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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case Number: **045013/22**

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED: No

DATE	SIGNATURE
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In the matter between:

MP BORDER TRADING (PTY) LTD

Plaintiff

and

TIGER BRANDS INTERNATIONAL LTD

Defendant

In re:

TIGER BRANDS INTERNATIONAL LIMITED

Applicant

and

MP BORDER TRADING (PTY) LTD

Respondent

JUDGMENT

Summary: *Whether a party can apply for documents in terms of Rule 35(14) when it has already pleaded. Interpretation of the Rule and how it should be applied. Court allowing discovery of one type of document but not another – reasons why explained.*

Manoim J,

Introduction

1. This matter concerns an application made by the defendant, which has already filed its plea, to discover certain documents from the plaintiff by invoking Rule 35(14) (the Rule). The application is opposed by the plaintiff.
2. This case raises two issues; firstly, when can such an application be made; secondly, is the request for documents one contemplated in the Rule.
3. The Rule provides as follows:
“35(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".

4. Rule 35(14) is a form of discovery that a party can utilize to obtain discovery prior to close of pleadings. It is thus a departure from the general rule that discovery takes place only after close of pleadings.¹ Although the Rule says it can be relied on by "any party to any action" it is presumably likely to be defendants who will invoke the rule as in the present case.

The pleadings

5. The plaintiff had ordered a supply of goods from the defendant. They had had previous dealings with one another. The plaintiff paid R 6 612 000 for the goods. Some of this amount was to be held by the defendant in credit for the plaintiff. For this reason, it was understood the defendant would deliver goods to the value of R6,187,286.90, and thus not the full amount. It is common cause that the plaintiff made this payment. The arrangement was for the goods to be taken by a third-party transport company to be delivered to an address in Angola. The plaintiff claims that the goods were never delivered and claims the full amount it paid to the defendant.

6. The defendant filed a plea, albeit under bar. The defendant admits that it did not deliver goods to the value of R6,187,286.90. But here is the difference between the parties; it says it delivered goods worth R1 177 600 to the third party on behalf of the plaintiff. This of course is substantially less than the plaintiff had paid it. But, says the defendant, there were in addition transport costs of R 154 000 it paid (presumably to the third party).

7. But there is a further explanation about what happened to the remaining balance and here is where the rule 35(14) application is relevant. The defendant says it discovered that the goods had not gone to Angola but had landed up near Nelspruit. It accuses the plaintiff and the third-party distributor of colluding in this

¹ Rule 35(1).

regard. Why were they colluding? Well, the defendant alleged, this was a VAT scam. If the goods had gone to Angola as they should have, there would not have been VAT of 15% levied on them.

8. But when the defendant found out the goods had landed up in South Africa it raised a VAT charge of 15% and paid this over to SARS. This VAT payment it says was not limited to the present instance with Angola but for all goods distributed under the same contract. The defendant says it refunded the plaintiff the difference between the amount it had been paid by the plaintiff (R 6 612 000) less these other amounts i.e., the transport, the VAT it paid to SARS, and cost of goods it delivered to the third party. The balance refunded was R1,361,684.85 which it says it paid to the defendant's bank account. This is an account it has previously used for payments to the defendant. Thus, the defendant alleges it is not indebted to the plaintiff.

9. The defendant has not replied to the plea. Its version on the defendant's repayment of the amount into its bank account is not known. Nothing of this repayment is mentioned in the particulars of claim. Instead, the plaintiff applied for summary judgment. The defendant has opposed the summary judgment, but it is yet to be heard. There was some confusion initially as to whether the defendant was relying on its Rule 35(14) application for the purpose of opposing the summary judgment, but it made clear at the hearing that this was required solely for the purpose of the action.

The documents sought.

10. The defendant seeks the following two classes of documents in its Rule 35(14) notice:

- a. The Plaintiffs bank statement for an identified account held with First National Bank for June 2020;
- b. The Plaintiff's value added tax returns for the period March 2020 to June 2020, alternatively, for the 2020/2021 tax year.

Analysis of the Rule

11. In *Quayside Fish Suppliers CC v Irvin & Johnson Ltd*² Traverso J usefully summarised the elements of a Rule 35(14) application as follows:

“It is apparent from wording of the Rule that before a party can invoke the provisions thereof:

- (a) he/she must discharge the onus of persuading a Court that an order should be made in terms of the Rule;*
- (b) an appearance to defend must have been entered;*
- (c) the document must be required for purposes of pleading;*
- (d) the documents must be clearly specified;*
- (e) the documents must be relevant to 'a reasonably anticipated issue in the action'.*

12. In the present matter it is common cause that two of those requirements have been met. The defendant has put in an appearance to defend, and the documents are clearly specified.

13. The remaining issues are contested. What distinguishes Rule 35(14) from the general discovery right given to litigants under Rule 35(1), is that it permits discovery requests to be made before the close of pleadings. The problem with the manner in which the Rule is formulated is that it indicates when the right commences (after an appearance to defend has been entered) but does not specify for how long it can be exercised. The defendant suggests the right remains for as long as a party retains the right to amend its pleadings which remains until judgment in the matter has been given. Whether the right exists until then, is not a point I need to decide now.

