IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **2683/2020**

In the matter between:

LOUIS JONKER Applicant

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Respondent

AND

Case no: **2686/2020**

In the matter between:

LOUIS JONKER N.O. 1st Applicant

JOHANNA JACOBA JONKER N.O. 2nd Applicant

ANNETTE LIEBENBERG N.O. 3rd Applicant

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Respondent

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CORAM: JP DAFFUE J

HEARD ON: 23 MAY 2024

DELIVERED ON: 19 JUNE 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16h30 on 19 June 2024.

Introduction

[1] The Land and Agricultural Development Bank of South Africa (the Landbank) instituted three claims against Mr Louis Jonker under case number 2683/2020. Claim one is for payment in the amount of R 13 480 486.33 together with interest, claim two for payment in the amount of R 4 708 710.41 plus interest and claim three, being an alternative to claim one, for the amount of R 8 517 431.29 plus interest. Costs of suit on an attorney and client scale are sought as well.

[2] The Landbank also instituted action under case number 2868/2020 against the trustees of the Louis Jonker Familie Trust, they being Louis Jonker, Johanna Jacoba Jonker and Annette Liebenberg, for payment of exactly the same amounts as claimed from Mr Jonker in case number 2683/2020 under claims one and two. In this instance an order is also sought to declare two farms in the Senekal district specially executable. The pleadings in both actions have been closed nearly four years ago.

[3] The defendants in both actions filed two interlocutory applications in which the same relief, based on rule 35(3), is claimed. The parties are in agreement that insofar as the applications are mirror images of each other, the outcome should be the same in both instances and that one judgment should be delivered.

[4] In both instances, a so-called written recordal, annexed as annexure POC 4 to each particulars of claim, is relied upon by the Landbank. This recordal will be dealt with in more detail when I evaluate the parties' submissions hereunder. The difference between the two actions is the Landbank's reliance on a covering mortgage bond, annexed as annexure POC 6 to the particulars of claim in case number 2686/2020 and the request to declare the immovable properties specially executable. The mortgage bond was duly endorsed by the registrar of deeds, indicating that all rights, title and interest in the mortgage bond was ceded by Unigro Financial Services (Pty) Ltd (Unigro) as mortgagee to the Landbank.[1]

The relief claimed

[5] As mentioned, the same orders are sought in both applications, to wit:

'1. An order compelling the respondent to comply with the rule 35(3) notice and make available the additional documents, as requested by the first and, second applicants in their Rule 35(3) Notice,

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[1] See page 85 of the record in case number 2686/2020: the endorsement with reference number BC8398/2014 dated 21 August 2014.

which was served on the respondents' attorney on **19 October 2023**, within 10 days after the granting of this order or to state under oath within ten days that such documents are not in its possession, in which event the respondent shall state the whereabouts of the documents requested if known to the respondent.

2. That the respondent be directed to pay the costs of this application on an attorney and client scale.'

[6] Both applications are opposed by the Landbank. Adv FG Janse van Rensburg appeared before me for the applicants and Adv S Tsangarakis for the Landbank. In order to prevent confusion, I shall herein later refer to the plaintiff in the main actions and the respondent in the applications as the Landbank and to the other parties as the applicants.

Relevant factual background

[7] The Landbank instituted both actions on 23 July 2020. Pleas were filed on 17 September 2020. The replications were filed on 10 November 2020. Therefore, the pleadings in both actions have become closed nearly four years ago.

[8] The Landbank filed its discovery affidavits in both matters in March 2021, more than three years ago. It discovered a total of 153 documents. The following documents were *inter alia* discovered in each of the two discovery affidavits:

a. Sale Agreement between Landbank, Gro Capital Financial Services and Afgri Operations dated 21 October 2011;

b. Service Level Agreement between Landbank, Gro Capital Financial Services and Afgri Operations dated 17 November 2011;

c. Sale of Business Agreement entered into between Gro Capital Financial Services and Unigro Financial Services dated 27 September 2012;

d. Cession and Delegation Agreement between Landbank, Gro Capital Financial Services, Afgri Operations and Unigro Financial Services dated 27 September 2012.

These four documents are the very same documents referred to in the recordal attached as annexure POC 4 to both particulars of claim.

