

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 071639/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

25/03/2025

In the matter between

GEMVEST 45 (PTY) LTD

FIRST APPLICANT

NKHUMBULENI LESLEY RAMOLIFHO

SECOND APPLICANT

**PROGROUP ASSET MANAGERS AND
FINANCIAL CONSULTANTS (PTY) LTD**

THIRD APPLICANT

And

NEDBANK LTD

RESPONDENT

JUDGMENT

KEKANA AJ

INTRODUCTION

[1] This is an opposed interlocutory application in terms of rule 30A whereby the applicants seek an order to compel the respondent to comply with the applicants' notice in terms of rule 35(12) and (14).

BACKGROUND

[2] This application arises from action proceedings in which the respondent is claiming payment of monies lent and advanced in respect of a Nedbond Loan Agreement and a Term Loan Agreement to the first applicant. The second and third applicants signed deeds of suretyship whereby they bound themselves jointly and severally and as co-principal debtors *in solidum* with the principal debtor in favour of the respondent. Upon receiving summons the applicants served a plea and a notice in terms of rule 35(12) and (14) requesting the production of a list of documents. In response thereto, the respondent filed a notice to inspect. The applicants, not satisfied with the respondent's response, served notice in terms of rule 30A which led to this application.

[3] The documents requested in terms of rule 35(12) and (14) were as follows:

- “3.3.2.1 All registration documents, licenses and permits to establish whether the respondent is duly registered as a bank as alleged in paragraph 1.1 of the particulars of claim;
- 3.3.2.2 All registration documents, licenses and permits to establish whether the respondent is duly registered as a public company as alleged in paragraph 1.1;
- 3.3.2.3 All correspondence, memorandum, letters, minutes of meetings, emails, SMSs and Whatsapp conversations/documents regarding:
 - 3.3.2.2.1 All agreements referenced by the respondents in the particulars of claim;
 - 3.3.2.3.2 The first, second and/or third applicant herein;
 - 3.3.2.3.3 The business rescue proceeding of the first applicant; and
 - 3.3.2.3.4 The business rescue practitioner of the first applicant.
- 3.3.3 Detailed ledgers and records of all transactions, payments, debits, credits, or charges relating to the accounts referenced in the particulars of claim.

3.3.4 Original and clear versions of the following documents/agreements referenced in the particulars of claim:

- 3.3.4.1 The written Nedbank loan agreement (account number 2[...])
- 3.3.4.2 The covering mortgage bond referred to in paragraph 4.1;
- 3.3.4.3 The covering mortgage bond (B[...]) and the deed of transfer (T083906/03);
- 3.3.4.4 The suretyship agreement referred to in paragraph 5.1;
- 3.3.4.5 The suretyship agreement referred to in paragraph 6.1;
- 3.3.4.6 The term loan agreement referred to in paragraph 11.1 (account number: 2[...])
- 3.3.4.7 Annexure 'A' to the particulars of claim
- 3.3.4.8 The agreement attached from page 22 to 26
- 3.3.4.9 The document attached as annexure 'D'
- 3.3.4.10 The document attached as annexure 'E'
- 3.3.4.11 The document attached from page 60 to 66
- 3.3.4.12 The document attached from page 67 to 68."

THE LAW

[4] Rule 30A provides as follows:

"(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as it seems meet."

SUBMISSION

[5] The applicants contended that although they have pleaded that there was reckless lending and further that the respondent interfered with the business rescue process, they required the listed documents to enable them to exercise their rights. The applicants argued that the required information would enable them to mount up

a proper plea. It was submitted that withholding the required information was prejudicial to the applicants.

[6] The applicants submitted that although they had already filed their plea, they did so with a caveat that upon receipt of the document requested, they would file an amended plea. In the filed plea the applicants denied that the referenced agreements in the particulars of claim are enforceable. They asserted that the National Credit Act is applicable and that the agreement constituted reckless lending.

[7] The applicants further argued that the sureties should be released because of the alleged conduct of the respondent which the applicants considers prejudicial. The applicants alleged that the representatives of the respondent 'pressured, coerced and/or unduly influenced the business rescue practitioners of the first applicant to terminate the business rescue proceedings to the prejudice of the *concursum creditorum* and sureties.

[8] The respondent submitted that the applicants' founding affidavit fails to demonstrate that the documents sought are relevant to a reasonably anticipated issue in the main action. Further, that the applicants requested documents of a general nature of which some may be irrelevant and/or privileged.

ANALYSIS

[9] The object of discovery is to ensure that before trial both sides are made aware of all available documentary evidence. Ordinarily, the right to discovery arises only after pleadings have been closed. However, under rules 35(12) and (14) discovery is permitted before pleadings are closed.

Rules 35(12) reads as follows:

[10] "Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to in any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with leave of the court, use such document or tape

recording in such proceeding provided that any other party may use such document or tape recording”.

[11] This subrule authorises the production of documents referenced in a party’s pleadings or affidavits at any time before the hearing of the matter. The rights hereunder may be exercised before the respondent or defendant has disclosed his defence. The first step in the adjudication under this subrule is to consider whether reference is made to a document. It is not a requirement that the document be described in detail.

