

SOUTH AFRICA / JUDGMENT

Arijs v Firstrand Bank Ltd (39338/2014) [2018] ZAGPJHC 402 (29 May 2018)

[2018] ZAGPJHC 402

COURT

South Gauteng High Court, Johannesburg

BEFORE

SM Wentzel

CASE / FILE NUMBER

39338/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST

TO OTHER JUDGES

(3)

REVISED.

Case

number: 39338/2014

29/5/2018

In

the matter between:

FREDERICK

ARIJS

APPLICANT

and

FIRSTRAND

BANK LTD

RESPONDENT

In

re :
FIRST
RAND BANK
LTD
PLAINTIFF
FREDERIK
ARIJS
DEFENDANT

JUDGMENT

WENTZEL, AJ:

1. This is an application to compel the discovery of certain documents in terms of Rule 35(7), alleged to be relevant in an action instituted by the respondent/ plaintiff, Rand Merchant Bank (“RMB”), a division of Firststrand Bank Ltd, based upon a suretyship signed by the applicant/defendant, Frederick Arijs (“Arijs”) for the indebtedness owed by Shock Proof Investments(Pty) Ltd (“SPI”),now in liquidation, arising from moneys lent and advanced to it by RMB.
2. For convenience, I will refer to the parties in the abbreviated manner referred to above.
3. Rule 35(3) provides:
“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, he or she may give notice to the latter requiring him or her to make the same available for inspection in accordance with rule 35(6), or to state on oath within ten days that such documents are not in his or her possession, in which event he or her must state their whereabouts, if known to him or her.”
4. The documents required must be properly identified since the sub-rule envisages a demand for the production of specific documents

(Richardson’s Woolwasheries Ltd v Minister of Agriculture 1971 4 SA 62 (E); Tractor & Excavator Spares (Pty) Ltd v Groenedijk 1976 4 SA 359 (T) 363).
5. It is trite that the test as to whether a document should be discovered is relevance, having regard to the issues as defined in the pleadings. It is thus, incumbent upon Arijs to show how the documents requested serve to advance his own case or damage that of the plaintiff. He has made it plain that the documents required are sought because it is averred that they are relevant to his defence to the action against him based upon the suretyship signed by him.
6. However, relevance is a matter for the court, having regard to the pleadings and does not depend upon the applicant’s own views on the matter (Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd 2005 1 SA 398 (C) 404).

7. In addition, relevance is to be determined from the pleadings without regard to extraneous evidence (*SwissboroughDiamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T)).
8. It is of some importance that the Rule refers, not to documents that are relevant, but to documents that “may” be relevant to the action (*Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 565 B). This is determined, having regard to the issues, taken at face value, as defined in the pleadings.
9. I say this because a somewhat novel defence has been raised in the pleadings. It is that Arijs, as surety, has been prejudiced by the breach by another entity, RMB Property Holdco 1 (Pty) Ltd (“RMB Holdco”), of an entirely extraneous agreement, to which neither RMB, the principal debtor, SPI or the surety, Arijs, was party, which it is averred entitles Arijs to be released from his suretyship obligations (*Absa Bank Ltd v Davidson* 2000(1) SA 1117 (SCA) at para [19]).
10. This, expressed in these terms, would appear to be a rather liberal application of the requirements for the defence of prejudice that require that the plaintiff has breached “some or other legal duty or obligation” to the surety’s detriment.
11. It has hitherto been found that the breach envisaged, is that of obligations that arise either from the suretyship agreement or the agreement/s between the plaintiff and the principal debtor, upon which the principal debt secured by the suretyship is based. (*Absa Bank Ltd v Davidson* 2000(1) SA 1117 (SCA) at para [19]. *Bock v Dubororo Investments (Pty) Ltd* 2004(2) SA 241 (SCA)).
12. Alive to the fact that there was no breach of these agreements, Arijs has sought in his plea to place reliance on the breach of a third agreement, namely the shareholders agreement between RMB Holdco, Gemini Moon Trading 467 (Pty) Ltd (“Gemini”) and Robberg Wildside Development (Pty) Ltd (“Robberg”) in respect of the shares in SPI, which he avers was breached and forms part of the composite suite of agreements concluded between RMB, Arijs and SPI, namely the loan agreement and the suretyship agreement. This agreement entitled RMB Holdco to 50% of the shares in SPI and required it to secure funding for SPI to enable it to rezone and develop property in the Plettenbergbay area owned by it. In essence, it is argued that RMB, not only agreed to finance the development, but entered into a joint venture, through RMB Holdco, with the other shareholders of SPI to pursue the development of SPI’s property. Arijs’ interest in this joint venture was through his shareholding in Robberg.
13. RMB Holdco’s averred breach of this agreement, in failing to pursue the rezoning and secure the required funding for the development,

