

SOUTH AFRICA / JUDGMENT

# Doola v Firtstrand Bank Ltd trading inter alia as RNB Private Bank and as FNB (2020/13723) [2022] ZAGPJHC 837 (27 October 2022)

[2022] ZAGPJHC 837

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

Moorcroft

## CASE / FILE NUMBER

2020/13723

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## Source record

IN

THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG  
DIVISION, JOHANNESBURG  
CASE  
NO: 2020/13723

## REPORTABLE:

NO  
OF  
INTEREST TO OTHER JUDGES: NO  
27/10/2022  
In

## the matter between:

DOOLA,  
RIYADH  
Applicant  
And  
FIRST  
RAND BANK LTD trading inter alia as RMB PRIVATE  
BANK  
and as FNB  
(Registration  
Number: 2011/009111/07)  
Respondent

**JUDGMENT**

MOORCROFT AJ:

## Summary

Documents and recordings that are referred to in pleadings or affidavits must be discovered when they are relevant to the dispute, unless they are privileged.

## Order

[1] In this matter I make the following order:

1. The applicant's application to strike out paragraphs of the respondent's answering affidavit in this application is

dismissed;

2. The applicant is ordered to pay the costs of the striking out application on the scale as between attorney and client;
3. The application in terms of Rule 35(12) is dismissed;
4. The applicant is ordered to pay the costs of the application on the scale as between attorney and client, such costs to include the reserved costs of 25 April 2022;

[2] The reasons for the order follow below.

**Introduction**

- [3] This is an application for discovery in terms of Rule 35(12) of documents referred to in the founding affidavit and replying affidavit in the main application between the parties. The applicant ("the surety") in this interlocutory application is the respondent in the main application and the respondent ("the bank") in this application is the applicant in the main application .

## Pending applications

- [4] The litigation is acrimonious. In the main application launched in June 2020 the bank seeks payment of an amount of R6 514 057.13 with interest and costs arising out of a loan in the form of a credit facility granted to Northend Showroom CC, the principal debtor, and a deed of suretyship signed by the surety in favour of the bank for the debts of Northend. The debt was secured by the registration of mortgage bonds over the surety's immovable property. The surety was the only member of Northend.
- [5] In August 2020 the surety brought a counter - application for the joinder of various parties, a declaratory order that Northend is not indebted to the bank, that the credit facility and the suretyship constitute unlawful and reckless credit agreements and are void ab initio, that his

obligations arising out of the credit facility and the suretyship be set aside, and that leave be granted to him to apply for the cancellation of the mortgage bond. In the alternative the surety seeks an order for rectification of the loan agreement to reflect the applicant as the principal debtor, or that the bank's application be dismissed, or that the dispute be referred to trial. In addition he seeks a money judgment and order for the debatement of the account.

- [6] The credit facility granted in 2017 was for an amount of R6 000 000 repayable over 240 months. Northend was a juristic person with a turnover in excess of R1 000 000 and the credit facility was a large agreement as defined in the National Credit Act. For these reasons the Act did not apply to the transaction. The Act therefore also did not apply to the suretyship.[1] This is common cause on the papers but the case for the surety is that had he entered into the agreement as principal debtor, then the Act would have been applicable. He states that when signing the documents that "I did notice that the loan agreement was in the name of Northend and that I was signing as surety."
- [7] This need not to be decided in this application but if the agreement were to be rectified to reflect the surety as principal debtor, then documents pertaining to the credit application by Northend would be irrelevant to the application.
- [8] The parties submitted to mediation that did not result in an amicable resolution of the dispute. When the bank filed an 'answering/replying affidavit' together with an application for condonation of late filing of the affidavit in June 2021, the surety gave notice in terms of Rule 30 on 26 July 2021 and followed two days later with an application to set aside the replying affidavit as an irregular step. The notice was out of time.[2]
- [9] In the affidavit in support of the application to set aside the bank's answering / replying affidavit, the surety states that the replying affidavit was filed 'without any notice of request for condonation or indulgence for the late filing.' This statement made under oath is palpably false.
- [10] The next day, 29 July 2021, the surety gave notice in terms of Rule 35(12) for the discovery of documents referred to in the bank's affidavits.
- [11] On 6 August 2021 the bank gave notice in terms of Rule 30(2)(b), stating that although a Rule 30 application is interlocutory, the surety's application had been brought by way of the long form. Furthermore, the bank was of the view the surety had taken a further step with the knowledge of the alleged irregularity by delivering his notice in terms of Rule 35(12) and was now in any event precluded from continuing with the Rule 30 application.
- [12] The surety neglected to deliver heads of argument, a practice note, and a chronology in the bank's Rule 30(2) application. The bank applied for an order to compel the surety to deliver same and the application became opposed. On 11 April 2022 Adams J granted an order compelling the surety to deliver heads of argument, practice note and

chronology.

