



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **5036/2021**

In the matter between:

UBUNTU CHICKEN PRODUCTS(PTY)LTD

First Applicant

G.J. BREDENKAMP

Second Applicant

and

**FIRST RAND BANK LTD t/a
FIRST NATIONAL BANK**

Respondent

In re:

**FIRST RAND BANK LTD t/a
FIRST NATIONAL BANK**

Plaintiff

And

UBUNTU CHICKEN PRODUCTS (PTY) LTD

First Defendant

G.J. BREDENKAMP

Second Defendant

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **9 NOVEMBER 2023**

DELIVERED ON: **13 FEBRUARY 2024**

- [1] In this interlocutory application, the Applicants seek an order in terms of Uniform Rule 35(3) to compel the Respondent to make additional discovery to the extent set out in the Notice dated 6 July 2022. The application is opposed by the Respondent on the basis that the documentation sought is irrelevant and that there exists no triable issue in respect of the same.
- [2] The plaintiff/respondent and the first defendant/first applicant and second defendant/second applicant will conveniently be referred to as plaintiff and first defendant and second defendant in these proceedings
- [3] The plaintiff instituted an action against the defendants for money lent and advanced, based on a written Covid 19 loan agreement between the plaintiff and first defendant as principal debtor and second defendant on a written suretyship in which the second defendant bound himself as surety and co-principal debtor in solidum for the obligations of the first defendant to the plaintiff.
- [4] The defendants jointly pleaded that either the Reserve Bank and/or the National Treasury guaranteed the payment of the obligations of the defendants to the plaintiff. The defendants also pleaded that they were entitled to a 'hiatus' of payments in respect their obligations to the plaintiff arising from the Covid 19 and suretyship agreements.
- [5] The defendants delivered on the plaintiff a Notice in terms of Rule 35(1),(6),(8) and (10). The plaintiff responded to the Notice and duly delivered a discovery affidavit. The defendants were not satisfied with the discovery made and in the belief that there are additional various documents of a so called '*Covid 19 Loan Guarantee Scheme*' in the possession of the plaintiff which may be relevant to the dispute in the action proceedings, filed a Notice in terms of Rule 35(3).

- [6] In response to the Rule 35(3) Notice, the plaintiff said the following on affidavit:

“ The Plaintiff submits that the aforesaid notice in terms of Uniform Rule 35(3) dated 6th of July 2022 constitutes an impermissible abuse of the court rules in pursuance of an ulterior purpose. The Plaintiff thus submits that it is entitled to refuse to provide the documentation so requested.”

- [7] It is submitted on behalf of the defendants that not only are the documents relevant and necessary for the defendants to prepare for the trial, but also that provision of the documents boils down to the heart of the defendants' defence. The defendants also submitted that the plaintiff did not replicate to the plea of the defendants as set out in the relevant parts as in paragraph [10] below. The further contention of the defendants is that the plaintiff does not aver that the requested documents are non-existent or are not in possession of the plaintiff.
- [8] It is submitted on behalf of the plaintiff that the defendants by filing this Rule 35(3) request, seek to impermissibly gain access to facts in order to support their defence. This submission is based, according to the plaintiff on the failure of the defendants to plead material facts to support the proposition that the first defendant was entitled to a hiatus from its payment obligations. According to the plaintiff, the defendants failed to plead the particulars of the agreement in accordance with the prescripts of Rule 18.
- [9] In *Durbach v Fairway Hotel Ltd*¹ it was held that the object of discovery was to ensure that before the trial, both parties should be made aware of all documentary evidence that is available. Such discovery is meant to assist the court and the parties to arrive at the truth. In *Ferreira v Endley*² it was held that discovery of affidavits are important documents in any trial and the party

¹ 1949(3) SA 1081(SR) at 1083.-

² 1966(3) SA 618(E) at 621 C-D

requesting discovery is entitled to have full and complete discovery on oath. The court in *Ferreira v Endley*(*supra*) went further to say:

“The words ‘all documents relating to any matter in question in such action whether such matter is one arising between the party requiring discovery and the party required to make discovery or not’ appearing in Rule 35, must be given a wide interpretation, and will include any document which may lead to a train of enquiry which may ultimately serve to advance the case of the party seeking discovery or damage the case of his adversary.”³

[10] The defendants pleaded as follows to the plaintiff's particular of claim:

- “3.2 During or about 2020 the South African Government and banks (in particular the plaintiff) facilitated what is known as the COVID-19 loan guarantee scheme.
- 3.3 In terms of the aforementioned guarantee scheme, the Reserve Bank of South Africa and/or National Treasury and/or South African Banking Council entered into an agreement with banks and in particular the plaintiff herein.
- 3.4 In terms of the aforementioned agreement the purpose was to allow banks to deviate from its normal loan and recovery schemes in particular in respect of small businesses like the first defendant, who suffered financial distress as a result of the COVID-19 pandemic.
- 3.5 In particular the plaintiff invited such small businesses, and in particular the first defendant, to apply for financial assistance.
- 3.6 The purpose of such financial assistance, would be to assist the first defendant to obtain finance to pay its basic expenses and operational costs at a time when businesses were restricted due to the pandemic and the regulations issued in terms of the Disaster Management Act, Act 57 of 2002.