forms the basis of a separate action instituted by the other shareholders against it for damages, which they unsuccessfully sought

to have consolidated with the present action.

14. The difficulty that arises in the present action, is that the averred breach of the shareholders agreement is that of RMB Holdco and not of RMB, which was not a party to the shareholders agreement. Alive to this further difficulty, the defendant seeks to have the Court pierce the corporate veil between RMB and RMB Holdco, averring that RMB was the “directing mind” and “manifesting agency” in relation to all “juristic acts, rights and obligations of [RMB Holdco]”.
15. In this respect, reliance is placed on the dictum in *Amlin (SA) (Pty) Ltd v Van Kooij* 2008(2) SA 558 (C) at paragraph [13]:

“The leading cases concerning piercing the corporate veil on the basis of agency are the Supreme Court of Canada’s decisions in Toronto (City) v Famous Players Canadian Corp (1936) 2 D.L.R. 129 and Aluminium Co of Canada v Toronto (City) (1944) 3 D.L.R. 609. In these cases the Court justified piercing the veil on the basis that the parent effectively controlled the policies and the operations of its subsidiaries. In Aluminium Co supra the Judge stated that veil may be pierced where “it can be said that the (subsidiary) company is in fact the puppet of the (parent); when the directing mind and will of the (parent)

reaches into and through the corporate façade of the (subsidiary) and becomes, itself, the manifesting agency”

16. Similar averments were made in the shareholders’ action, namely that the plaintiff in this action, RMB, was de facto the contracting party to the shareholders’ agreement and exercised de facto management and control over SPI. This, it is averred, was not only because RMB Holdco was entitled to appoint two of the four directors

to the Board of SPI and had the casting vote, but because RMB effectively appointed those directors who were all people employed by RMB. In addition, reference is made to an e-mail from Ruth Boake of RMB to Theunis Bosch (“Bosch”), also of RMB, enquiring as to “which of the RMB’s subsidiaries will own the 50% shareholding” in SPI. Bosch was then appointed as a director of SPI.

17. Nicholls J dismissed the consolidation application as no legal obligation resting on RMB was indentified in either the loan agreement or the suretyship; the conduct complained of was rather that of RMB Holdco under the shareholders agreement. She rejected that the alleged suite of agreements formed part of a composite agreement and stated that “all that Firstrand is required to show in the suretyship action is that Arijs bound himself in writing as surety for the obligations of the principal debtor who had failed to make payment. If there is a defence of prejudice, this can only be in respect of the conduct of Firstrand, not RMB Holdco”. She, thus, concluded that the issues in the suretyship action were distinct from the issues in the shareholders action. She also found that as RMB Holdco had invoked the

arbitration clause in the shareholder's agreement, were she to consolidate the action with the present action, that would effectively deprive RMB Holdco of its right to insist that its dispute be determined by way of arbitration to its prejudice. Nicholls J accordingly, refused the application for consolidation.

18. Leave to appeal this judgement was refused by Nicholls J and by the Supreme Court of Appeal. However, this was apparently not on the merits, but rather on the basis that Nicholls' judgment was interlocutory and not final in effect and accordingly, was not appealable.
19. With this background in mind, it is necessary to examine the basis upon which RMB has argued it is not obliged to produce the requested

documents. The grounds of objection are threefold: Firstly it is argued that the documents requested have not been adequately identified as required. Second, it is contended that the requested documents were only relevant to the shareholders' action, which has not been pursued by the shareholders, and bears no relevance to the current action. Third, it is argued that Nicholls' findings in the consolidation application that the averred composite agreement had not been established and/or was of no relevance to the current action were, on the principles of issue estoppel, binding on the Court in the present action, and served to preclude Arijs insisting on production of any documents allegedly required to enable him to establish any such composite agreement, or to establish grounds for piercing the corporate veils (four in all) between RMB and RMB Holdco. In this respect, reliance was placed upon the matter of *Prinsloo NO and Others v Goldex 15 (PTY) Ltd & Another* 2014 (5) SA 297 (SCA).

