

SOUTH AFRICA / JUDGMENT

Steyl N.O and Others v Land and Agricultural Development Bank of South Africa (4197/2020) [2021] ZAFSHC 161 (5 August 2021)

[2021] ZAFSHC 161

COURT

Free State High Court, Bloemfontein

BEFORE

G.J.M. Wright

CASE / FILE NUMBER

4197/2020

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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: 4197/2020

In the matter between:

MARTHINUS PHILLIPUS STEYL N.O.

1st Applicant

CORNELIUS KAPP STEYL N.O.

2nd Applicant

JACOB JOHANNES KOTZE DEMPSEY N.O.

3rd Applicant

(in their capacities as duly appointed Trustees of the

BOSRAND BOERDERY TRUST, Master's Ref: IT1096/07)

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK

OF SOUTH AFRICA

Respondent

CORAM:

WRIGHT AJ

HEARD ON:

29 JULY 2021

DELIVERED ON: 5 AUGUST 2021

- [1] This is an application to compel discovery following a notice filed by the Applicant in terms of Rule 35(12). The Respondent did not respond to the request for discovery, hence the application to compel.
- [2] The Applicants are the defendants in the main action where the Respondent, as plaintiff, claims a significant amount of money as well as an order whereby certain farms will be declared executable.

CONDONATION: LATE FILING OF REPLYING AFFIDAVIT

- [3] A pre-liminary matter needs to be dealt with first. The Applicants issued an application for condonation pertaining to the late filing of their replying affidavit. The Respondent opposes the request for condonation. This resulted in an additional bundle of documents comprising of 107 pages.
- [4] The Respondent's answering affidavit in the application to compel was filed on 15 April 2021. Being an interlocutory application, it was expected of the Applicants to file a reply within a reasonable time, such reasonable time generally accepted to be no longer than the time allowed for in terms of Rule 6(5).[1] The Replying Affidavit was only filed on 27 May 2021.
- [5] The Applicants' attorney deposed to the Founding Affidavit in the condonation application. He sets out an explanation for the delay in filing the replying affidavit, essentially stating that the delay was caused by logistical problems within his firm, relating to his own work load as well as personnel who had to isolate in terms of

Covid-19 protocol. Although the Respondent voiced various negative comments regarding the problems allegedly experienced, I appreciate

that the Applicants' attorney accepts responsibility for the delay, or at least part thereof, although he tries to justify it. It seems that no blame can be laid before the Applicants' own door.

[6] Unfortunately, this is not the end of the matter. The explanation provided for the delay only covers the period from the beginning of May 2021 onwards. The crucial period directly after the answering affidavit was received remains completely unexplained. It is trite that an applicant requesting condonation should explain the entire period of delay and should apply for condonation as soon as he or she realises that condonation is or may be needed. The Applicants failed

in these respects.

[7] A poor explanation may be saved through good prospects of success. In this regard, counsel for the Applicants attempted to present arguments relating to the merits of the main action. That is of course not the relevant issue here – the Applicants needed to convince me that they have good prospects of succeeding with their application to compel. They failed to do so. I engaged counsel on the question whether the Applicants will be prejudiced should the replying affidavit not be allowed. It was not argued that the replying affidavit contains any averments crucial to the Applicants' request for an order to compel discovery. There is of course the well-known principle that an applicant should make out his or her case in the founding affidavit. It was not argued that the Replying Affidavit contains averments vital to the Applicants' case in

the application to compel.

[8] During the oral arguments I ruled that condonation is not granted and that the matter should proceed without any further reference to the Replying Affidavit. I indicated that my reasons for the ruling will form part of the judgment on the application to compel.

[9] I am satisfied that the Replying Affidavit contains no averments vital to the Applicants' request for an order compelling discovery. Considering further the incomplete excuse for the delay, I was not convinced that condonation should be granted for the late filing of the Replying Affidavit. The Applicants did not present sufficient good cause to justify condonation.

[10] No reasons were advanced as to why costs relevant to the condonation application should not follow success. The Applicants are to be held liable for all costs connected to the application for condonation. The Respondent requested a punitive cost order, based on the clause in the relevant suretyship dealing with costs.[2] I took note of the relevant clause in the suretyship agreement. I am however of the view that the condonation application is too far removed from the surety agreement, which features in the main action between the parties, to impact on the costs of the condonation

application. Costs on the scale between party and party will be more appropriate in the circumstances.