- [13] On 14 April 2022[3] the surety launched the present application to compel discovery of the documents sought in the Rule 35(12) notice.
- [14] In this judgment I am called upon to deal only with the Rule 35(12) application for discovery. Nothing in this judgment impacts on the other pending applications in terms of Rule 30 and I do not have to decide whether the surety's Rule 35(12) application is a further step as described in Rule 30(2)(a). I also do not find it necessary to determine whether the bank would be taking a further step in the proceedings, thus thwarting its own application in terms of Rule 30, by complying with a request for documents made to it in terms of Rule 35(12).

In limine: The authority of the bank's deponent

- [15] A deponent to an affidavit is a witness and need not be authorised to give evidence. The more fundamental question is that the institution and prosecution of the proceedings must be authorised[4] and this appears from the founding affidavit in the main application.
- [16] The deponent is a Recoveries Manager of the bank and relies in paragraph 1 of the founding affidavit in the main application for his authority on a Delegation of Authority annexed to the founding affidavit. The written delegation reflects a delegation by the bank that includes the power to sue for the recovery of moneys due. None of these averments are disputed in the answering affidavit save for a bald and generic denial in paragraph 87 of the answering affidavit. These facts have therefore been established by the time when the founding and answering affidavit in the main application were delivered. The surety did not invoke the provisions of Rule 7.[5]
- [17] Having failed to deal with the authority or the personal knowledge of the deponent in the main application, the surety now wishes to dispute the authority of the deponent in the replying affidavit in the application to compel. There is no basis for such an about-turn.
- [18] The point in limine is dismissed.

Striking out application

- [19] The court has a discretion to strike irrelevant matter.[6] Rule 6(15) provides that:

*“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.”*

- [20] The application must be heard with the application to which it relates, in this case the Rule 35(12) application. An applicant in a striking out application is required to deal with the averments sought to be struck.[7] A failure to deal with the allegations means that if the application to strike the objectionable matter does not succeed, the allegations made by the other party are the only evidence before Court.
- [21] The surety gave notice of an application to strike paragraphs 5 to 12, 16.1, 16.2 and 17.2 of the bank's answering affidavit in the Rule 35(12) application. The application is brought on the basis that the allegations in those paragraphs are irrelevant.
- [22] The surety does not allege that he would be prejudiced[8] if the application to strike were not granted.
- [23] The bank's evidence set out in the paragraphs sought to be struck are relevant to the merits of the Rule 35(12) application and to the cost order sought, and also in the context of the surety's argument that the bank is a large corporate entity with unlimited resources, and that he is therefore at a disadvantage. To the extent that the evidence is irrelevant, it will be merely ignored if it did not contribute to the judgment but it needed not to be struck - there is no prejudice to the opponent.
- [24] The application to strike out is dismissed. The paragraphs sought to be struck are relevant and no prejudice has been alleged or shown.

#### Rule 35(12) of the Uniform Rules

- [25] Rule 35(12) provides for the discovery of documents or recordings referred to in the opponent's pleadings or affidavits. The opponent may produce the document, object to its production on the basis that it is privileged or irrelevant, or state under oath that the document is not in its possession.
- [26] In *Democratic Alliance v Mkhwebane*
- [9] Navsa JA said:

*"It appears to me to be clear that documents in respect of which there is a direct or indirect reference in an affidavit or its annexures, that are relevant, and which are not privileged, and are in the possession of that party, must be produced. Relevance is assessed in relation to rule 35(12), not on the basis of issues that have crystallised, as they would have had pleadings closed or all the affidavits been filed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised and, on the basis that they will better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences."*

- [27] Three questions therefore arise in the context of Rule 35(12):

27.1 Are the documents referred to in an affidavit or pleading, either in the body of the document or in an annexure,

27.2 are the documents relevant, and

27.3 are the documents privileged?

[28] Documents referred to in affidavits and pleadings would often be relevant. A party is required in litigation to rely on relevant evidence and irrelevant evidence is inadmissible.

[29] Relevance is a matter of common sense.[10]

The substance of the application

[30] I now deal with the substance of the application, namely the discovery of the documents sought by the surety.

[31] It is so that the surety stated in an affidavit that his purpose is to inspect the required documents for the purpose of pursuing fraud, perjury and other criminal charges. The statement is not framed with great accuracy and it is not apparent that criminal charges were his only objective.