20. For the reasons that follow, I do not believe that this latter question is an issue that need be decided for present purposes.

THE ISSUES ON THE PLEADINGS

21. It is not correct that the documents requested only have relevance to the shareholders action. On the contrary, the requested documents, in so far as they are relevant to the case pleaded that the shareholders agreement is to be regarded as part and parcel of the loan and suretyship agreements, and that RMB should be regarded as the de facto party to the shareholder's agreement, are equally relevant to the current action as pleaded. Indeed, in her judgment, Nicholls

noted in paragraph [9] that "[t]he plea of Arijs in the suretyship case, mirrors the particulars of claim of the damages case."

22. The fact that the case as pleaded may have been rejected by Nicholls J, and thus, may be res judicata or subject to issue estoppel, or on any other basis not be good in law, is irrelevant to an application to compel discovery of documents that may be relevant to the issues as defined in the pleadings; the merit of the averments made in the plea, need not be established.

23. If the plaintiff contends that the issues raised do not constitute a valid defence in law, or have already been decided against the defendant, these are issues to be raised by way of exception, special plea (replication) or at the trial. If, by way of exception, the defence raised were found to have no basis in law and be excluded, so too would the relevance of the documents presently being sought be negated, and an application to compel discovery of such documents would be precluded.
24. However, as will be demonstrated, as the pleadings presently stand, and in the absence of the striking out of the defence raised by way of exception, or special plea of res judicata to be decided separately from the main action, the requested documents, in so far as they relate to the defence raised and are adequately identified, remain relevant to the issues raised and should be produced.
25. It is thus not necessary for me to consider the merit or otherwise of the defence raised, or whether it has effectively been decided by Nicholls against Arijs.

ISSUE ESTOPPEL

26. RMB relies upon the “findings” by Nicholls J in paragraph [14] and [17] of her judgment that:

“...the notion of the ‘composite agreement’ is unsustainable. By pre-supposing that RMB Holdco and RMB/Firststrand are one and the same entity, the applicants disregard separate corporate personalities. Significantly, it was not pleaded how and when and who represented the parties when they entered into the so-called composite agreement. The shareholders’ agreement and the loan agreement were entered into on different dates in 2009. The first and second addenda to the loan agreement were signed by Arijs in 2011 and 2012 respectively. Arijs signed consent as a surety in both the first and second addendums. In all these documents no reference is made to a ‘composite agreement’ or the inter-relation between the agreements;” and

“All Firststrand is required to show in the suretyship action is that Arijs bound himself in writing as surety for the obligations of the principal debtor who has failed to make payment. If there is a defence of prejudice, this can only be in respect of the conduct of Firststrand, not RMB Holdco.”

27. On the basis that the issues raised in the consolidation application and the current application are essentially the same, it is argued that they have been decided against Arijs and preclude him raising the defence as pleaded.
28. As I have said, whatever merit there may or may not be in such a contention is not an issue that is before me. Even if it had been

raised as a “special plea”, by way of replication, unless separation of that issue was sought and granted, requiring that it be disposed of before the remaining issues raised, the issues raised in the plea by Arijs would remain live issues and entitle Arijs to production of all documents he could establish were properly identified and were relevant thereto.

29. In any event, as I am told that leave to appeal Nicholls' judgment was refused by the Supreme Court of Appeal on the basis that it was interlocutory and not final in effect, it would not be binding on the Court in the current action.