APPLICATION TO COMPEL

[11] During the pre-trial stage litigants are often spoiled for choice, presented with a wide range of procedures to choose from to ensure that they are ready for trial. Unfortunately, the different available options often confuse litigants and legal practitioners, causing more problems than they provide solutions.

[12] The following rules play a part in these proceedings:

[12.1] Rule 35(12) that allows any party to any proceeding to request any other party to produce documents or tape recordings referred to in a pleading or affidavit. Failure to comply with a notice in terms of Rule 35(12) carries the penalty that the party in default shall not be allowed to use such document or tape recording, save with the leave of the court. The subrule finds application “at any time before the hearing” of the particular matter.

[12.2] Rule 35(14) which finds application “after appearance to defend” has been entered; thus, even prior to the filing of a plea by a defendant. Whereas Rule 35(12) specifically relates to documents and tape recordings referred to in pleadings, Rule 35(14) may be used to request inspection “a clearly specified document or tape recording in such party’s possession which is relevant to a reasonably anticipated issue in the action”; thus, it may also be used to request inspection of documents not referred to in pleadings or discovered by a party.

[12.3] Rule 30 deals with irregular steps and proceedings. A party may apply to have an irregular step taken by any other party set aside, provided that (i) the applicant has not himself taken a further step in the cause with knowledge of the irregularity and (ii) the opponent was by written notice afforded an opportunity to remove the cause of complaint.

[12.4] Rule 30A deals with the non-compliance with rules or requests made or notices given pursuant thereto. Considering the facts and circumstances of the present matter, subrule 1 deserves to be quoted:

“Where a party fails to comply with these rules or with a request made or notice given pursuant thereto . . . 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.”

APPLICANTS’ NOTICE

[13] In casu the Applicants delivered a notice headed “Notice in terms of Rule 35(12)”. It is necessary to quote the introductory paragraph of the notice:

“PLEASE TAKE NOTICE that the First to the Third Defendants hereby require that the Plaintiff make available for inspection within 5 (five) days, documents as set out herein under, to enable the First to the Third Defendants to plea to the summons and particulars of claim of the Plaintiff dated 03rd November 2020:”

- [14] The wording of the introductory paragraph is more in line of the provisions of Rule 35(14), and not the provisions of subrule (12). The notice then proceeds to specify documents as they are allegedly referred to in specific paragraphs of the Respondent's Particulars of Claim. Thus, using a mixture of subrule (12) and (14), the Applicants attempted to request discovery of documentation for purposes of preparing a plea.
- [15] The Respondent did not respond to the Applicants' notice. Although the Founding Affidavit does not contain averments in this regard, it appears from the application papers that the Applicants' attorney sent two letters requesting compliance with the notice. These were seemingly also not responded to. No notice as provided for in Rule 10A was delivered prior to the application to compel. I enquired from counsel in terms of which rule then the application to compel was brought. According to the response received, the application was brought in terms of Rule 35(12), which of course does not provide for any application to compel. Non-compliance with the subrule may be addressed through an application in terms of Rule 30A.
- [16] Even though the Applicants did not follow the procedure provided for in Rule 30A, the Respondent did not object. Counsel for the Respondent further graciously indicated that they will accept, for purposes of the adjudication of the application, that it was brought in proper form.

RELIEF REQUESTED

- [17] The Applicants launched the application to compel the Respondent to "make available the documents/information as requested in the Notice in terms of Rule 35(12), dated 11 March 2021".[3] The Applicants further requests an extension of the time within which to file their plea.
- [18] In order to make sense of the relief claimed, it is firstly necessary to engage with the relevant timeline. The summons was issued on 3 November 2020. I have not been informed as to when it was served on the Applicants. On 11 March 2021 the Applicants served their notice in terms of Rule 35(12), allowing the Respondent five days within which to respond. Although the Respondent did not comply with the notice, its attorney communicated with the Applicants' attorney and indicated that the Respondent expects delivery of the plea within the prescribed time period. In response, the Applicants' attorney stated in a letter dated 17 March 2021 that the Applicants will proceed with an application to compel discovery should the Rule 35(12) notice not be complied with forthwith. This letter was not worded in the format of a notice in terms of Rule 30A.