² 2000 (2) SA 529 (C)

14. The plaintiff on the other hand argues that the right exists only prior to the applicant having filed its plea.

15. On this approach, the purpose of the rule is to enable the party to plead. Once the party has been able to plead, it follows that it did not require the discovery of the documents sought in order to do so. This reasoning was the one adopted by Goodman AJ in *Kgamanyane and another v Absa Bank Limited*³ where she held:

“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).”

16. Goodman AJ’s interpretation of the Rule turns on whether the document was ‘necessary’ for the defendants to plead. There certainly is authority in the case law for that approach as I go on to discuss. Nevertheless, more recent decisions suggest that ‘necessary’ is too rigid a requirement. But I consider that Goodman AJ had made the correct decision on the facts of that case even though I consider the test is a more flexible one.

17. This is because Goodman AJ noted that the defendants had required the documents to show that their defence was ‘sound.’ This distinguishes that case from the present matter. Even on a more expansive reading of the Rule, using it to test whether your defence is ‘sound’ goes too far, and I would agree with the learned judge’s conclusion in that matter not to order discovery in terms of the Rule.

³ Unreported case number Case no: 15497/2020 22 January 2024

18. If the Rule is confined to a test of 'necessary' then the present defendant would fail. It has after all filed a plea so it cannot have been necessary. But if the Rule is susceptible to a more flexible interpretation, as I go on to discuss, then the defendant might still succeed. Nevertheless, the Rule cannot be applied too permissively, otherwise it becomes a backdoor to a party seeking early discovery.

19. The necessity test, and the case on which Goodman AJ relied on for her approach, has its genesis in *Cullinan Holdings v Mamelodi Stadsraad*.⁴ There the court held the rule could only be invoked if the document was essential not merely useful for the purpose of pleading. What the court there was doing was equating the term 'require' to mean 'necessary.'⁵ But in a later decision in *Unitas Hospital v Van Wyk* the court whilst agreeing that the rule does not apply when a document is merely useful, also held that at the other end of the scale, the requester does not have to establish that the document is necessary.

20. More recently in *Capricorn Makelaars (Edms) Bpk & others v EB Shelf Investment No 79 (Pty) Ltd & others* Froneman J, (as he was then), cautioned against what he termed any preconceived historical bias in favour of a restrictive interpretation of Rule 35(14). He cited a passage from *Clutchco (Pty) Ltd v Davis*⁶ where the court, albeit interpreting a statute not Rule 35(14), held that:

*"required" does not mean necessity, let alone dire necessity. I think that reasonably required in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need."*⁷

21. Froneman J went on to say after citing this passage that:

"It seems to me that there is nothing in the wording of rule 35(14) which precludes a similar interpretation, namely that clearly specified documents or

⁴ 1992(1) SA 645(T).

⁵ *Supra*, at 647 E to F.

⁶ *Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225 (SCA) Note 16 para [13] at 230b-c.

⁷ [2005] JOL 14784 (E) at paragraphs 10-11.

tape recordings in the possession of any party which is relevant to a reasonably anticipated issue in the action, required (in the sense explained above) for purposes of pleading, must be discovered upon a request to that effect under the rule. There seems to me to be no compelling countervailing interests, at this stage of the proceedings, to protect the other party's right to privacy beyond this. To the contrary, it appears to me that there are compelling reasons not to do so. The trend in current civil procedure is, as far as I can discern, away from secrecy and withholding of information until the last moment. Pre-trial procedure is increasingly geared towards laying one's cards on the table before actually going to trial. The purpose is to ensure a quicker and more effective resolution of the real disputes between the parties. If discovery is indeed a "mighty engine for exposing truth" then the purpose of rule 35(14), to expose the truth earlier rather than later, would be undermined by restricting its ambit to "necessity" instead of "reasonably required in the circumstances" as explained in the Clutchco case."

22. This distinction between 'necessity' and 'reasonably required' is important to this case. If the Rule is limited to only cases where the document is necessary – then a fortiori if the requester could plead, then clearly it was not necessary. But if the Rule contemplates a wider meaning – somewhere on the continuum between being necessary and being merely useful, then a wider interpretation of the Rule is justified.

23. In considering why such an approach is justified it is worth returning to first principles and to contemplate why pleadings exist in the first place. The purpose of pleadings as was held in oft cited case of *Imprefed (Pty) Ltd v National Transport Commission*:

"...is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed" (Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082.)"

This fundamental principle is similarly stressed in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22ed at 113:

‘The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.’⁸

24. Inherent in the purpose of Rule 35(14) is that with the aid of the document the pleader can more properly plead to a fact in issue. It follows if this is its primary purpose, the fact that a litigant has already pleaded should not be fatal to a reliance on this Rule. I readily accept that this can lead to abuse.

25. But this can be avoided in those cases where the requester has already pleaded by requiring that it justify why it did not rely on the Rule prior to pleading.

26. In the present case the defendant alleged that it elected to file a plea at a time when it was already under bar. The plaintiff argued that this was not a valid excuse, and that the defendant could have applied for condonation.