[9] On 19 October 2023 the applicants served notices in terms of rule 35(3) on the Landbank in terms whereof they required discovery and the making available of a multitude of documents. I quote the first two paragraphs of the one notice (the other reading essentially the same):

'**TAKE NOTE** that the 1st 2nd and 3rd defendants believe that there are, in addition to documents discovered by the plaintiff, the below-mentioned documents in possession of the plaintiff, which are relevant to the matter.
The defendants require the plaintiff to discover these documents and make them available to the defendants within 10 days of receipt of this notice.'

[10] No response was received from the Landbank whereupon the applicants' attorney served a letter dated 28 February 2024 on the Landbank's attorneys,[2] requesting compliance with the notice and the furnishing of copies of the documents so requested within three days. Again, there was no response.

[11] Two identical applications were issued on 20 March 2024 and set down for hearing in the unopposed motion court of 4 April 2024. On that day the applications were postponed as a result of belated notices of intention to oppose filed on 2 April 2024. This was after the close of the motion court roll. The applications were postponed by agreement to the opposed roll of 23 May 2024. Answering and replying affidavits were filed in both applications.

The procedure adopted by the applicants

[12] The applicants' reliance on rule 35(3) must be considered in accordance with rules 35(6) and (7), read with Form 13 of the Uniform Rules of Court. Therefore, it is apposite to quote these three sub-rules:

'(3) If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), 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.
(6) Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3)..... A party's failure to produce any such document or tape recording for inspection shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise.
(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order

[2] Annexure EG 2 to the founding affidavits.

compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence. (my emphasis)

[13] Form 13 is the notice to produce referred to in rule 35(6). The party to whom the notice is addressed is required to produce the documents referred to in that party's affidavit for inspection within five days. Clearly, the emphasis is on making available for inspection those documents discovered under oath in terms of rule 35(2) or 35(3) and not on documents that the one party believes are in possession of the opposing party.

Evaluation of the parties' submissions and the authorities relied on

[14] It is trite that discovery ranks with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised. This is apparent from the judgment in *MV URGUP.*[3]

[15] In *ST v CT*[4] the Supreme Court of Appeal pointed out that discovery is not dictated by a litigant's view of what is relevant, but it is a matter for the court to consider with reference to the pleadings, and not extraneously therefrom. A discovery affidavit is taken to be *prima facie* conclusive.

[16] The requirement of relevance has been dealt with in several judgments. It is not necessary for the party relying on rule 35(3) to prove that the additional documents are relevant, but only that these may be relevant to any matter in dispute. The documents required by an applicant to be discovered and/or produced may, as authority has it, lead to a so-called 'train of enquiry' in order to establish the truth.[5]

[17] The court should apply logic and common sense pertaining to an applicant's requests and it is not necessary to rely on certainty. It must be emphasised that an applicant shall not be allowed to proceed on a fishing expedition, although care should be taken not to place undue or unnecessary limitation on a party's right to a fair trial.

[18] In the same vein, a court should also consider whether an applicant is attempting to make use of ulterior means to prove their case or disprove the other parties' version. It is the court's duty to prevent abuse of process.

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[3] *MV URGUP Owners of the MV URGUP v Western Bulk Carriers (Australia) (Pty) Ltd & others* 1999 (3) SA 500 (CPD) at 513H.
[4] 2018 (5) SA 479 (SCA) para 19.
[5] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A.

[19] Rule 35(3) is clear. Any party who believes that there are additional documents in the possession of the other party thereto which may be relevant to any matter in question may give notice to the latter requiring them to make the same available for inspection in accordance with rule 35(6), read with Form 13. The entitlement to inspection does not arise, unless the other party has discovered the documents under oath.

[20] In my view the correct approach in a similar factual matrix is the following. If further discovery is not made as requested, the applicant must apply in accordance with rule 35(7) for an order to compel further discovery within a certain period, usually 10 days, failing such compliance, the court may dismiss the claim or strike out the defence depending on whether the plaintiff or defendant is in default.

[21] Mr Van Rensburg on behalf of the applicants conceded during oral argument that the rule 35(3) notices issued herein are incorrectly worded and not in accordance with the rule. The same applies to the orders sought. However, he submitted that the rule 35(3) notices required an answer under oath to which the Landbank failed to respond. He also submitted that in the event of a dismissal of the applications, the applicants should not be penalised with costs. Instead of filing affidavits in response to the rule 35(3) notices, the Landbank did not respond thereto and also not to the letters of demand which followed these notices. Instead, it not only decided to oppose the applications on the merits, but eventually provided answers under oath which should have been provided in response to the rule 35(3) notices.

