to make of *Potpale's* statement, in paragraph 23, that it is open to a defendant who has elected to plead to avoid a bar "*to apply to compel delivery of the documents and, if so advised, to thereafter seek to amend his plea*"? Does it permit that defendant to compel compliance with an earlier Rule 35(14) notice

⁵ *Centre for Child Law* para 17.

⁶ See *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F.

after they have elected to plead? In my view, it does not. A party faced with bar can defeat it either by pleading as best they can, or by compelling discovery under Rule 35(14) read with Rule 30A and simultaneously seeking an extension of the period within which to plead. Where the former course of action is followed, the party elects to waive insistence on compliance with its Rule 35(14) notice, and the notice falls away. The ordinary process then takes its course. Once pleadings close, that party can pursue discovery in the ordinary course under Rules 35(1) to 35(12). If the discovered documents disclose a basis for it, that party can later seek to amend its pleadings. But the election to plead precludes such party from continuing to rely on Rule 35(14) to compel early discovery; the very fact of its pleading means that the documents sought are not necessary to enable it to plead.

20. In the circumstances, the application to compel is appropriately dismissed. I see no reason to depart from the ordinary approach that costs follow the result.

ORDER

21. I accordingly make the following order:

The application to compel is dismissed, with costs.

I GOODMAN, AJ
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG**

Hearing date: 22 January 2024

Judgment date: 29 January 2024

Appearances:

For the applicant: Shamase Ramotswedi Attorneys

Counsel for the second respondent: A J Reyneke

Instructing attorneys: Tim du Toit & Co Inc.