27. But as the defendant explained the matter is not that simple. The defendant explained that it pleaded out of an abundance of caution as the law is uncertain on this point. Rule 26 states that any party which fails to deliver its plea within five days of service of a notice of bar is ipso facto barred. In *Potpale Investments v Mkhize*, Gorven J as he was then, observed that the service of a Rule 35(14) notice does not suspend the period set down in Rule 26.⁹

28. But in *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* the SCA put the emphasis in such a situation instead on Rule 27 when it observed of the *Potpale* decision that:

“Whilst there is much to be said for the view expressed by the learned Judge, sight should however not be lost of the fact that it is open to the court, in the exercise of its discretion, to extend the time periods prescribed in terms of the rules whenever a proper case therefor has been made out by the party

⁸ 1993 (3) SA 94 (A) at 107 C–F.

⁹ 2016 (5) SA 96 (KZP) at paragraph 18

*seeking such indulgence. Indeed, this is what Uniform Rule 27 itself contemplates.”*¹⁰

29. Whilst *Caxton* does not expressly overrule *Potpale*, it leaves a litigant who seeks to rely on Rule 35(14), and who has been served with a notice of bar, with a difficult election. It can choose to withhold its plea until the Rule 35(14) application is resolved and apply for condonation simultaneously. But that entails an element of risk. The court might turn it down on both grounds. Or it can reluctantly, as in this case, remove that element of risk and file a plea and bring its Rule 35(14) application subsequently. I see no reason to penalise a litigant for opting for the more cautious option.

30. Having decided that the application is competent at this time I now turn to whether the document request credibly relates to an issue in the pleadings. This is a monetary claim. One of the issues is whether the defendant refunded a certain amount to the plaintiff. If it has, the amount outstanding is greatly reduced. Thus, if the defendant can ascertain from the bank statement that the amount was paid by it into the plaintiff's account, as it alleges it did, then this will be a matter it may want to plead, further in turn requiring a response from the plaintiff.

31. The plaintiff if it has received the payment might well want to file amended particulars of claim. If it received the money in its banking account, why is the amount claimed not reduced. Perhaps it has a reason for why it is not being reduced. Perhaps given that the parties have had prior dealings this was put to repay a past debt? Whatever that reason might be it is a relevant issue for the pleadings and will focus the dispute for the trial.

32. Conversely, if the payment is not reflected in the plaintiff's bank account, the defendant may have to reconsider this part of its plea. For instance, the defendant might want to make a tender of this amount and hence file an amended plea.

¹⁰ *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraph 85.

33. Thus, on either outcome, this document has relevance to the finality of the pleadings. It is not merely an attempt to ascertain premature discovery. It has the potential to significantly alter the manner in which the case might need to be pleaded.

34. A similar issue arose in the *Capricorn* case, where the applicants who were the defendants in the main action, sought Rule 35(14) discovery of certain invoices. Froneman J allowed the discovery of these documents for two reasons. They would determine whether the goods the plaintiff was claiming from them were the plaintiffs and second, their value.¹¹

35. The overarching purpose of pleadings is to define the issues so that litigation is curtailed and focussed. This supports giving the text of the Rule a purposive interpretation that does not confine it to instance of necessity. Nor does such an interpretation strain the language of the text.

36. That said whilst a good case has been made for the inspection of the bank statement the same has not been made for the production of the VAT returns. It does not seem to be disputed that the goods in question were to be delivered to Angola – in which case VAT would not have been levied. Nor is it in dispute that the goods were located in South Africa in the agent's truck. The dispute here is whether that third party was the agent of the plaintiff with whom it colluded or the defendant.

37. Whatever the VAT receipts might show they are not likely to alter the pleadings on this point. That they may be discoverable for trial is another matter.

38. For this reason, I find that the defendant is entitled to exercise its rights in terms of Rule 35(14) at this time, given the circumstance of this case, and secondly, that the bank statement sought meets the requirements that it (i) it has been clearly specified(this was not contested – the defendant seeks a bank statement for one month from a specified bank account) and (ii) that it is relevant to 'a reasonably anticipated issue in the action'.

¹¹ *Capricorn*, supra, paragraph 13.

39. As far as costs are concerned, I consider although it was not wholly successful the defendant should still get its costs, with those of counsel on Scale B.

40. I have not granted prayer 2 of the Notice of Motion, which relates to the defendant being able to approach the court for a dismissal of the summary judgment if the documents are not furnished. This would be interfering with the discretion of the court that hears that application.

ORDER

Having heard the parties and considered the matter, it is ordered that:

1. The Respondent (Plaintiff) is directed to produce for the Applicant's (Defendant's) inspection the Plaintiffs bank statement for the account held with First National Bank under account number 6[...] within 10 (ten) days of this order.
2. The Respondent is ordered to pay the costs of this application including the costs of counsel on Scale B.

**MANOIM J
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant: Adv. K.K Gwaza instructed by Edward Nathan Sonnenbergs Inc.

For the Respondent: Adv. T Mokheithi instructed by Soomar & Malik Attorneys

Date of hearing: 24 February 2025

Date of Judgement: 25 March 2025