THE DOCUMENTS REQUESTED

30. Although initially 23 items were requested in the Rule 35(3) notice, in the application to compel, these were reduced to 13 items, which have in the heads of argument filed, been whittled down to 5 items, namely those sought in paragraphs 5,8,9,10 and 11 of the notice.
31. These are all items which Arijs avers are relevant to his defence and which RMB avers are inadequately described and/or are solely relevant to the shareholders agreement and have no relevance to the current action.
32. As the relevance relied upon is limited to establishing the defence raised in the plea, the documents sought should be examined with regard to the issues therein raised, namely:
- 32.1. Whether the suite of agreements constituted a composite agreement such that a breach of the one could be regarded as a breach of the other, and in particular, a breach of the shareholders' agreement would constitute a breach of the loan agreement and/or the suretyship agreement for the purposes of establishing prejudice and entitling Arijs to be released from the suretyship agreement; and
- 32.2. Whether RMB exercised effective management and control over RMB Holdco, such that it could be regarded as "the directing mind" and "manifesting agency" of RMB Holdco, which was effectively its "puppet," so that, in substance it was RMB that was the party to the shareholders' agreement and RMB Holdco's breach thereof can be attributed to RMB in these proceedings.
33. RMB points out that RMB is not in the corporate chain of RMB Holdco and Holdco is not a subsidiary of RMB. However, irrespective of how many hoops and legal obstacles Arijs will need to establish this defence, these are issues that remain on the pleadings for purposes of discovery.
34. It is against these issues that the relevance of the documents sought in the Rule 35 (3) notice must be judged:
- 34.1. Item 5: All and any documentation in relation to the subscription for preference shares in RMB Property Holdco 1 (Pty) Ltd (RMB Holdco) by RMB Investments and Advisory (Pty) Ltd.
- 34.1.1. According to the organogram of the group structure of Firststrand Limited, it appears that Firststrand Bank Limited is a wholly owned subsidiary of Firststrand Limited, as is Firststrand Investment Holdings Limited. Firststrand Bank Limited, in turn, owns 100% of the issued share capital in RMB. RMB Holdco is ultimately connected to the holding company, Firststrand Limited, through its other subsidiary, First- rand Investment Holdings Limited, which owns all the shares in RMB Investment and Advisory (Pty) Ltd, which in turn owns 92.5 % of the shares in RMB Holdco.

34.1.2. As these documents are properly identified and are relevant to establishing the link between RMB Holdco and RMB Investment and Advisory (Pty) Ltd and, ultimately, Firststrand Limited through Firststrand Investment Holdings Limited, which is then linked to RMB through Firststrand Bank Limited, they may be relevant to the issue whether RMB was de facto in control of and the effective mind of RMB Holdco and whether the corporate veil of all of these intervening companies should be pierced.

34.1.3. Again, it is repeated that this is said without making any finding with regard to the merits of such an assertion.

34.2. Item 8 : Reports, site meeting minutes, director's meetings and board meetings which were disclosed by RMB Holdco to Firststrand Bank Limited, RMB or RMB Holdco 1 (Pty) Ltd (being distinct from RMB Holdco) as well as minutes of the meetings where these were discussed and decisions were made concerning the funding and approval of the development of the property owned by SPI and its rezoning, as well as RMB Holdco's decision not to pursue the development. In addition documentation is sought regarding RMB's calling up of the loan facility granted to SPI and its securitisation of the debt of SPI. (my summation)

34.2.1. Arijs avers that this documentation relates to the funding and approval of the development of SPI, the zoning thereof, the exit of RMB from the development, the calling up of the facility by RMB, which it is avers are relevant to his defence in paragraph 13.2 of the plea. It is pointed out the RMB does not dispute the existence of such documentation.

34.2.2. RMB has declined to produce such documentation because Arijs has not disputed the loan agreement between RMB and SPI and has not relied on any breach thereof.

34.2.3. However, no matter how fanciful, the defence is that it was a duty of RMB, as the effective party to the shareholders' agreement, to ensure that finance for the development was secured from itself, wearing a different hat, as it were. Arijs' case is that by failing to provide further finance, discouraging other banks to provide finance and in calling up the loans, RMB breached the shareholders' agreement, of which, the loan agreement and the suretyship were a composite part.

34.2.4. As these documents may serve to establish that the decisions concerning the development were essentially made by RMB and not RMB Holdco, and the breach by RMB Holdco of the shareholders' agreement, essentially in pulling the plug on the development and the finance it had promised, they may be relevant and should be discovered. Arijs accepts, however, that the debt was not securitised and thus, that no such documentation exists.

