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

CASE NO : 2022-36346

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 4/5/2026

SIGNATURE:

In the matter between :

SYDNEY DAVID MABALAYO

First Applicant

Identity Number: 6[...]

PETER RANTHO KGAME

Second Applicant

Identity Number : 5[...]

and

SIEMENS (PTY) LTD

Respondent

Registration Number : 1923/007514/07

In re:

SIEMENS (PTY) LTD

Plaintiff

Registration Number : 1923/007514/07

and

**INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA LTD**

Registration Number : 1940/014201/06

First Defendant

SYDNEY DAVID MABALAYO

Identity Number: 6[...]

Second Defendant

PETER RANTHO KGAME

Identity Number : 5[...]

Third Defendant

MOTHOGO BENG ZANDILE FUYANE

Identity Number: 7[...]

Fourth Defendant

SELIKANE LEBOHANG MAKAPE

Identity Number: 6[...]

Fifth Defendant

MODISE ANDREW MATLALA

Identity Number: 7[...]

Sixth Defendant

ABDURAGHIEM BRANDT

Identity Number : 6[...]

Seventh Defendant

JUDGMENT

BOTES, AJ

A. INTRODUCTION

1. The First and Second Applicants¹ are the Second and Third Defendants in the action initiated by the Respondent² on **7 July 2022**. Siemens is the Plaintiff in the aforementioned action.

2. Electro Inductive Industries (Pty) Ltd, Registration Number 1999/019752/07³ was finally wound up in the High Court of South Africa, Western Cape Division, Cape Town, under case number 4454/2020, on **26 August 2020**. The Applicants and the Fourth, Fifth, Sixth and Seventh Defendants were at all relevant times executive directors of EII.

3. The First Defendant has been the main funder of EII. During the period 2012 to 2020 the First Defendant funded EII in the amount of approximately R326 million.

4. The First Defendant was allegedly actively involved in the business of EII in one or more of the following capacities :

4.1 Financier;

4.2 Shareholder - 49% shareholding; and

4.3 Board of Directors - with the right to appoint a chairperson to the board.

5. EII was initially established as a private company conducting the business of transformer repairs.

SIEMENS' CLAIMS AGAINST EII

6. Siemens initiated two claims against EII, premised on:

6.1 A Bridge Loan Agreement entered into and concluded between it and EII on or about 24 July 2019; and

¹ Hereinafter collectively referred to as "**the Applicants**".

² Hereinafter referred to as "**Siemens**".

³ Hereinafter referred to as "**EII**".

6.2 A Master Service License Agreement entered into and concluded between it and Ell on or about **16 August 2019**.

7. Siemens alleges that it will receive no liquidation dividend since Ell's liabilities exceed its assets by at least R400 million and the First Defendant has a preferential claim in excess of R450 million. There will thus be no dividend payable to concurrent creditors, such as Siemens.

8. Siemens claims payment in the amounts of :

8.1 **R9 967 799.00**, in respect of the outstanding amount due and payable to it by Ell pursuant to the Bridge Loan Agreement; and

8.2 **R18 499 149.00**, in respect of damages which it suffered pursuant to tools and equipment it supplied and provided to Ell to the value of R23 499 149.00, which amount is calculated as follows :

8.2.1 Total cost of tools and equipment R23 499 149.00
supplied and delivered to Ell

8.2.2 Less the amount recovered from the R5 000 000.00
sale of the tools and equipment

8.2.3 Total damages suffered by Siemens **R18 499 149.00**

9. Siemens alleges that the business of Ell was carried on :

9.1 with the intent to defraud creditors of Ell; and/or

9.2 recklessly, for the reasons alluded to in paragraph 8.1.2 of its Particulars of Claim.

10. Siemens therefore submits that the Defendants⁴ were all knowingly parties to the fraudulent and/or reckless carrying on of the business of Ell.

