



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 2278/2022

In the matter between:

LOT 38 BIZANA PROPERTIES CC

APPLICANT/PLAINTIFF

and

TIADOR 119CC (IN LIQUIDATION) FIRST RESPONDENT/FIRST DEFENDANT

ABSA BANK LIMITED

SECOND RESPONDENT/SECOND DEFENDANT

GARY RONALD VAN WYK N.O. THIRD RESPONDENT/THIRD DEFENDANT

(in his capacity as Executor of the Estate
of the late Vuyani Stanley Godlawana)

THE REGISTRAR OF DEEDS

MTHATHA

FOURTH RESPONDENT/FOURTH DEFENDANT

THE MASTER OF THE

HIGH COURT MTHATHA

FIFTH RESPONDENT/FIFTH DEFENDANT

JUDGMENT

Rugunanan J

[1] This is an opposed application in terms of rule 30A of the Uniform Rules of Court. Except for the second respondent, the remaining respondents have not entered opposition in these proceedings.

[2] The applicant, the plaintiff in the main action, served a notice in terms of rule 35(3) upon the second respondent, the second defendant in the main action, calling for discovery of specified documents, namely:

- ‘1. Written tripartite agreement concluded between First Defendant, Second Defendant and the late Vuyani Stanley Godlwana in respect of Second Defendant’s bond dated 31 July 2012 registered over the notarial deed of lease, “POC 8” to the Plaintiff’s particulars of claim dated 19 July 2022.
2. Written resolution of First Defendant dated 19 February 2008 concluded at Pinetown, referred to on page 2 of Notarial Agreement of Lease, “POC 7” to the Plaintiff’s particulars of claim dated 19 July 2022, concluded between First Defendant and the late Vuyani Stanley Godlwana.
3. Written resolution of First Defendant authorising a power of attorney in respect of the ABSA Bank Limited mortgage bond dated 31 July 2012, “POC 8” to the Plaintiff’s particulars of claim dated 19 July 2022.
4. All documentary proof of the Second Defendant’s due diligence processes and findings in accordance with the Second Defendant’s banking practices in respect of “POC 8” and prior registration of the bond over the notarial deed of lease, dated 31 July 2012 “POC 8” to the Plaintiff’s particulars of claim dated 19 July 2022.’

[3] The notice was served on the second defendant's attorneys of record on 15 November 2022. It called upon the second defendant to make the documents specified therein available for inspection or to state under oath that such documents are not in the second defendant's possession – in which event the latter was required to state their whereabouts.

[4] On 6 December 2022 and purportedly in response to the plaintiff's notice the second defendant delivered an affidavit deposed by its 'Senior Legal Counsel in the Group Legal Division'. (hereinafter interchangeably referred to as 'the affidavit' or 'the response' or 'the second defendant's answer' depending on the appropriate context).

[5] Quoting only where relevant, the deponent thereto makes the following averments:

- '4. The Second Defendant is not (and would not be expected to be) privy to the document sought in paragraph [2] above.
5. The Second Defendant is not in possession or control of the documents sought in subparagraphs [1] and [3] above and, despite a diligent and thorough search, neither the original requested documents nor copies thereof can be located.
6. In relation to the request recorded in paragraph [4] of the said notice, the documents sought are privileged, confidential and are subject to protection pursuant to inter alia the Protection of Personal Information Act, 2013. The plaintiff is accordingly not entitled to them.
7. In any event, Second Defendant is not in possession or control of the documents sought in subparagraph [4] ... and despite a diligent and thorough search, such documents cannot be located.'

[6] Straightforwardly, the very simple issue for decision is whether the second defendant's reply to the plaintiff's notice complies with the provisions of rule 35(3) (hereinafter 'the rule', where contextually suitable). The essential relief being claimed by the plaintiff is for an order directing the second defendant to comply with the provisions of the rule. In addition, the plaintiff seeks condonation for its recourse to rule 30A as opposed to rule 35(7). Nothing turns on this and since the relief contemplated in each of these rules is similar it is considered that the necessity for seeking condonation does not arise.

[7] The detailed background to the matter is set out in the papers before me. To repeat the material at length would be an unneeded exercise – it is intended to say what is only considered absolutely necessary for resolving the issue.

[8] Rule 35(3) entitles a party who believes that, in addition to documents discovered under rule 35(2), there are other documents in the possession of the other party which may be relevant to any matter in question, to give notice to require the other party to make such additional documents available for inspection in accordance with rule 35(6),¹

‘ ... or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts if known...’

[9] The aforementioned affidavit prompted the plaintiff to file a notice in terms of rule 30A in which it contends that the second defendant's answer constitutes non-compliance with rule 35(3).

[10] In summary the plaintiff's complaint is that:

10.1 the second defendant having indicated that it is not in possession or in control of the documents identified in paragraphs 1, 3, and 4 of the plaintiff's

¹ *RAF v Lifson* [2007] JOL 20861 (E).

notice, failed to disclose whether the whereabouts of the documents are known to the second defendant;

10.2 with regard to the documents identified in paragraph 4 of the plaintiff's notice there is in the first instance, a contradiction between the second defendant's claim to privilege in terms of the Protection of Personal Information Act² and its affirmation that it is not in possession or in control of those documents; and in the second instance, there has been a failure to sufficiently disclose the reasons³ for asserting privilege under the Act.