Rule 35(14) provides as follows:

[12] "After appearance to defend has been entered, any party to an action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

[13] The production of documents under rule 35(14) is limited to those documents that have been clearly identified, that are required for purposes of pleading and are relevant to a reasonably anticipated issue in an action. The right to information under this sub-rule is narrower than the right under rule 35(12) in which the applicant may request the production of documents referenced in general terms in a party’s pleadings or affidavits.

[14] I now turn to the documents requested. I intend to deal with the documents in 4 categories.

FIRST CATEGORY: REQUEST FOR ORIGINAL AND CLEAR DOCUMENTS

[15] I start with the documents that are said to have been referenced in the particulars of claim. The applicants requested the respondent to produce the ‘original and clear’ version of the following documents that were said to have been referenced in the particulars of claim:

- “3.3.4.1 The written Nedbond loan agreement (account number 2[...])
- 3.3.4.2 The covering mortgage bond referred to in paragraph 4.1;
- 3.3.4.3 The covering mortgage bond (B[...]) and the deed of transfer (T083906/03);
- 3.3.4.4 The suretyship agreement referred to in paragraph 5.1;
- 3.3.4.5 The suretyship agreement referred to in paragraph 6.1;
- 3.3.4.6 The term loan agreement referred to in paragraph 11.1 (account number: 2[...])
- 3.3.4.7 Annexure ‘A’ to the particulars of claim
- 3.3.4.8 The agreement attached from page 22 to 26
- 3.3.4.9 The document attached as annexure ‘D’
- 3.3.4.10 The document attached as annexure ‘E’
- 3.3.4.11 The document attached from page 60 to 66
- 3.3.4.12 The document attached from page 67 to 68.”

[16] The applicants claimed that the documents attached to the particulars of claim were illegible. In response to rule 35(12) and (14) the respondent provided the applicants with other copies and invited the applicants to inspect the documents. The applicants did not attend to the inspection of the documents.

[17] The documents listed in this category have not only been referenced in the particulars of claim but have all been provided by the respondent as annexures “A” to “E” and “G” to the particulars of claim. The reason provided for seeking to compel the production of these documents was that the documents provided by the respondent in its reply to rule 35(12) and (14) were copies and were still illegible. The respondent correctly objected to the production of the original documents as same is not sanctioned by either subrule.

[18] What remains is the applicants’ assertion that the second batch of documents provided by the respondent in response to the notice in terms of rule 35(12) and (14) were still illegible. The applicants did not inspect the documents despite being invited to do so, arguing that the notice to inspect limited the inspection to some documents to the exclusion of others. In my view, the applicants failure or refusal to inspect the

documents is irrational. A reasonable approach under the circumstances would have been to inspect the documents that were made available for inspection and; thereafter, approach the court in respect of the documents that were requested but not made available for inspection. Since the documents listed in this category were attached to the particulars of claim, there would be no reason for the respondent to withhold these documents from the applicants. In the circumstances, I find that there has been adequate compliance on the part of the respondent.

SECOND CATEGORY: REGISTRATION DOCUMENTS, LICENCES ETC.

[19] In this category, the applicants requested “All registration documents, licenses and permits to establish whether the respondent is duly registered as a bank as alleged in paragraph 1.1 of the particulars of claim;” and “All registration documents, licenses and permits to establish whether the respondent is duly registered as a public company as alleged in paragraph 1.1”. In response, the respondent provided the applicants with an Annual Business Licence to Conduct the Business of a Bank and a CIPC document indicating that the respondent is registered as a public company.

[20] The applicant argued that this reply was inadequate as the respondent did not provide all the requested documents. Since the documents referred to herein were not referenced in the particulars of the claim, the applicants needed to indicate the reason for requesting all the other documents in this category which the applicants failed to do.

THE THIRD CATEGORY

[21] In the third category the applicants requested the following documents:

“3.3.2.2 All correspondence, memorandum, letters, minutes of meetings, emails, SMSs and Whatsapp conversations/documents regarding:

- 3.3.2.2.1 All agreements referenced by the respondents in the particulars of claim;
- 3.3.2.3.2 The first, second and/or third applicant herein;
- 3.3.2.3.3 The business rescue proceeding of the first applicant; and
- 3.3.2.3.4 The business rescue practitioner of the first applicant.”

The respondent objected to the production of these documents on the basis that they were privileged.

THE FOURTH CATEGORY

[22] The applicants requested the following documents: “3.3.3 Detailed ledgers and records of all transactions, payments, debits, credits, or charges relating to the accounts referenced in the particulars of claim.”

[23] The respondent’s response to this request was that the applicants may inspect: “Statement of account for account number 2[...] and statement of account for account number 2[...], which indicates a full record of all transactions, payments, debits, credits and charges relating to the accounts, as requested by the Defendants at paragraph 4 of their notice in terms of rule 35(12) and (14)”. In addition thereto, the respondent provided the applicant with a copy which the applicants objected to, on the basis that the reply was inadequate as they were only provided with a two-page document.