11. Siemens therefore claims :

1. An order declaring that the Defendants, jointly and severally, are personally responsible and liable to it in terms of Section 424(1) of the Companies Act, No. 61 of 1973, for the debts incurred by Ell to it in the amount of R28 475 930.00⁵

2. An order in terms of Section 424(2)(a) of the Companies Act that the Defendants are liable, jointly and severally, the one to pay the other to be absolved, to pay to it interest :

2.1 On the amount of R18 499 149.00 at the rate of 9% per annum *a tempore morae*; and

2.2 On the amount of R9 967 799.00 at the rate of 0,5% below the prime overdraft rate per annum *a tempore morae* with effect from 1 October 2019 to date of payment;

3. Judgment in favour of it against the Defendants, jointly and severally, the one to pay the other to be absolved, as follows :

3.1 Payment in the amount of R28 475 930.00

3.2 Payment of interest :

3.2.1 On the amount of R18 499 149.00 at the rate of 9% per annum *a tempore morae*; and

3.2.2 On the amount of RS 967 799.00 at the rate of 0,5% below the prime overdraft rate per annum *a tempore morae* with effect from 1 October 2019 to date of payment;

4. Costs of the suit;

5. Further and/or alternative relief⁶.

⁴ Including the Applicants.

⁵ R9 967 799.00 plus R18 499 149.00.

⁶ See : Siemens' Particulars of Claim dated 29 June 2022.

12. The First, Fourth, Fifth and Sixth Defendants' filed and delivered their Plea on or about **7 September 2023**⁷.

13. The Applicants⁸ have not yet filed their Plea.

THE APPLICANTS' NOTICE TO PRODUCE DOCUMENTS IN TERMS OF RULE 35(14) OF THE UNIFORM RULES OF THE HIGH COURT

14. The Applicants' attorney filed and delivered a notice to Siemens' attorneys to produce various documents in terms of the provisions of Rule 35(14) of the Uniform Rules of this Court, dated **26 September 2022**. It is for purposes hereof not necessary to deal with each and every document contained in and provided for in the aforementioned notice⁹.

15. No response was forthcoming from Siemens' attorneys pursuant to the Applicants' aforementioned notice to produce documents in terms of the provisions of Rule 35(14) of the Uniform Rules of this Court. The Applicants subsequently initiated an application to this Court which was heard on **13 March 2024** in the Unopposed Motion Court. Leso J made an order in the following terms of 13 March 2024 :

1. The Respondent¹⁰ must comply with the First and Second Applicants' Notice in terms of Rule 35(14) within 10 days of service of this order.

2. The Respondent pays the costs of this application¹¹.

16. Siemens' attorneys filed and delivered a response to the Applicants' Notice in terms of Rule 35(14) on **20 May 2024**¹².

⁷ See : The First, Fourth, Fifth and Sixth Defendants' Plea, dated 7 September 2023 - Caselines 03-0006.

⁸ The Second and Third Defendants.

⁹ See : The Applicants' Notice to produce documents in terms Rule 35(14), dated 26 September 2002 - Caselines 05-33 to 05-40.

¹⁰ Siemens.

¹¹ See : The Court Order dated 13 March 2024 - Caselines 011-1 to 011-2.

17. Aggrieved by the aforementioned response submitted by Siemens' attorneys on 20 May 2024, the Applicants' attorneys filed and delivered a Notice of Non-Compliance with the Court Order dated 13 March 2024, in accordance with the provisions of Rule 30A of the Uniform Rules of this Court. The aforementioned Notice of Non-Compliance was filed and delivered on or about **25 June 2024**.

18. It is the Applicants' case that Siemens has in fact materially not complied with the Court Order in the respects set out in its Notice of Non-Compliance, dated 25 June 2024.

19. Siemens' attorneys persisted that it complied with the Court Order dated 13 March 2024.

20. The Applicants initiated this application on or about **13 September 2024** in terms of which they apply for an order in the following terms :

(a) Respondent's claims against First and Second Respondents in its Particulars of Claim dated 29 June 2022 is struck out in terms of Rule 30A(1)(b).

(b) Respondent pays First and Second Applicants' costs of suit;

(c) Respondent pays the costs of this application; and

(d) Further and/or alternative relief¹³.

¹² See : Siemens' response to the Applicants' Notice in terms of Rule 35(14), dated 20 May 2024 - Caselines 15-17 to 15-25.

¹³ See : The Applicants' Application to Strike Siemens' claim, dated 13 September 2024 - Caselines 015-01 to 015-12.

21. The relief which the Applicants apply for in their Application to Strike Siemens' claim is repeated **verbatim** in paragraph 20 *supra*.

**THE APPLICANTS' CASE IN SUPPORT OF THE RELIEF WHICH THEY APPLY FOR
IN THE NOTICE OF MOTION, DATED 13 SEPTEMBER 2024**

22. The Applicants confirm that Siemens' attorney provide their attorney with copies of the documents referred to in its Rule 35(14) response on **4 June 2024**¹⁴. The Applicants submit that **"it is evident that the Respondent has in fact not materially complied with the Order"**¹⁵.