34.3. Item 9: Any documentation and supporting documentation or minutes by Firststrand Bank Ltd, RMB or RMB Holdco as held in their Corporate or Property or Investment Credit Committee, Debt Restructuring Committee, Provisioning Committee, Investment or Recoveries meeting in respect of where discussions took place or decisions were made to invest in the development and acquire shares in SPI, to amend, grant extensions and change the facility granted to SPI, to call up that facility and seek to liquidate SPI and impair the exposure of SPI in the books of RMB

Holdco.

34.3.1. These documents are essentially sought on the same basis as those in item 8. As these documents relate to the decision of RMB to initially participate in and finance the development, and then to withdraw from the joint venture and call up the facility, they are relevant to the averred breach by RMB as set out in paragraph 13.2 of the plea and may be relevant and should be produced.

34.4. Item 10: All and any documentation and supporting documentation in respect of the opening of SPI's account with RMB on 1 July 2008 as set out in item 4 of RMB's discovery affidavit.

34.5. These are averred to relate to the reason for, and manner in which the debt of SPI came into existence. Their production is refused as the loan agreement and the debt are not disputed and they are thus, not relevant.

34.6. It was argued that as they are referred to in the document discovered by RMB, Arijs is entitled to same.

34.7. Although these documents are not referred to in the documents referred to in item 4 of RMB's discovery and the reason for the indebtedness of SPI is common cause- to acquire financing to develop its property- in so far as the supporting documentation surrounding the opening of an account with RMB by SPI may go to show that the finance was provided on condition, not only that portion of the indebtedness be secured by way of a suretyship to be provided by Arijs, but also that a subsidiary in the Firststrand Group hold 50% of the shares in SPI, exercise control over its affairs and participate in the development, such documentation may be relevant.

34.8. Item 11: All and any documentation and supporting documentation in respect of the Capital Receipt "ACBS Conversion-Account Closure" dated 23 May 2014 under reference no 33208957 as set out in item 4 of RMB's discovery affidavit.

34.8.1. It is averred that these documents are referred to in other documents discovered and relate to the decision taken to close SPI's account and should be discovered.

34.8.2. The documentation discovered can be inspected. No further documentation is referred to. It would also appear to be common cause that the account was closed. However, in so far as it is possible that such documentation may establish that the reasons for the closure and accordingly the averred breach of the shareholders' agreement, it may be relevant and should be disclosed.

DISCRETION

35. RMB avers that, even if it is found that the documentation may be relevant, the Court has a discretion to refuse to Order production of the documents sought where this would amount to an abuse of its process (Venmop 275 (Pty) Ltd and another v Cleverlad Projects (Pty) Ltd and another 2016 (1) SA 78 (GJ)).

36. Although I suspect that perhaps the application to compel discovery was launched to derail the hearing set down in January 2017, which is supported by the fact that the application was not proceeded with for a year, and despite my reservations as to the merit of the defence raised, I am not satisfied that the the documents sought constitute a fishing expedition to establish a defence, or that the contentions raised are so utterly baseless to constitute none other than a far-fetched attempt to conjure up a defence and thus, evade payment. Accordingly, I cannot find that the defence raised, or the request for documentation, constitutes an abuse of the process of Court.
37. In coming to this conclusion, I have been persuaded somewhat by the e-mail referred to above concerning which subsidiary should

participate in the development to be pursued by SPI indicating that RMB provided the finance on the condition that an entity in the Firststrand Group control, manage and participate in the development as a joint venture partner.

38. However, because the documents initially demanded have been substantially reduced and further reduced in the heads of argument filed, I believe that RMB was justified in its opposition to the application and that accordingly, it is appropriate that each party bear their own costs.

39. In the circumstances it is Ordered that:

39.1. the documents listed in items 5,8,9,10 and 11 of the applicant's Rule 35(3) notice be produced within 10 days of receipt of this Order;

39.2. each party bear their own costs.

SM WENTZEL, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Counsel for the applicant: JD De Vries (associate member of the Cape Bar, George)

Counsel for the respondent: JE Smit instructed by Edward Nathan Sonnenbergs Inc

Date of hearing: Week of 29 January 2018

Date of Judgment:

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