

SOUTH AFRICA / JUDGMENT

Bongata Trading 537 CC and Others v Firststrand Bank Ltd; Jack Tafelgerei CC and Others v Firststrand Bank Limited (4202/2019; 4340/2019) [2021] ZAFSHC 43 (25 February 2021)

[2021] ZAFSHC 43**COURT**

Free State High Court, Bloemfontein

BEFORE

DAFFUE

CASE / FILE NUMBER

4202/2019; 4340/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN****THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN****Reportable:**NO
Of
Interest to other Judges: NO
Circulate**to Magistrates:**NO
Case
number: 4202/2019
In**the matter between:**BONGATA
TRADING 537 CC
ANDRE
BAZZETT JANSEN KNIPE
JOHN
DOUGLAS JANSEN KNIPE
SMOKEY
MOUNTAIN TRADING 647 (Pty) Ltd
JACK
TAFELGEREI CC
JANELLE
DELPOR N.O
ANDRIES

JOHANNES DE JAGER
THABO
DANIEL MOAHLOLI N.O.
(in
their capacities as trustees of the
ANDRE
EIENDOMSTRUST (IT 1434/99))
and
FIRSTRAND
BANK LTD
1st
Applicant
2nd
Applicant
3rd
Applicant
4th
Applicant
5th
Applicant
6th
Applicant
7th
Applicant
8th
Applicant
Respondent
Case number: 4340/2019
and

In the matter between:

JACK
TAFELGEREI CC
ANDRE
BAZZETT JANSEN KNIPE
JANELLE
DELPORT N.O.
ANDRIES
DE JAGER N.O.
THABO
DANIEL MOAHLOLI N.O.
(in
their capacities as trustees of the
ANDRE
EIENDOMSTRUST (IT 1434/99))
and
FIRSTRAND
BANK LIMITED
1st
Applicant
2nd
Applicant

3rd
Applicant
4th
Applicant
5th
Applicant
Respondent

CORAM: DAFFUE, J
HEARD

ON: 25 FEBRUARY 2021

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 25 FEBRUARY 2021

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII.

The date and time for hand-down is deemed to be 12:00 on 25 FEBRUARY 2021.

I

INTRODUCTION

- [1] I have to adjudicate two applications in terms of Rule 35(7) of the Uniform Rules of Court brought by certain applicants following upon two actions instituted by a commercial bank as plaintiff against them as defendants under case numbers 4202/2019 and 4340/2019 respectively.
- [2] Although the same counsel appeared in both applications, they having drafted separate sets of heads of argument, one judgment will be delivered in respect of both applications as the applicable legal principles are the same whilst the facts are virtually the same as will be indicated below.

II THE PARTIES

- [3] I do not intend to set out the particulars of all the parties in any detail, save to say that in application 4202/2019 the 1st applicant is Bongata Trading 537 CC, the 4th applicant is Smokey Mountain Trading 674 (Pty) Ltd and the 5th Applicant is Jack Tafelgerei CC. Messrs ABJ Knipe and JDJ Knipe in their personal capacities are cited as 2nd and 3rd applicants respectively and the three trustees of the Andre Eiendomstrust are cited in their representative capacities as the 6th, 7th and 8th applicants. In the action they are cited as 1st to 8th defendants in the same order as in this application.

- [4] The applicants in 4340/2019 are Jack Tafelgerei CC, Mr ABJ Knipe and the three trustees of the Andre Eiendomstrust. They are also cited as defendants in the same order as herein. These applicants feature in the first application as well.
- [5] Adv DC Hattingh appeared for the applicants in both applications on instructions of Horn & Van Rensburg Attorneys, Bloemfontein.
- [6] The respondent in the two applications is First Rand Bank Ltd, represented by Adv WJ Groenewald, duly instructed by Symington & de Kok Attorneys, Bloemfontein.
- [7] The respondent instituted action as plaintiff against the various applicants cited as defendants in the two actions, relying on two causes of action, to wit monies lent and advanced in respect of the principal debtors and deeds of suretyship in respect of the sureties. I shall refer to the parties as cited in this application, save when it is deemed necessary to refer to a particular party by name.