[22] Mr Janse van Rensburg submitted that the present matters are on all fours with the facts in *Trakman N.O and Others v The Master of High Court of South Africa, Johannesburg and Others (Trakman)*[6]. In *Trakman* the Master of the High Court accepted the validity of the Landbank's claim filed against a company in liquidation. The joint liquidators of the insolvent company sought a review of the Master's decision in accordance with s 151 of the Insolvency Act 24 of 1936.[7] Dippenaar J, who delivered the judgment on review, set aside the Master's decision and expunged the Landbank's claim. In that case the Landbank relied *inter alia* on a sale agreement between it and

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[6] (2020/12432) [2021] ZAGPJHC 168 (21 May 2021).
[7] The section must be read with s 399 of the Companies Act 61 of 1973 and item 9 of schedule 5 of the Companies Act 71 of 2008.

GroCap as well as a cession of book debts. The sale agreement did not form part of the claim documents lodged with the Master. As in this case, the Landbank also relied on a document styled 'recordal', but the sale agreement was omitted on the basis that it contained confidential information that the bank did not want to disclose to third parties. The court *inter alia* held as follows[8]:

'. . . For reasons already provided, the mere *ipse dixit* of Land Bank and Grocap is insufficient to establish Land Bank's locus standi as creditor or the sale of the Trademar debt to Land Bank. A proper consideration of all the underpinning agreements is required to clarify what the agreements achieved, rather than simply accepting what the parties thought they achieved. The provision of the sale agreement is also insufficient to reach this conclusion, absent consideration of the "storage media", which evidences whether the Trademar debt is an "*A sale book debt*" in terms of the sale agreement.'

The court finally concluded that the Landbank did not provide all documents necessary to substantiate its claim.

[23] The Landbank unsuccessfully applied for leave to appeal whereupon it applied to the Supreme Court of Appeal for leave to appeal which application was also dismissed. Thereafter it applied in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 for special leave to the President of the Supreme Court of Appeal who held that there were no exceptional circumstances warranting a reconsideration or variation of the decision. Consequently, leave to appeal was refused.

[24] Mr Janse van Rensburg submitted that this court does not have any discretion, but to follow the *Trakman* judgment. I do not agree. The *Trakman* judgment is totally distinguishable from the facts *in casu*. I am not adjudicating the Landbank's claims in order to decide whether judgment should be granted or not. That will be the prerogative of the trial court. Although the Landbank only relied on a recordal which is annexed as POC 4 to the particulars of claim, the first four documents of the discovery affidavit referred to above are the precise documents that the Landbank will rely upon at the trials as is apparent from the recordal.

[25] If the applicants believed that the particulars of claim did not comply with the provisions of rule 18 insofar as the written contracts were not attached thereto, they could and should have brought an application in terms of rule 30 which they failed to do.[9] Obviously, insofar as it might have been their case that the Landbank failed to

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[8] *Ibid* para 43.
[9] See rule 18(12).

disclose causes of action, they should have excepted in terms of rule 23 which they also failed to do.

[26] Mr Tsangarakis on behalf of the Landbank referred me to an unreported judgment by Reinders J in *The Land and Agricultural Development Bank of South Africa v Casparus Johannes Rynhardus Cilliers.*[10] In that case the Landbank successfully applied for an order perfecting it notarial bonds. The Landbank also relied on a recordal similar to the one *in casu*. The respondent's submission that the Landbank did not have *locus standi* to enforce the notarial bonds was dismissed. Although I agree with the learned judge's approach, it is not necessary for adjudication of this application to say much more.

[27] Unlike as indicated in *Trakman*, this application does not concern so-called 'storage media' or spreadsheets. If such documents appear to be important and/or relevant at the trials in order for Landbank to prove its claims, and these have not been discovered, the Landbank shall be precluded from using these documents, unless the court on good cause allows otherwise. Failure to prove relevant documents may lead to the dismissal of its claims. These considerations are totally irrelevant for purposes of adjudicating the present applications. The validity of the sale and service level agreements and/or the cession agreements is not a bone of contention in these applications. It will eventually be the task of the trial court to make a finding in this regard.