[32] Discovery of relevant documents that are not privileged can in my view not be denied merely because a litigant may pursue other legal avenues, and once again the test is that of relevance and of privilege.[11]

[33] The affidavit in support of the application to compel discovery in terms of Rule 35(12) was signed by the surety. He is of the view that the fact that a document is referred to in a pleading or affidavit, without more entitles him to discovery. This is not so – as shown above the document has to be relevant to the dispute between the parties.

[34] The surety as the sole member of Northend negotiated with the bank when the facility was extended to Northend. There were negotiations and eventually an agreement was entered into. The document became the record of the transaction and the liability of Northend, and by extension of the surety, arose out of the agreement.

[35] It is common cause that the National Credit Act is not applicable and the bank did not need to apply the reckless credit provisions of the Act at the time when the agreement was entered into. As it is, no relevance is shown or even alleged and the documents listed below have no relevance to the application. These documents are:

35.1 The certificate from Northend's auditors referred to in clause 5.7 of annexure "DF2" to the founding affidavit referred to in paragraph 11;

35.2 Signed and audited financial statements referred to in clause 18.1 and 19.2.3.1 of annexure "DF3" to the founding affidavit referred to in paragraph 13;

35.3 Copies of Northend's CK1 and CK2 documents referred to in clause 19.3..2.1 of annexure "DF3" to the founding affidavit referred to in paragraph 13;

35.4 The written confirmation from Northend's auditors referred to in clause 19.3.2.1 of annexure "DF3" to the founding affidavit referred to in paragraph 13;

35.5 The audited financial statements for the year ending February 2017 referred to in paragraph 14 of the replying affidavit and annexure "DFR5";

35.6 The motivation to the bank's credit department referred to in paragraph 18 of the replying affidavit;

35.7 The lever arch file referred to in paragraph 13 of the replying affidavit;

35.8 The surety's personal balance sheet referred to in paragraph 18.11 of the replying affidavit.

[36] The surety also requires discovery of certain documents that are, in fact, not referred to in the bank's founding affidavit or replying affidavit as alleged:

36.1 There is no loan application form referred to in paragraph 3 of the founding affidavit. (There is a facility agreement that is referred to in paragraph 11 and that is attached to the founding affidavit.)

36.2 Commission documents and payments from the bank to Reinecke referred to in paragraph 7.6 of the replying affidavit;

36.3 The decision to grant a credit facility on the terms set out in annexure "DF2" to the founding affidavit as referred to in paragraph 20 of the replying affidavit;

36.4 There is no document entitled 'Structured loan application' referred to in paragraph 21.1 and the relevant letter is annexure "DFR7" of the replying affidavit;

36.5 There are no documents confirming the purchase of trading stock referred to in paragraph 31 of the replying affidavit;

36.6 There are no documentation for consignment stock referred to in paragraph 36.3 of the replying affidavit;

36.7 There is no written request referred to in paragraph 36.5 of the replying affidavit;

36.8 There is no resignation document referred to in paragraph 44.7 of the replying affidavit (if the paragraph did indeed refer to a letter of resignation, it is impossible to see how it could be relevant and no averments were made by the surety in this regard).

36.9 There are breach documents referred to in paragraph 66.1 of the replying affidavit.

[37] If there were indeed such documents, it is not alleged or shown that any of them are relevant.

[38] The following documents are also clearly not relevant and the surety did not present any evidence or argument to the effect that these are relevant:

38.1 The power of attorney authorising a conveyancer to appear before the Registrar of Deeds for the purposes of the mortgage bond referred to in paragraph 24 of the founding affidavit;

38.2 A copy of the tracer's report referred to in paragraph 28 of the founding affidavit;

38.3 The correspondence referred to in paragraph 15 of the replying affidavit;

38.4 The decision to grant a credit facility on the terms set out in annexure "DF2" to the founding affidavit.

[39] The surety seeks discovery of Rule 46A. This is one of the Uniform Rules of Court and is not subject to discovery. Rules are published and are in the public domain. The fact that the surety approaches a court for an order that a rule of court be furnished to him under the machinery of Rule 35(12) was not explained in argument.

[40] The surety seeks discovery of 'misplaced documents' referred to in paragraph 7.5 and 7.6 of the bank's replying affidavit. These documents are not described or defined in any detail, and an order for discovery is not possible. The request has the appearance of a fishing expedition and no relevance is shown.

[41] In conclusion, no case is made out for the relief sought.

The wasted costs of the enrolment in April 2022

[42] The application to compel was sent to the bank's attorneys on 18 April 2022 and on the 19th a notice of set down for 25 April 2022. The bank's attorneys alerted the surety's attorneys that a date of 4 May 2022 had been allocated on Caselines. The surety's attorneys then removed the matter on the roll of 4 May 2022.