III THE RELIEF SOUGHT

- [8] As mentioned, the applicants seek similar relief in terms of Rule 35(7) in both applications. I quote from application 4202/2019:

“1. That the Respondent be ordered to, within 10 (TEN) days after service of this Court order, make available to the Applicants the documentation requested by Applicants in paragraphs 1, 2, 4 and 5 of its Notice in terms of Rule 35(14) dated 20 February 2020.

2. That, if the Respondent does not comply with the order as set out in paragraph 1 hereof, that the Respondent's (Plaintiff's) claim under case number 4202/2019 in the above Honourable Court, be dismissed with costs.
3. That the Respondent be ordered to pay the costs of this application.”
- [9] The relief claimed in application 4340/2019 is exactly the same, save that the documents mentioned in paragraphs 1 and 3 of the notice in terms of Rule 35(14) are required. I shall deal with the particular documents below.

IV THE OPPOSITION

- [10] Respondent opposes the application, raising two pertinent points, to wit:

10.1 the applicants' application is fatally defective in so far as it was brought in accordance with the provisions of Rule 35(7) instead of Rule 30A;

10.2 more importantly, the relief sought by the applicants does not fall within the ambit of Rule 35(14) in so far as no evidence was presented that the documents are relevant to a reasonably anticipated issue in the main actions which are also essential, not merely useful, in order to enable them to plead to respondent's declarations in both actions.

V THE LITIGATION THUS FAR

- [11] The respondent issued simple summonses in both matters as long ago as September 2019.
- [12] The respondent filed its declaration in case no 4202/2019 on 6 December 2019 and in case no 4340/2019 on 13 January
2020. In case no 4202/2019 respondent relies on a written facility agreement entered into between it and Bongata Trading 537 CC in terms whereof an amount of R200 000.00 was lent and advanced. The outstanding amount which is now claimed is R160 839.90 together with interest and costs. Messrs ABJ Knipe and JDJ Knipe, Smokey Mountain Trading 674 (Pty) Ltd and Jack Tafelgerei CC as well as the three trustees of the Andre Eiendomstrust are held liable as sureties based on deeds of suretyship allegedly entered into.
- [13] In case no 4340/2019 the respondent relies on a written facility agreement between it and Jack Tafelgerei CC in terms whereof the amount of R1.3 m was lent and advanced. The amount claimed, which includes interest, is R1 700 802.19 plus further interest. The respondent also seeks an order in terms whereof the principal debtor's immovable property is declared especially executable. Mr Knipe is held liable as limited surety for payment of R1,3 m and the trustees are held liable as sureties for the full amount of the claim.
- [14] The applicants failed to file their pleas in the two matters.
- [15] Applicants filed notices in terms of rule 35(14) on 20 February 2020, requesting certain documentation, the following which are still required:

In case no 4202/2019

1. the resolution of Bongata, authorising JDJ Knipe to enter into the written facility agreement;
2. detailed statements of account from 1 September 2018 to date of summons, notwithstanding the fact that the certificate of balance was attached;
3. the resolution by Jack Tafelgerei, authorising ABJ Knipe to enter into a deed of suretyship;
4. the resolution of the trustees of Andre Eiendomstrust, authorising ABJ Knipe to enter into a deed of suretyship.

In case no 4340/2019

1. the resolution of Jack Tafelgerei CC, authorising ABJ Knipe to enter into the written facility agreement.
 2. the resolution of Andre Eiendomstrust, authorising ABJ Knipe to enter into a deed of suretyship.
- [16] The respondent replied to the said notices on 6 May 2020, refusing in essence to provide copies of the documents required.