[11] The complaint at every level is not without merit.

[12] The rule requires a party to whom notice is given to answer on oath. This requires the declarant to provide the information enjoined by the rule knowing that he/she is dealing with a solemn execution of an important document. The importance of a conscientious disclosure in appreciation of the oath was emphasised in *Van Vuuren v Agricura Laboratoria (Edms) Bpk*⁴ where it is stated:

‘[B]lootleggingsverklarings is belangrike dokumente and die voorlegger moet bewustelik die nodige inligting verstrek welwetende dat hy met ‘n plegtige verlyding van ‘n belangrike document te make het wanneer die eedsverklaring gedoen word.’

[13] Consistent with answering in appreciation of the oath, the rule requires the whereabouts of requested documents to be disclosed only if known. There is no further requirement or obligation on a party to whom notice is given to explicitly state that it is not aware of the whereabouts of requested documents. To read this into the rule would be tantamount to amendment by interpretation.

² Act 4 of 2013.

³ See Cilliers *et al* Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* (9th ed) (Juta) p799.

⁴ *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974(2) SA 324 (NC) at 327H. The *dictum* was quoted with approval in *Sebogodi v Eskom Holdings (SOC) Ltd and Another* [2022] ZAGPJHC 593 para 13.

[14] It is obvious that the second defendant's answer to the plaintiff's notice does not address the issue whether it has any knowledge of the whereabouts of the requested documents. In heads of argument the second defendant appears to contend that it does not need to go any further than having stated that the documents cannot be located despite diligent search and that this implies a lack of knowledge of their whereabouts. That, however, is not where the matter ends since the contention entirely ignores the contents of the second defendant's affidavit in opposition to the rule 30A application.

[15] In reply to that affidavit the deponent on behalf of the plaintiff makes the following observation (all *sic*):

'6.4 The "searches" conducted by the Second Defendant, in reply to the Plaintiff's rule 35(3) were clearly conducted only after this application was launched if regard is had to annexures A, B1, and B 2 of the opposing affidavit. This correspondence is irrefutable evidence that:

6.4.1 Second Defendant had knowledge at the time of its reply to rule 35(3) dated 6 November 2022, that some or all of the requested documents may have been in the possession of Moors Dlamini (formerly Grobler & Moors) yet failed to state so in its aforesaid reply to rule 35(3).

6.4.2 Evidence of "searches" conducted clearly indicate, that same was only done on 20 February 2023 when the second defendant's reply to rule 35(3) was delivered on 6 December 2022.'

[16] What is revealing about these averments (when read with the second defendant's opposing affidavit and annexures thereto) is that the second defendant is aware of the possibility that the whereabouts of certain documents may be ascertained. This ought to have been disclosed in the second defendant's

answer to the plaintiff's rule 35(3) notice. In *Van Vuuren*⁵ the court appositely stated:⁶

‘Vir my is dit duidelik dat reël 35(2) gebiedend is en dat eiser se blootleggingsverklaring beide wat vorm en substansie betref nie in orde is nie.’

[17] I am unreservedly in agreement therewith – and the same holds true for rule 35(3) considering that it is circumscribed by *inter alia* the requirements of rules 35(1) and 35(2) and must be read in context.⁷ That said, the answer/disclosure in the second defendant's opposing affidavit must properly be brought within the parameters of rule 35(3).

[18] Before concluding it is timely at this juncture to say something about the second defendant's general approach to this application.

[19] Its opposing affidavit and its heads of argument (pointless, albeit not drafted by counsel who appeared) misconceives the nature of the application and the relief sought.

[20] On this footing, counsel for the second defendant referred to the particulars of claim read with the second defendant's plea and submitted that the documents requested in paragraphs 1, 2, 3 and 4 of the plaintiff's rule 35(3) notice are irrelevant. The matter was undeservingly disdained as a fishing expedition to compel discovery. I accept that relevance is an issue determined with reference to the pleadings⁸ but the issue, as submitted by the plaintiff, is not to be convoluted with the relief sought in these proceedings – it correctly falls to be addressed in the second defendant's answer to rule 35(3).

⁵ *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974(2) SA 324 (NC).

⁶ *Ibid* p328B.

⁷ *Cilliers et al* *ibid* fn 3 p814.

⁸ *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (T) at 316-317.

[21] In the circumstances I make the following order:

1. The second defendant/second respondent is ordered to comply with the provisions of rule 35(3) of the Uniform Rules of Court in respect of the notice delivered by the plaintiff/applicant on 15 November 2022 within fifteen (15) days of the date of this order.
2. In the event of a failure by the second defendant/second respondent to comply with paragraph 1 of this order, the plaintiff/applicant is hereby given leave to approach this Court on the same papers, supplemented if necessary, and on ten (10) days' notice, for an order striking out the defence of the second respondent/second defendant together with an appropriate costs order.
3. The second respondent/second defendant shall pay the costs of this application.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant/Plaintiff: *W H Olivier*, Instructed by De Jager & Lordan Inc., Makhanda, Tel: 046-622 2799 (Ref: *L Vaccaro*).

For the Second Respondent/Second Defendant: *K L Watt* (heads of argument drafted by *L M Mills*), Instructed by Wheeldon Rushmere & Cole Inc., Tel: 046-622 7005 (Ref: *M Van der Veen*).

Date heard: 12 October 2023.

Date delivered: 10 January 2024.