

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**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.: 5268/2019

In the matter between: -

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Plaintiff/Respondent**

and

PETRUS ALBERTUS PRETORIUS **1st Defendant/Applicant**

ANNA MAGDALENA PRETORIUS N.O **2nd Defendant**

PETRUS ALBERTUS PRETORIUS N.O **3rd Defendant**

WIL

CORAM: N. M. MBHELE, DJP

HEARD ON: 03 NOVEMEBR 2022

DELIVERED ON: 23 FEBRUARY 2023

- [1] The defendants approached this court for an application to compel the plaintiff to comply with their request for discovery made in terms of Rule 35(14). They seek an order compelling the plaintiff to comply with the first to fifth defendant's request for discovery, filed on 18 February 2020, and to make available for inspection within 5 days of the order the documents in its possession and to allow copies of transcriptions thereof to be made. They further seek leave for the first to fifth Defendants to approach court on the same papers for an order that the plaintiff's claim be struck out in the event that the plaintiff fails to comply with the order as set out above.
- [2] On 18 February 2020 the defendants filed a notice in terms of Rule 35 (14) calling upon the plaintiff to provide the below stated documentation:
- 2.1 **Bank Statements and / or Agreements for the following account numbers:**
- 2.1.1 Account number [...] from 25/09/2016 till 25/01/2018;
- 2.1.2 Account number [...] from 25/09/2016 till 25/01/2018;
- 2.1.3 Account number [...] from 25/09/2016 till 25/01/2018;
- 2.1.4 Account number [...] from 25/09/2016 till 25/01/2018.
- [3] On 27 February 2020 the Defendants served the notice in terms of Rule 30 A on the plaintiff's attorneys. On 06 March 2020 the plaintiff served an answer to the Defendant's notice in terms of Rule 35 (14) and 35 (10) and refused to make available the requested documents on the basis that they are not relevant for the purpose of pleading as the application was served long after the defendants' plea was filed. They further allege that the requested documents do not fall within the ambit of Rule 35(14) as they relate to accounts that were closed between 2017 and 2018 and have nothing to do with the case that the defendants are called upon to answer.
- [4] The defendants submit that they have appointed a forensic auditor to determine whether the plaintiff's calculations of the defendants' alleged indebtedness was in fact correct. The said forensic auditor alleges that there are certain account entries which are linked to the aforementioned account

numbers and it would be impossible to finalise his audit without the information relating to these accounts.

- [5] The plaintiff contends that the Defendants' auditor will be in a position to finalise his audit without the requested information. The plaintiff gave the following account in respect of the aforementioned accounts:

[...] - an agricultural production loan opened in December 2015 and closed during February 2018 and has zero balance;

[...] – an agricultural production loan opened during August 2015, repaid and closed during 2017 and has zero balance;

[...] - an agricultural production loan opened during August 2015 and closed in March 2018 and has zero balance;

[...] the account is closed and no longer exists on the plaintiff's records.

- [6] Rule 35(14) of the Uniform Rules of Court provides as follows:

(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.

- [7] Rule 35 (14) prescribes that a document or tape recording may be required (a) after an appearance to defend has been entered, (b) it must be for the purposes of pleading, (c) it must be clearly specified and (d) it must be relevant to a reasonably anticipated issue in the action.

- [8] This was amplified in **Cullinan Holdings LTD v Mamelodi Stadsraad¹ 1992 (1) SA 645 (T) at 647F** where the following was said:

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 verwerse duidelik kon formuleer sonder die vermeldde dokumente. Die dokumente is nie noodsaaklik ten einde te kan pleit nie.

¹ Cullinan Holdings LTD v Mamelodi Stadsraad 1992 (1) SA 645 (T) at 647F

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 Reël 30 faal.

[9] The rule does not give parties carte blanche to request any document even if it bears no relevance to the issue at hand. The document must be pertinent to the issue in dispute, it must have some connection with the issue to be determined in the action or have some tendency to prove a matter of fact significant to the issue in dispute.

[10] In **Priday v Thos Cook & Son (SA) Ltd**² Van Winsen J remarked as follows :

On the other hand, there are decisions in our Courts which tend to show that it is not the policy of our Courts to encourage a person to search amongst the books and documents of another in order to find out whether or not he has an action against such other. Thus for instance in *Rogers v Sanitary Board of Johannesburg* 1 OR 65 the Court refused to grant an application for discovery which was made

"to obtain evidence for the purpose of seeing if he (applicant) really has a case and not with the object of using the evidence in an action already begun".

An application to hand over for inspection a letter alleged to contain defamatory statements concerning the applicant so as to enable the applicant to institute an action for damages against the respondent was refused, the Court holding that there was nothing to show that there had been a libel committed against the applicant. *Attwell & Co v Van de Ven and Another* 1875 B 93. So also in *Dabuku v Mann* 9 NLR 253, the Court refused to allow the applicant inspection of books and documents in order to ascertain whether or not he had an action against the respondent.'

6. In **Quayside Fish Suppliers CC v Irvin & Johnson Ltd**³ Traverso J remarked as follows:

"[16] Mr *Burger*, who appeared for the applicant, submitted that the *Cullinan Holdings* case was wrongly decided. Mr *Burger* contended that the interpretation attributed to Rule 35(14) by Van Dijkhorst J effectively renders the Rule inoperative. I cannot agree with this submission. Rule 35(14) is limited in application and is aimed at operating only in the very specific circumstances set out in the Rule. To interpret it more widely would make inroads into the general principle that prior to the institution of an action a party cannot snoop around other people's books. See, too, *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C) at 515BI. In my view, the issues pending between the parties are those reflected in the pleadings. What the applicant is asking me to do is to permit it to search amongst the documents of the respondent to find out whether or not it has an additional or alternative counterclaim against the respondent. If this is what Rule 35(14) contemplates, it will give a plaintiff in reconvention a right which a

² *Priday v Thos Cook & Son (SA) Ltd* 1952 (4) SA 761 (C) at 764

³ *Quayside Fish Suppliers CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C)

plaintiff in convention does not have. The legislature could never have envisaged that once appearance to defend has been entered to a claim in convention it would give a plaintiff in reconvention *carte blanche* to ask for the production of documents to establish whether he/she has a legal or factual foundation to formulate a claim in reconvention.”

- 7 The Plaintiff dispatched notices in terms of Section 129 of the National Credit Act 34 of 2005 (the NCA) to the defendants during September 2018. When the section 129 notice was issued the accounts that are the subject matter of this application were already closed.
- [11] The defendants filed their plea in the main action before their request in terms of Rule 35(14). They contend that they require the documents for the purposes of filing their counterclaim and possibly amending their plea. The basis upon which they submit that the requested documents are relevant to the main claim is that according to their forensic auditor, the aforementioned accounts are still in existence and that there are unidentified interest transactions relating to the said accounts being debited against account number [...], being one of the accounts central to the main claim. This allegation is denied by the plaintiff. There is evidence showing that all these accounts are closed and three of them have zero balance while the fourth one is no longer available on the records of the plaintiff.
- [12] The correspondence from the forensic auditor shows that these accounts have not been audited. It is not clear how interest can continue to be debited for accounts that are already closed. There are closing statements showing that the defendants do not owe plaintiff a cent in respect of these accounts. There would be no ongoing entries in these accounts if they are closed.
- [13] The correspondence exchanged between the parties indicates that the defendants require inspection of the documents relating to the aforementioned account to investigate and formulate their claim in reconvention against the plaintiff. They are not required for the purpose of pleading because they would be able to file their plea and formulate their defence on the information at their disposal.

For the Defendant/Applicant: Adv. PJJ Zietsman
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