[17] On 19 May 2020 applications in terms of Rule 35(7) were filed in respect of both matters, the founding affidavit having been deposed to by the attorney for the applicants wherein he did not provide any facts, but merely stated the following[1]:

“The applicants are severely prejudiced because of Respondent’s refusal to duly comply with the Applicant’s Notice in terms of Rule 35(14). Applicants need the requested documents listed in its Rule 35(14) (sic) to properly enter a Plea.”

This is a legal conclusion relying on facts not pleaded whilst it would have been expected of the deponent to state the relevant primary

facts.

[18] The respondent filed its answering affidavits on 23 June 2020 to which the applicants replied on 2 July 2020.

VI THE RELEVANT RULES OF COURT

[19] The following rules have been referred to by the parties and are relevant in casu:

19.1 Rule 35(7) reads as follows:

“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 compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.” (Emphasis added)

19.2 Rule 35(14) reads as follows:

“After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.” (Emphasis added)

19.3 Rule 30A reads as follows:

“(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—

- (a) that such rule, notice, request, order or direction be complied with; or
 - (b) that the claim or defence be struck out.
- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.”

VII SOME LEGAL PRINCIPLES

[20] In *Business Partners Ltd v Trustees Riaan Botes Family Trust and Another*[2] Schippers J (as he then was) held that an application for summary judgment should not be deferred to enable the defendant to obtain

documents which might support a bona fide defence. The same principle applies to the filing of pleas.

[21] In *ABSA Bank Ltd v The Farm Klippan 490 CC*[3] Epstein AJ stated the following:[4]

“Rule 30A has an important place in the Rules, in that, as I have stated, it provides a remedy where none exists elsewhere. However, it could not have been intended by the drafters of Rule 30A to jettison the existing and effective remedies provided in the specific remedy Rules. If it was so intended, it would render such remedies nugatory. The remedies in the specific remedy Rules have always been effective and there is no reason to denude them of their efficacy.”

[22] In *MV Cape Providence and Another v Nassua Maritime Holdings Designated Activity Company*[5] the court considered the effect of non-compliance with rule 35(12) which provides for a negative sanction in so far as a party that fails to comply with a notice by the opposing party, may not use a particular document, except with leave of the court. The sub-rule reads as follows:

“Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.” (Emphasis added)

[23] Consequently the court held as follows in *MV Cape Providence*:[6]

“It is trite that where the party seeking the production of documents in terms of Rule 35(12) and where such party is not satisfied with the negative sanction provided for in the Rule in the event of non-compliance, such party may resort to Rule 30A for positive relief. Documents that can be sought in terms of Rule 35(12) are not only documents that are referred to in the pleadings or affidavit

themselves, but also document referred to in annexures to such pleadings or affidavits. In this regard, see Universal Studios v Movie Time 1983 (4) 736 (D) at 750 D where Booysen J said the following ...”

[24] Rule 22(2) reads as follows:

“The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.”