- [19] On 25 March 2021 the Applicants launched the application to compel. In response, and on 31 March 2021, the Respondent issued a notice of bar, effectively warning the Defendants to file their plea within five days, failing which they will be ipso facto barred.[4] This was coincidentally the same day on which the Plaintiff filed its notice of intention to oppose the application to compel.
- [20] The Applicants did not react to the notice of bar by filing a plea or by applying for an extension of the period within which to file their plea. Instead they allowed the five day period to expire and then filed a notice in terms of Rule 30A on 9 April 2021, complaining that the notice of bar and failure to comply with the request for discovery constitute “an irregular step and/or proceeding in contravention of Rule 26 read with Rule 35 read with Rule 30A . . . as contemplated in Rule 30”. Once again, the Applicants got confused with different rules. Be that as it may, this Rule 30A notice was not the precursor to the application to compel.

NOTICE OF BAR

- [21] In circumstances where a notice in terms of rule 35(14) is delivered after a notice of bar has been issued, the time period for the filing of a plea is not suspended. Should however, a 35(14) notice be delivered and followed-up with an application to compel prior to a notice of bar being delivered, the period for delivery of a plea is suspended. These different situations were comprehensively discussed in the matter of Sanniegraan CC v Minister of Police.[5]
- [22] Considering the wording of the Rule 35(12) Notice issued by the Applicants, I accept that they meant to refer to Rule 35(14). Alternatively put, they also engage the provisions of subrule (14). And in as far as the Notice was issued prior to the filing of a plea, I am of the view that the ratio decidendi of the Sanniegraan matter is mutatis mutandis applicable in casu. I am comfortable in aligning myself with the reasoning of Laubscher AJ in the Sanniegraan matter. The Respondent filed a notice of bar after the application to compel discovery was launched and the notice of bar is considered an irregular step. The Respondent was alive to the fact that this application to compel is to be adjudicated and in fact indicated its intention to oppose it. The Applicants are at the moment not barred from pleading to the Particulars of Claim.
- [23] As stated earlier, the Applicants’ notice fuses the provisions of Rule 35(12) with those of subrule (14). It intends to obtain access to documents for purposes of pleading,[6] while specifying documents referred to in the Particulars of Claim.[7] Should the hybrid request not be analysed properly and pragmatically, it may create a situation where the Applicants are deemed entitled to something to which they are not.

REQUESTED DOCUMENTATION

- [24] It is the Applicants' case that they are severely prejudiced by the non-delivery of the documentation requested as, without it, it is impossible for them to plead to the Particulars of Claim. They further submit that they are entitled to the requested documentation as referred to in the Particulars of Claim as reference are made to these documents in the Respondent's pleading.
- [25] Most of the documents requested by the Applicants are in fact not referred to in the Particulars of Claim. I proceed to list them:[8]
- (i) Authorisation of the trustees of the Bosrand Trust to appoint the First Applicant to enter into the relevant written credit agreement;
 - (ii) Details of the member of the principle debtor authorised to enter into the loan;
 - (iii) The resolution ("authority") signed by all the trustees binding the Trust as surety;
 - (iv) The resolution signed by the trustees for purposes of the registration of the mortgage bond.
- [26] The Applicants insisted on relying on the provisions of subrule (12) despite the wording of the contents of their notice. This reliance was repeated by counsel during oral argument. Subrule (12) relates specifically to documents referred to in a pleading. In as far as discovery of documents not referred to in the Particulars of Claim is thus requested, the Respondent cannot be compelled to do so. The Applicants may have done better with a proper notice in terms of subrule (14), instead of persisting with the reliance on the provisions of subrule (12).
- [27] Not only are the documents listed above not referred to in the Particulars of Claim,[9] it cannot be said that they are necessary for purposes of drafting a plea. Whatever the Applicants' responses may be to the relevant paragraphs in the Particulars of Claim, pleading thereto will be possible, even without engaging with any implied documentation such as resolutions / authorities. Of course, in as far as it is the Applicants' case that they did not authorise certain steps or decisions, they can plead that without insight into any documentation that the Respondent may or may not have in its possession. In as far as the documents may be necessary for trial purposes, they can be requested then by means of an applicable subrule to Rule 35. Should the Plaintiff then still fail to provide them, the Defendants will have the sanction contained in Rule 35(12)(b) in their favour.
- [28] During oral argument counsel for the Applicants were at pains to point out that at least three of the documents requested in terms of Rule 35(12) were in fact annexed to the Respondent's answering affidavit in the condonation application. Thus, so the submission continued, the Respondent did eventually discover requested documentation. By attaching the documents, the Respondent of course did not "discover" the documents. Counsel for the Respondent explained that the documents were annexed to the answering affidavit in response to allegations that the Applicants have good prospects of success, and were dealt with within the setting of the condonation application (not as an admission that they should have been discovered in response to the Rule 35(12) notice). In the premises, the Applicants'

submissions that the application was shown to be necessary and successful in that it convinced the Respondent to discover documents, are not correct.