³ At 622A-C.

- 3.7 *It was particularly understood that such financial assistance was to be guaranteed in repayment by the South African Reserve Bank and/or National Treasury.*
- 3.9 *In those circumstances, the plaintiff invited the first defendant to obtain financial assistance from it on the understanding that although the South African Reserve Bank and/or National Treasury guarantees the payment of the amounts so forwarded, the first defendant would receive financial assistance and, would, repay the aforementioned amount from time to time, and, in the event, it being needed, through a hiatus from time to time.*
- 3.14 *Notwithstanding written request by the first defendant to plaintiff to obtain a copy of the COVID-19 loan guarantee scheme agreement, first defendant has not been able to obtain same.*
- 4.1 *Second defendant in particular pleads that he signed annexure "POC4" on the understanding that the agreement for the financial assistance were on the terms and conditions as stated herein.*
- 4.2 *Second defendant avers that in view of the COVID-19 loan guarantee scheme in terms whereof the Reserve Bank and/or National Treasury would guarantee payment on behalf of the first defendant, there is and was no need for second defendant to sign the document as required."*

[11] Careful analysis of the defendant's plea shows that the defendants have not pleaded material facts in support of the proposition that the first defendant was entitled to a hiatus from its payment obligations. Rule 18(6) provides that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded. The defendants joint plea falls short of what Rule 18(6) requires. As contended by the plaintiff, the defendants do not particularise the identity of the third party who guaranteed their payment in case of non-payment. According to paragraph 3.9 of the plea, it is either the South African Reserve Bank and/or the National Treasury. The defendants do not aver who the parties were to the agreement and when and where the agreement was concluded.

[12] The proposition of the hiatus pleaded herein, is based on no foundational facts to entitle the defendant to arrive at its conclusion. The pleaded case is silent on the specific terms of the alleged hiatus.

[13] A party is required to discover all documents and records which are relevant to any pleaded issue in dispute. Relevance is thus linked to the pleadings and must not be determined outside of the four corners of the pleadings. With reference to the particulars of claim, the court in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*⁴ held that:

“ In determining relevance, regard can only be had to allegations contained in the plaintiff's particulars of claim. Insofar as the further particulars for trial seek to widen the issues they cannot be taken into account.”

In my view, the sentiments expressed herein apply equally to a plea. Absent any triable issue raised, there can be no matter in question as envisaged in Rule 35 to which the documentation can relate.

[14] A party is not allowed to raise a defence after the fact with information obtained from the discovery by his/her adversary. It follows that a party cannot venture into discovery in order to ascertain the basis for the defence or to look for information in order to garner evidence or to structure a defence. In *Marillac v Plax*⁵, the court referred to with approval to *Yorkshire Provident Life Assurance Company v Gilbert and Rivington* where the following was said:

“Now for the purpose of this application I am prepared to guide myself by the course that was pursued in the case of the *Yorkshire Provident Life Assurance Company v Gilbert and Rivington* (1895, 2QBD 148), a decision which is brought up in Halsburg (vol. 10, sec. 512) as being the leading case. That case decided that **where there is a general allegation against a plaintiff, and justification of such a general allegation is pleaded and particulars are given how the plea is going to be justified and proved, that then the defendant in such**

⁴ 1999(2) SA 297(T) at 325 H.

⁵ 1941 CPD 206 at 208.

a, case is not entitled to ask the plaintiff to produce documents relating to the sale and carrying on of his business generally; he is only entitled to call upon him to produce, and entitled to inspect, such books, documents and papers as related to the specific instances which were indicated of which proof would be given before the Court by way of justification. Otherwise, as the Judge in that case said, it would be a very bad precedent to suggest that a person can simply by libelling another obtain access to all his books and see whether he can justify what he has said or not. It seems to me that is really what the applicant is in this case asking to be allowed to do, and I am not prepared to accede to his request to the extent asked for". (emphasis added).

[15] In STT Sales v Fourie & Others⁶ the court observed as follows:

"The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established. (my emphasis)

[16] The predicament the defendants find themselves in, is that they elected not to comply with Rule 18 and plead and identify the facts they rely upon for the alleged hiatus of payment obligation. It cannot thus be open to them to use the discovery process to seek such facts. Allowing the application would amount to assisting the defendants to go on a fishing expedition and hunt for facts to support their defence. That cannot be correct. The application must accordingly fail. The costs should follow the cause.

ORDER

1. The application is dismissed with costs, which costs shall include the costs occasioned by the employment of two counsel.

⁶ 2010(6) SA 272(GSJ) at para [16].



P. E MOLITSOANE, J

On behalf of the Plaintiff:

Appearing with

Instructed by:

Adv.K.W Luderitz SC

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BLOEMFONTEIN

On behalf of the Defendant:

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