VIII EVALUATION OF THE SUBMISSIONS

- [25] Rule 35(7) is clear. It provides a remedy for non-compliance with the “aforegoing” sub-rules, to wit, sub-rules 1 to 6. It is not a remedy in order to obtain relief for non-compliance with rule 35(14). In so far as Ms Hattingh placed much emphasis on the judgment in *MV Cape Providence and Another v Nassua Maritime Holdings Designated Activity Company*,^[7] that judgment must be seen in proper perspective. It dealt with rule 35(12) which provides for a negative sanction.
- [26] The point is taken by respondent that applicants’ applications are fatally defective for relying on rule 35(7) instead of rule 30A. It must be borne in mind that the relief provided for in both rules are in essence the same, ie to seek compliance, failing which the claim or defence as the case may be, should be struck out.
- [27] It is accepted that rule 30A is a general remedy which should be applied if no other remedy exists. It is evident that rule 35(14) does not contain its own remedy and that no reliance can be placed on rule 35(7) for the reasons stated above. The applicants failed to utilise rule 30A when they should have done so and consequently, the respondent’s submission that the applications are fatally defective must be accepted as correct if a purely technical approach is adopted. However, the rules are made for the court and not the court for the rules. If applicants could have brought their matters within the ambit of rule 35(14), I would have been inclined to grant appropriate relief. I reiterate that the relief sought in both rules, rule 35(7) and rule 30A is in essence the same.
- [28] It has never been the law that a financial institution claiming the amount due in respect of a monies lent and advanced shall attach hundreds or even thousands of pages containing statements of account rendered over the period of the loan. As in this case, the financial institution is usually entitled to rely on a certificate of balance provided for in the agreement between the parties. The written facility agreements and various deeds of suretyship are attached to the respondent’s pleadings. Respondent had to do no more than comply with the requirements of rule 18. The allegations in the declaration have been pleaded with sufficient particularity to enable applicants to plead thereto.
- [29] In casu the two close corporations, the company as well as the trustees of the trust should know whether they resolved to authorise a third party to enter into agreements on their behalf with respondent; therefore, it would be an obvious matter for the purpose of pleading. The validity of the agreements may be attacked based on lack of authority of the signatory, or if it is really a case that the facts are not known, this may be pleaded and respondent called upon to prove its case without fear that the plea might be held to be excipiable. Such allegations in a plea would be in line with the provisions of rule 22. The documentation required are neither necessary, nor essential in order to enable applicants to plead.

- [30] Applicants could not have utilise the procedure they have embarked upon to defer the filing of their pleas.[8] They should plead now and if it appears later, once discovery has been made, that it is necessary to amend the pleas, they would be within their rights to do that.[9]
- [31] There is no acceptable reason why relief should be granted to the applicants. The required documents are not relevant to a reasonably anticipated issue as provided for in rule 35(14), and most definitively not essential for the purposes of pleading.
- [32] Once the pleadings have been closed, the process of discovery in accordance with rule 35 should be followed and if no resolutions are discovered by respondent, the applicants will be well within their rights to make use of notice in terms of rule 35(3), and if there is no compliance therewith, to approach the court in accordance with rule 35(7).
- [33] The application must be dismissed. There is no reason why respondent as the successful party shall not be awarded costs. In case no 4202/2019 the amount claimed is less than R200 000.00 and thus falls within the magistrate's court's jurisdiction. If that was the only case before me, I would not be prepared to grant costs on the high court scale. However, the claim in the other matter is far in excess of R1 m. The two matters need to be heard together due to the relationship between the applicants and the proper forum is the high court.

IX

ORDERS

- [34] The following order is issued in both applications, to wit application numbers 4202/2019 and 4340/2019:

1. The application is dismissed with costs.

J P DAFFUE, J

On behalf of Applicants : Adv DC Hattingh

Instructed by

: Horn & Van Rensburg

Bloemfontein

On behalf of the Respondent : Adv WJ Groenewald

Instructed by

Symington & De Kok

- [1] Para 6 of the founding affidavit

- [2] 2013 (5) SA 514 (WCC); and see Potpale Investments v Mkhize 2016 (5) SA 96 (KZP) at paras 20 & 23

- [3] 2000 (2) SA 211 (W)
 - [4] At 214 I - J
 - [5] (AC5/2020) [2020] ZAWCHC 124 (11 September 2020)
 - [6] Ibid para 10
 - [7] (AC5/2020) [2020] ZAWCHC 124 (11 September 2020) at para 10
 - [8] Potpale Investments v Mkhize – loc cit fn 2 supra
 - [9] Ingledew v Financial Services Board [2003] ZACC 8; 2003 (4) SA 584 (CC) paras 15 & 33
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2021/43.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bongata-trading-537-cc-and-others-v-firststrand-unknown-topic-afshc-2021>

Prepared on 13 October 2026 · Esheria