- [29] Part of the Respondent's case as pleaded in the Particulars of Claim is that it had entered into a written sale agreement with GroCapital Financial Services (Pty) Ltd and Afgri Operations Ltd regarding the sale, cession and delegation by GroCap of its right, title and interest in its debtors' book to the Respondent. The written sale agreement forms part of the basis on which the Respondent alleges that it has the necessary locus standi to institute action against the Applicants.
- [30] It was submitted on behalf of the Applicants that they consider raising a special plea of lack of locus standi in response to the Respondent's claim in the main action. It was argued that the documents requested relate specifically to that very issue and that the Applicants want to peruse the documents in order to decide whether such a special plea is open to them. The argument was further developed to include the submission that the Applicants do not want to waste time by filing a special plea which, once the documents become available, may prove to be unnecessary.
- [31] I am not convinced by this argument. The Respondent will carry the burden to prove that it has the necessary locus standi to institute action against the Applicants. The Applicants are entitled to challenge locus standi by means of a Special Plea. And sufficient averments have been made in the Particulars of Claim, read in conjunction with annexures thereto, to assist them in wording the Special Plea. Towards the end of his argument, counsel for the Applicant conceded that, in any event, the documents "discovered" in answer to the condonation application provide enough information for the Applicants "to know what to do".
- [32] The Applicants did not succeed in showing that they are entitled to the documents requested in their Rule 35(12) Notice at this stage.

EXTENSION OF TIME FOR FILING OF PLEA

- [33] I have already ruled that the Notice of Bar is in the circumstances an irregular step. Thus, the Applicants are not under bar at the moment, and they may proceed to file a plea. Of course, after adjudication of the application to compel (and without any relief granted in terms of prayer 2 of the Notice of Motion) the Respondent will legitimately be entitled file a notice of bar, allowing the Applicants five court days in which to file their plea.[10]
- [34] Considering counsel's argument that the documents attached to the answering affidavit in the condonation application provided information that may be used for purposes of a special plea relating to locus standi, the Applicants could at least have started to draft a plea. Already during oral argument I alerted the parties to the Sanniegraan matter, referred to earlier, and that I intend to follow the principles applied therein. In the premises, both parties knew then already that the Applicants may (and should) proceed drafting their plea.

[35] I pause here to point out that counsel for both parties were unaware of the judgment in Sanniegraan. Considering that it is an unreported judgment, this appears acceptable. The Applicants may be prejudiced should they not now be allowed more time within which to file their plea (or should the Respondent immediately after this order is granted file a new notice of bar). Considering however the time that has already elapsed since summons was issued, the extension need not be for the “normal” period allowed for the filing of a plea. I consider 10 days from the date of the order to be more than sufficient. Of course, it needs to be understood that, should the plea not be filed within this extended period of time, the Respondent will be entitled to issue a notice of bar at that point in time.

COSTS

- [36] The Applicants are only successful in as far as some relief is granted in terms of prayer 2 for an extension of time in which to file a plea. However, considering all the relevant circumstances as well my findings on other issues, it cannot be said that the success is due to a proper application or to a proper reliance on legal principles. In fact, quite the contrary. The extension of time is only granted due to the parties’ ignorance of the applicable legal situation regarding the filing of a notice of bar after an application to compel has been launched.
- [37] The main relief requested, namely an order compelling the Respondent to make discovery, is not granted. It can thus not be argued that the Applicants were substantially successful and that they should be awarded costs.
- [38] A factor that counts heavily against the Applicants is the confusing and incorrect manner in which the notice to compel was worded. This was compounded by their reliance on Rule 35(12) as basis of the application to compel, instead of Rule 30A. Slovenly practice should not be rewarded with a cost order.
- [39] The Respondent argued for an order of costs on the scale between attorney and client, again with reference to the suretyship agreement where it was agreed that legal costs will be payable on the scale between attorney and client. The relevant clause in the agreement however links the payment of legal costs and fees with instances for example where steps are taken to secure payment of any amount owed, to enforce the Respondents’ rights in terms of the agreement and relating to matters such as liquidation and business rescue.[11]
- [40] The application to compel is an interlocutory step taken during the process whereby the Respondent claims the payment of money. I do not see how opposing an application to compel falls within the definition of “any steps taken to secure payment”. In my view the reach of the costs clause in the suretyship agreement should not be extended to include opposition of this application to compel.[12]