23. The Applicants consequently served and delivered a Notice of Non-Compliance with the Court Order at the offices of Siemens' attorneys on **25 June 2024**, in accordance with the provisions of Rule 30A of the Uniform Rules of this Court¹⁶.

24. The Applicants therefore submit that Siemens remains in default of the Court Order dated 13 March 2024¹⁷.

25. The onus is on the Applicants to demonstrate whether there has been non-compliance with the Court Order, which exercise should be attended to objectively. If the Court finds that Siemens has not complied with the Court Order, this Court should exercise its discretion to determine the appropriate remedy¹⁸.

26. The Applicants submit that Siemens confirmed in its Answering Affidavit that it has in its possession some of the documents that were requested in the Rule 35(14) Notice, being :

26.1 a due diligence report;

¹⁴ See : Paragraph 8 of the Founding Affidavit.

¹⁵ See : Paragraph 9 of the Founding Affidavit.

¹⁶ See : Paragraph 10 of the Founding Affidavit.

¹⁷ See : Paragraph 11 of the Founding Affidavit.

¹⁸ See: *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 79.

26.2 minutes of meetings; and

26.3 documents relating to the negotiation and conclusion of the Bridging Loan Facility Agreement.

27. The Applicants therefore submits that :

27.1 Siemens intentionally refuses to comply with the Court Order. This constitutes contempt of court in that the Applicants have proven "beyond reasonable doubt" :

27.1.1 the existence of the Court Order;

27.1.2 that Siemens is aware of the Court Order; and

27.1.3 that Siemens intentionally failed to comply with the Court Order.

27.2 Siemens' Affidavit in terms of Rule 35(14)(c) is in fact "incorrect" when it alleges that "notwithstanding a diligent search" the documents required were no longer accessible to it and that the "facts deposed to in such Affidavit are both true and correct". This, according to the Applicants, clearly constitutes perjury by the deponent to Siemens' Affidavit in terms of Rule 35(14)(c)¹⁹.

28. The Applicants submit that they require the documents requested in their Rule 35(14) Notice so as to enable them to prepare their Plea. It is the Applicants' case that "without such documents they are unable to plead". The Applicants furthermore submit that Siemens' failure to comply with the Court Order and to provide the requisite documents is also prejudicial to them because they cannot plead without such documents²⁰.

**SIEMENS' RESPONSE OR ANSWER TO THE RELIEF WHICH THE APPLICANTS
APPLY FOR IN THE NOTICE OF MOTION, DATED 13 SEPTEMBER 2024**

¹⁹ See : Paragraph 8 of the Applicants' Heads of Argument.

²⁰ See : Paragraph 12.4 of the Applicants' Heads of Argument.

29. Siemens' attorney²¹ deposed to an Answering Affidavit in which the following is stated :

29.1 The Applicants have at no stage made out a case that they cannot plead to the allegations and averments contained in Siemens' Particulars of Claim²²;

29.2 It cannot be in the interest of justice to dismiss Siemens' action against the Applicants at this early stage of the proceedings²³;

29.3 From Siemens' response to the Applicants' Notice in terms of Rule 35(14) it is evident that a large number of documents were made available to the Applicants, as provided for in his Affidavit dated 20 May 2024, deposed to in terms of Rule 35(14)(c) of the Uniform Rules of this Court²⁴;

29.4 The documents called for by the Applicants that were not made available for inspection are not in Siemens' possession, and if they were, were no longer accessible by Siemens. This is still Siemens' position²⁵; and

29.5 The Applicants have not made any statement alleging facts and/or circumstances which in the absence of these documents prevent them from pleading. It is not sufficient for the Applicants to simply state that they are being prejudiced in the formulation of the Plea if the documents are not provided²⁶.

30. Siemens therefore submits that:

30.1 The Applicants are in fact in a position to file their Plea, as the First, Fourth, Fifth and Sixth Defendants did;

30.2 Once the pleadings are closed, the issues will become crystalized and the issues for trial will be defined;

²¹ Mr Geoff Ferreira.

²² See : Paragraph 2.2.1 of the Answering Affidavit.

²³ See : Paragraph 2.2.3 of the Answering Affidavit.

²⁴ See : Paragraph 3.4 of the Answering Affidavit.