[28] Mr Tsangarakis submitted that the applicants' applications as presented to the court are fatally flawed insofar as the Landbank is compelled in terms thereof to make available additional documents. He submitted that the plaintiff is not afforded an opportunity to refuse to make further discovery of the documents sought on any of the grounds which are available to it in law. It is debatable whether the applications are fatally flawed. In any event, the Landbank could have proceeded in terms of rule 30 relating to irregular proceedings which it failed to do.

[29] A party is not entitled, generally speaking, to go behind the other party's discovery affidavit. The same applies *in casu*. I do not intend to deal with each and every document and/or documents required in paragraphs 1 – 6 of the rule 35(3)

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[10] 4201/2019 (delivered on 19 December 2019).

notice. I am satisfied that the applicants embarked upon a fishing expedition, but in any event, the Landbank has fully and comprehensively and to my satisfaction dealt with all six paragraphs in its answering affidavits.[11] In conclusion, I am satisfied that the applicants' applications should be dismissed.

Costs

[30] I accept that the applicants' rule 35(3) notices are not worded correctly and must be regarded as irregular. Consequently, the relief sought in the applications are not in line with the relief afforded in rule 35(7). However, insofar as the adjudication of costs is concerned, I consider the following in exercising my discretion:

a. the Landbank's attorneys bluntly ignored the rule 35(3) notices as well as the letters of demand: they could and/or should have pointed out non-compliance with the rules of court and/or embarked upon rule 30 procedure which they did not do;

b. instead of merely responding to the rule 35(3) notice in answering the present applications, the Landbank vehemently opposed the applications on the merits, but deemed it necessary to eventually respond to the rule 35(3) notices;

c. Mr Janse van Rensburg submitted that if the Landbank had not elected to present a full blown opposition on the merits, the applications might not have been dealt with on an opposed basis, causing unnecessary extra costs, or put otherwise, if the Landbank's response now presented to the court was filed in response to the rule 35(3) notices, the applications would not have been issued;

d. Mr Janse van Rensburg's submissions were duly considered, but I cannot agree therewith, bearing in mind the applicants' stance in the replying affidavits as well as the submissions made in his heads of argument and during oral argument. There can be no doubt that the applicants would insist on the same relief, even if the Landbank responded earlier.

[31] In my view it would be fair to the parties to split the costs. I shall accept that the Landbank's failure to respond should be held against it. Mr Tsangarakis submitted, in an alternative argument that the applicants should at best for them, only be entitled to the costs of the application until receipt of the answering affidavits on 23 April 2024. This would obviously include the costs incurred on 4 April 2024 that stood over for later adjudication. Instead of accepting the response and/or enrolling the matter for

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[11] Answering Affidavit paras 49 – 54.

argument on costs only, it proceeded with the filing of replying affidavits in an attempt to justify their entitlement on the merits. Therefore, so he argued, the costs incurred after receipt of the answering affidavit and consideration thereof shall be for the account of the applicants. I agree with Mr Tsangarakis' alternative submissions.

[32] Mr Tsangarakis asked for costs on an attorney and client scale. I am not prepared to grant such costs as the Landbank is entitled to costs on the usual scale, to wit party and party costs only.

Order

[33] Consequently, the following orders are issued:

In application 2683/2020:

1. The application is dismissed.
2. The Land and Agricultural Development Bank of South Africa, the respondent in this application, shall pay the applicant's costs until 23 April 2024, to wit the date on which the answering affidavit was served.
3. The applicant shall pay the respondent's costs in opposing the application, such costs to be calculated from 24 April 2024 onwards, including the costs of counsel on scale B of rule 69, read with rule 67A.

In application 2686/2020:

1. The application is dismissed.
2. The Land and Agricultural Development Bank of South Africa, the respondent in this application, shall pay the applicants' costs until 23 April 2024, to wit the date on which the answering affidavit was served.
3. The applicants shall pay the respondent's costs in opposing the application, such costs to be calculated from 24 April 2024 onwards, including the costs of counsel on scale B of rule 69, read with rule 67A.

[redacted]

JP DAFFUE J

[redacted]

On behalf of the Applicants in both applications: Adv FG Janse van Rensburg
Instructed by: Hendré Conradie Inc
BLOEMFONTEIN

On behalf of the Respondent in both applications: Adv S Tsangarakis
Instructed by: EG Cooper Majiedt Inc
BLOEMFONTEIN