ORDER

- [41] In the premises, I make the following orders:

1. Condonation for the late filing of the Replying Affidavit is denied;
2. The application to compel the Respondent to make available documents as requested in the Rule 35(12) Notice, dated 11 March 2021, is dismissed;
3. The Applicants are allowed ten (10) days from the date of this order within which to file a Plea in response to the Respondent's Particulars of Claim;
4. Should the Applicants fail to file a Plea within the ten (10) days so allowed, the Respondent will be entitled to file a notice of bar in terms of Rule 26;
5. The Applicants are to pay the costs of the application, which costs shall include the costs of the application for condonation, on the scale as between party and party.

G.J.M. WRIGHT, AJ

On behalf of the Applicants: Adv. A.P. Berry

Instructed by: FJ SENEKAL INCORPORATED

BLOEMFONTEIN

On behalf of the Respondent: Adv. S. Tsangarakis

Instructed by: E G COOPER MAJIEDT INC

- [1] Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd 1977 (4) SA 25 (W) at 25H – 26A.
- [2] It was agreed in the suretyship that the surety, Bosrand Boerdery Trust, will be liable for all legal fees on an attorney and client basis. I deal herein later with the specific situations envisioned in the clause.
- [3] Prayer 1 of the Notice of Motion.
- [4] The Applicants request in prayer 2 of the application for an extension of the time period in which to file a plea thus preceded the notice of bar.
- [5] Unreported judgment from the North West Division of the High Court, Mahikeng, case no 680/18, dated 3 May 2019, at paragraph 36.3. Laubscher AJ referred to the matter of Potpale Investments (Pty) Ltd v Mkhize 2016 (5) SA 96 (KZP), explaining the differences between the facts in the two cases.
- [6] Rule 35(14).
- [7] Rule 35(12).
- [8] As far as practically possible I use the wording as contained in the Rule 35(12) notice.

- [9] It may be that the requested documents are implied in certain paragraphs of the Particulars of Claim, but they are not referred to or identified as such in any paragraph of the Particulars of Claim.
- [10] As provided for in Rule 26.
- [11] Clause 6 reads as follows: “KOSTES EN UITGAWES 6.1 Die Borg(e) sal alle kostes en uitgawes (inlsuitende maar nie beperk nie tot alle regs-koste op ‘n prokureur-en-kliënt basis) aangegaan deur die Skuldeiser betaal: 6.1.1 wanneer stappe teen die Hoofskuldenaar gedoen word om enige bedrag verskuldig aan die Skuldeiser deur die Hoofskuldenaar te verhaal of poog om te verhaal . . . 6.1.2 wanneer stappe gedoen word om die Skuldeiser se regte kragtens hierdie Borgstelling uit te oefen of af te dwing; en 6.1.3 om sy eis te bewys in geval van sakeredding, afwikkeling, likwidasië”
- [11] Clause 6 reads as follows:
- “KOSTES EN UITGAWES*
- 6.1 Die Borg(e) sal alle kostes en uitgawes (inlsuitende maar nie beperk nie tot alle regs-koste op ‘n prokureur-en-kliënt basis) aangegaan deur die Skuldeiser betaal:
- 6.1.1 wanneer stappe teen die Hoofskuldenaar gedoen word om enige bedrag verskuldig aan die Skuldeiser deur die Hoofskuldenaar te verhaal of poog om te verhaal
- 6.1.2 wanneer stappe gedoen word om die Skuldeiser se regte kragtens hierdie Borgstelling uit te oefen of af te dwing; en
- 6.1.3 om sy eis te bewys in geval van sakeredding, afwikkeling, likwidasië”
- [12] This is not to say that it may not be applicable to other interlocutory proceedings between the parties.

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Prepared on 28 October 2026 · Esheria