²⁵ See : Footnote 24 *supra*.

²⁶ See: Paragraph 3.7 of the Founding Affidavit.

30.3 If the Applicants feel that the information presently sought is relevant to the issues for trial, they can utilize the Pre-Trial Discovery Procedures set out in Rule 35 of the Uniform Rules of this Court;

30.4 The Applicants cannot be prejudiced or even suffer potential prejudice in obtaining the information later, as and when and if the documents or information become available; and

30.5 The Applicants are not in the least being prejudiced by Siemens' inability to provide the documents²⁷.

31. Siemens' attorney furthermore submits that if the Applicants insist that the documents that they seek are relevant for purposes of the trial, they could utilize the Pre-Trial Discovery Procedures otherwise set out in Rule 35 of the Uniform Rules of this Court. Siemens' inability to produce or disclose any such documents will be to its own detriment who would not (save with the leave of this Court) be able to make use of those documents, were they so critically relevant in the first place²⁸.

32. It is therefore not possible for Siemens to comply with the Court Order, as it submitted and made available all the documents in its possession to the Applicants in its response to the Applicants' Notice in terms of rule 35(14), dated 20 May 2024²⁹.

DISCUSSION AND RATIONALE

33. The Applicants apply for an Order in terms of which Siemens' claims, as set out in its Particulars of Claim dated **29 June 2022**, be struck out.

34. Siemens opposes this application on the following grounds :

34.1 It duly complied with the provisions of Rule 35(14) of the Uniform Rules of this Court;

²⁷ See : Paragraph 3.8 of the Answering Affidavit.

²⁸ See : Paragraph 3.9 of the Answering Affidavit.

²⁹ See : Paragraph 3.10 of the Answering Affidavit.

34.2 The Applicants failed to establish material non-compliance with the provisions of Rule 35(14) and/or the provisions of the Court Order dated 13 March 2024;

34.3 It provided copies of all specified documents in its possession;

34.4 The Applicants, in essence, demand from it to make available for inspection documents which either do not exist or which are no longer, alternatively have never been in its possession; and

34.5 Neither Rule 35(14) of the Uniform Rules of this Court, nor the subsequent Court Order is intended to compel it to make available documents which are not in its possession or under its control or which are not clearly identifiable.

35. Siemens furthermore submits that the Applicants failed to comply with the provisions of Rule 35(14)(a) of the Uniform Rules of this Court, by failing to identify clearly specified documents or tape recordings for purposes of pleading.

36. Rule 35(14) specifically provides for the following :

(a) Make available for inspection within 5 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 of transcription to be made thereof.

37. Siemens' response consisted of a list of all specified documents as requested by the Applicants, and which are in its possession, together with an Affidavit confirming the fact that Siemens is not in possession of any of the remaining documents.

38. Notwithstanding the above qualification, the Applicants nevertheless filed a Notice of Non-Compliance in terms of Rule 30A of the Uniform Rules of this Court.

39. Rule 30A can never be interpreted as authority to require a party to make available documents which are neither in its possession, nor under its control.

40. The Court Order dated **13 March 2024** specifically instructs Siemens to :

Comply with the First and Second Applicants' Notice in terms of Rule 35(14) within 10 days of service of the Court Order.

41. It cannot be expected from Siemens to provide or to submit documents to the Applicants which are not in its possession, or do not exist.

42. Rule 35(14) of the Uniform Rules of this Court was designed for the situation where a party to an action requires, for purposes of pleading, the production of a specific document or tape recording of which he has knowledge and which he can describe precisely. The test to be applied in these circumstances is whether the document or tape recording in question is essential, not merely useful, in order to enable a party to plead³⁰.

43. Van Dijkhorst J summarized the purpose of Rule 35(14) as follows :

"Die eerste vereiste is dat die aangevraagde dokument "vir doeleindes van pleit benodig word". Uit die eedsverklaring van Nel is dit duidelik dat die Verweerder sy verwerre duidelik kon formuleer sonder die vermelde dokumente. Die dokumente is nie noodsaaklik ten einde te kan pleit nie. Die feit dat dit nuttig kan wees indien die opsteller van die pleitstuk dit beskikbaar het, is nie die toets nie. Om hierdie rede alleen al moet die aansoek onder Reel 30 faal.