[43] The bank's attorneys then proposed to the surety's attorney that the matter be removed from the roll by agreement, failing which an application to strike it would be brought on the ground of short service. No response was received and on the day of the hearing the presiding Judge postponed the matter sine die, set dates for exchange of affidavits by agreement, and reserved the question of costs.

[44] In terms of the Judge President's Directive 1 of 11 June 2021, matters shall be set down on seven clear court days' notice and the surety's attorneys persisted with a three-day notice period even when the Directive was pointed out to them. The costs could have been avoided by dealing with the matter in accordance with the Practice Directive and the practice of the High Court in Johannesburg. It follows in my view that the costs should be borne by the surety.

The costs of this application

[45] Both parties sought an attorney and client cost order against the other party.

[46] In *Public Protector v South African Reserve Bank*[12] Khampepe J and Theron J said:

- [223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. [13] Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.” [footnotes omitted]
- [47] The one aspect that militates against such an order is the fact that some of the allegations that may, prima facie at least, merit a punitive cost order relate not to this Rule 35(12) application but to the application to strike out the bank’s answering / replying affidavit that was brought out of time, his failure to file heads of argument in the Rule 30 application that led to an opposed application as well as a second counter-application, and his notice that the set down of the application to file heads constituted an irregular step. He also served a notice in terms of Rule 30 out of time, complaining about the replying affidavit in the main application being out of time. He alleged that the replying affidavit was filed late without any application for condonation, when a proper condonation application had indeed been made.
- [48] Seen in isolation however, the surety’s conduct in the main application and the Rule 30 applications does not justify a punitive cost order in this Rule 35(12) application.
- [49] In this application the surety disputed the authority of the bank’s deponent when his authority had already been dealt with in the founding and answering affidavit in the main application, and he persisted with an inappropriate application for discovery of a Uniform Rule of Court which is inappropriate as it is available to his attorneys from various sources. This conduct is vexatious, frivolous, and in bad faith.
- [50] Some of the documents sought in the R35(12) notice and then persisted with in this application merit the inference that the application is vexatious and frivolous and in bad faith.
- [51] In this regard the demand for the power of attorney authorising a conveyancer to appear before the Registrar of Deeds on behalf of the surety, the tracer’s report, payments made to the bank official Reinecke, documentation confirming the purchase of trading stock and consignment stock, the request for financial statements of Northend, and the surety’s resignation from the time he was employed by the bank all come to mind.

## Conclusion

- [52] I therefore come to the conclusion that an attorney and client cost order is justified.
- [53] For all these reasons I made the order in paragraph 1 above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 27 October 2022

COUNSEL FOR THE APPLICANT: G NEL SC

INSTRUCTED BY:

VALLY CHAGAN & ASSOCIATES

ATTORNEYS

COUNSEL FOR RESPONDENT: R SHEPSTONE

INSTRUCTED BY:

A D HERTZBERG ATTORNEYS

DATE OF THE HEARING:

12 October 2022

DATE OF ORDER:

27 October 2022

DATE OF JUDGMENT:

27 October 2022

[1] Northend is a juristic person with an asset value or turnover of more than R1 000 000 and the agreement is a large

agreement of more than R250 000. See s 4(1)(a)(i) and 8(5) of the National Credit Act, 34 of 2005, and GN 713 in GG 28893 of 1 June 2006.

[2] In terms of Rule 30(2) notice must be given within ten days and the application to court must be brought not more than 15 days thereafter.

[3] Not 2021 as per the notice of motion.

[4] Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) para [18] & [19]; Eskom v Soweto City Council 1992

- [2] SA 703 (W) 705C – J.
- [5] The authority of anyone acting on behalf of a party may be disputed in terms of Rule 7 of the Uninform Rules.
- [6] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974
- [4] SA 362 (T) 368G.
- [7] Compare Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978
- [1] SA 173 (W) 177D–E and Gore v Amalgamated Mining Holdings 1985
- [1] SA 294 (C) 295H–296B.
- [8] Beinash v Wixley [1997] ZASCA 32; 1997
- [3] SA 721 (SCA) 733B.
- [9] Democratic Alliance v Mkhwebane 2021
- [3] SA 403 (SCA) par [41]. See also Caxton and CTP Publishers and Printers Ltd v Novus Holdings Ltd
- [2022] 2 All SA 299 (SCA).
- [10] R v Matthews 1960 (1) SA 752 (A) 758.
- [11] The question of privilege does not arise in this application - the bank does not claim that any of the documents are privileged.
- [12] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) para. 223.
- [13] The footnote refers to Orr v Solomon 1907 TS 281.

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