[24] The documents listed in the second, third and fourth category have not been referenced in the particulars of claim and therefore rule 35(12) is not applicable. To succeed under rule 35(14) the applicants have to meet the following requirements: (a) the documents must be clearly specified, (b) required for purposes of pleading (c) must be relevant to a reasonably anticipated issue in an action.

Clearly specified documents

[25] The first requirement under rule 35(14) is that the documents must be clearly specified. Under the third category the applicants require the respondent to produce amongst others (a) the minutes of meetings, every correspondence, email, WhatsApp and SMS conversation regarding all the agreements referenced by the respondents in the particulars of claim; (b) every correspondence, memorandum, email, WhatsApp and SMS conversation regarding the business rescue practitioner, first, second and/or third applicant and (c) the minutes of meetings, every correspondence, email, WhatsApp and SMS conversation regarding the business rescue proceeding of the first applicant. Similarly, under the fourth category, the applicants did not indicate the specific ledgers or records required.

[26] Essentially, the applicants seek an order that affords the applicants unlimited access to all communications regarding the applicants, the agreements in question, the business rescue proceedings, and the business rescue practitioner. An order that will allow them to trawl through these unspecified documents with the hope of finding evidence that (a) the transaction constituted reckless credit and (b) that the respondent interfered with the business rescue proceedings.

[27] This is impermissible under rule 35(14). Rule 35(14) provides an opportunity for the applicant to obtain an inspection of documents that he is aware of but which are not filed. Therefore, a certain level of specificity is required from the applicant. The subrule entitles the applicants to anticipate normal discovery provided for in rule 35(1), only where the applicant can give a precise description of the document he seeks. A generic description of semi-known documents is not allowed. (see *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648F)

[28] In *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (AUST)* 1999 (3) SA 500 at 515 C- referring to rule 35(3) and (14) Thring J said that “These rules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent’s possession or under his control which may be relevant to the issues and which he is able to specify with some degree of specificity. He went on further to say that rule 35(3) and (14) do not afford a litigant a license to fish in the hope of catching something useful and concluded that the request regarding invoices and receipts that had been described in general terms fell outside the scope of rule 35(14). (See also *Contango v Central Energy Fund Soc Ltd* 2020 (3) SA 58)

[29] In *Contango v Central Energy Fund Soc Ltd* 2020 (3) SA 58 it was stated that for a request to fall within the ambit of rule 35(14) there must be a reference to a specific document, not to a general category of documents. Cachalia JA found that the court a quo correctly refused the order sought for a general category of documents on the basis that an order of that kind would have included every bit of paper generated during the process of review and that would have been contrary to what rule 35(14) envisaged.

[30] The authorities are clear that the documents required under rule 35(14) must be described precisely and explicitly. The applicants in this matter have cast their net so wide that their request falls outside the ambit of rule 35(14). On this basis alone the application ought not to succeed.

Are the documents required for the purposes of pleading?

[31] It is a requirement that the documents sought by the applicants must be required for purposes of pleading. In this matter, the applicants first filed their plea on the 22nd February 2024. Thereafter, on the 9th July 2024, the applicants filed their amended plea. In their amended plea the applicants denied that the referenced agreements are enforceable. They pleaded that the National Credit Act is applicable and the agreements constitute reckless lending. They denied that the first applicant's asset value or annual turnover at the time of the agreement equaled or exceeded the threshold set out in the NCA.

[32] The applicants submitted that they require the documents to disclose 'fully the nature of the defence and the material facts relied upon therefore. Rule 22 requires the pleader to state the material facts on which reliance is made and not the evidence that the pleader will adduce in support of those facts. The applicants have pleaded and set out facts upon which they rely. In support of their plea that the second and third applicants should be released from being surities, the applicants alleged that the respondent pressurized the business rescue practitioner to terminate the business rescue proceedings to the detriment of the first applicant and the other creditors. To support the allegation that the agreement constituted reckless lending, the applicants relied on the following facts amongst others that the respondent failed to conduct an assessment, the first applicant fell into financial difficulty within a year of entering into the agreement. What the applicants require is the evidence to prove the alleged facts.

[33] The applicants have already pleaded and they have also disclosed the facts upon which their defence is based. It is evident from the above that they do not require the documents to plead but rather to substantiate their pleaded case. In *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 SA

514 (WCC) Schippers J stated that rule 35(14) required a clearly specified document to be made available for the purpose of pleading, and 'then only if it is necessary for that purpose'. (own emphasis) In their founding affidavit, the applicants contended that they would not be able to mount a proper defence and further the court would not be in a position to adjudicate the real issues properly. This is not what the subrule was intended for. Since the applicants have pleaded, they cannot rely on rule 35(14).

CONCLUSION

[34] Rule 35(12) and (14) were not intended to provide the applicant with an unlimited right of disclosure before the pleadings are closed. These subrules were meant for specific circumstances alluded to hereinabove. The applicants have requested a general category of documents which they would still have an opportunity to request under other subrules of rule 35. Consequently, this application stands to be dismissed.

I make the following order:

The application is dismissed with costs.

P D KEKANA
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 18th February 2025

Date of judgment: 25th March 2025

Appearances

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