Daar is egter nog 'n rede. Die dokumente wat in die kennisgewing aangevra word, word omskryf in algemene terme by wyse van klas of soort. Alie

³⁰ See : *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F; *Bennett Attorneys Inc. v Pro-prop Constructions and Civils (Pty) Ltd* (unreported) Gauteng Johannesburg Case Number 2021/37739, dated 11 April 2022, at para 13; and *The MV Urgup Owners v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (CPD) at 515C-I.

fakture met hoeveelheidslyste, alle kwitansies van die Ontvanger van Inkomste ten aansien van betaling van algemene verkoopsbelasting en die waarborg of waarborge na bewering verskaf deur die Eiser, word gevra.

Dit is myns insiens nie wat die reel voorsien nie. Dit was nie die bedoeling met die invoeging van Reel 36(14) in 1987 om 'n onbeperkte ofwye reg tot blootlegging voor sluiting van pleitstukke in te voer nie. Soos Reel 36(12) die geleentheid skep om voor sluiting van pleitstukke insae te verkry in 'n dokument of bandopname waarna in die teenparty se pleitstukke of eedsverklarings verwys word, so skep Reel 35(14) 'n geleentheid ten aansien van dokumente of bandopnames waarvan die Applikant kennis dra, maar wat nie vermeld word in die stukke dan geliasseer nie."

And

"Myns insiens skep Reel 35(14) nie 'n metode waardeur 'n gedingsparty deur gebruikmaking van generiese omskrywings 'n net kan knoop waarmee vir halfbedekte dokumente gevis kan word nie. Dit is 'n remedie wat vir besondere omstandighede geskep is. Dit vereis die oproep van 'n spesifieke dokument waarvan die Applikant kennis dra en wat hy presies kan omskryf. Slegs dan kan hy deur gebruikmaking van Reel 35(14) die normale blootlegging van Reel 35(1) vooruit loop.³¹"

44. It is therefore evident that the provisions of Rule 35(14) of the Uniform Rules of this Court does not provide a mechanism whereby a party may cast a net within which to fish for vaguely known documents. The provisions of Rule 35(14) is not a tool to be used as a "sniping weapon" in preliminary skirmishes³².

³¹ See: *Cullinan Holdings v Mamelodi Stadsraad*, *supra* at 647E-I and 648F-G.

³² *STT Sales (Pty) Ltd v Fourie and Others* 2010 (6) SA 272 (GSJ) at para 15.

45. In trial proceedings the legal issues existing between the parties are apparent once the pleadings are closed. That is the purpose of pleading. The factual issues are, however, not identified. The factual issues can only become identified once the facts in question are produced. This takes place by way of production of documents and by way of evidence given in Court. The purpose of discovery is to enable the parties to become aware of documentary evidence that is available and to identify factual issues. In addition, discovery results in the production of documents that can be used in the course of interrogation of witnesses³³.

46. 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 the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established³⁴.

47. This Court is not prepared to strike Siemens' Particulars of Claim at this stage, as it is evident that Siemens provided and made available all the requisite documents in its possession to the Applicants. It cannot be expected from Siemens to produce or to discover documents which are not in its possession.

48. The Applicants have to demonstrate on a balance of probabilities that the requisite documents :

- 48.1 are required for purposes of pleadings;
- 48.2 are precisely described in the possession of Siemens; and
- 48.3 are relevant to a reasonably anticipated issue in the pending action³⁵.

³³ *STT Sales (Pty) Ltd v Fourie, supra* at para 14.

³⁴ *STT Sales (Pty) Ltd v Fourie, supra* at para 16.

³⁵ See : *Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA) at para 11.

49. The Applicants have not discharged the aforementioned onus, as provided for and envisaged in paragraph 48 supra.

50. The Applicants are therefore dutybound and obliged to file and deliver their Plea to the allegations and averments contained in Siemens' Particulars of Claim, dated 29 June 2022.

51. The Applicants have sufficient opportunity to invoke the provisions of discovery, as provided for and envisaged in Rule 35 of the Uniform Rules of this Court, in the furtherance of the trial.

CONCLUSION

52. This Court is therefore not prepared to prevent Siemens from an opportunity to ventilate its claims against the Applicants.

53. The Applicants have not made out a case in support of the relief they apply for in the Notice of Motion, dated 13 September 2024. The costs of this application should follow the result.

In the premises an Order in the following terms is made :

- 1. The application is dismissed with costs on the scale as between party and party [Scale B].**

FW BOTES
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA