

SOUTH AFRICA / JUDGMENT

Waldeck NO and Others v Land and Agricultural Development Bank of South Africa (4013/18) [2019] ZAMPMHC 4 (14 October 2019)

[2019] ZAMPMHC 4

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

4013/18

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IN

THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION, MIDDELBURG
(LOCAL
SEAT)
CASE
NO:4013/18

In

the matter between:

VICKY
WALDECK
N.O FIRST
APPLICANT
RUDOLF
WALDECK
N.O SECOND
APPLICANT
ERIKA
BESTER
N.O THIRD
APPLICANT
VICKY
WALDECK FOURTH
APPLICANT
RUDOLF
WALDECK FIFTH
APPLICANT
ERIKA

BESTER SIXTH
APPLICANT
and
THE
LAND AND AGRICULTURAL DEVELOPMENT
BANK
OF SOUTH
AFRICA RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

- [1] This is an application in terms of Rule 35(12) of the Uniform Rules of this Court (“the Rules”). The applicants seek an order against the respondent to be provided with copies of the documents listed as items 2 to 12 in its Rule 35(12) notice within 10 days after this Courts’ order, and upon payment of the reasonable costs for such copies, being paid by the applicants.
- [2] In the alternative, should the respondent fail to comply with this Courts’ order as far as provision of the copies of the documentation, that the defendants summons and declaration be set aside.
- [3] The applicant seeks a punitive costs order on the scale as between attorney and client against the respondent.
- [4] The respondent denies that it is obliged to provide copies of the documentation and states that the documents were made available for inspection to the applicant’s attorney of record on 15 January 2019, albeit only for an hour, and that applicants’ attorneys were not allowed to make copies of the documents. The respondent also complains that the attorney took photographs of the relevant documentation and sought an undertaking, at a stage, that the said photographs will be deleted.
- [5] The respondent similarly seeks an order on attorney and client scale against the applicant together with an order dismissing the application.
- [6] It is common cause that the respondent issued summons (simple summons) against the applicants in this Court.
- [7] After appearance to defence was entered an application for summary judgment was launched by the respondent. The application was opposed by the applicants and after receipt of the opposing affidavit from the applicants the respondents granted the applicants leave to defend the action.

- [8] The respondents thereafter filed its declaration.
- [9] The applicants served a notice in terms of Rule 35(12) of the Rules on the respondent's attorneys requiring them to discover and make available to have copies made of the documentation that appears in the said notice being Annexure F to the founding affidavit.

These documents are:

"1. A copy of the Registration Certificate as a Credit Provider in terms of Section 40 of the National Credit Act 34 of 2005 (registration number: NCRCP

- 18) as referred to in the National Credit Act 34 of 2005 (registration number: NCRCP 18) as referred to in paragraph 1.1 on pages 4 of the Summons.
2. A copy of the complete Sale Agreement together with all and or any annexures attached thereto between GroCapital Financial Services (PTY) LTD ("GroCap") and Afgri Operations LTD ("Afgri") dated 21 October 2011, as referred to in paragraph 1.2 on pages 4 of the Summons and paragraph 1.2 of the Recordal on page 16 of the Summons.
3. A Copy of the book debts that forms the subject matter of the Sale Agreement as referred to in Paragraph 1.3.2 on pages 5 of the Summons.
4. A copy of the list of all the Excluded Products originated by GroCap during the duration of the Sale Agreement and all or any annexures, together with all the related securities as referred to in Paragraph 1.3.2 on pages 5 of the Summons.
5. A copy of the list of all the related security documentation as referred to in paragraph 1.3.2 and more specifically Paragraph 1.3.2.1 on pages 6 of the Summons.
6. A copy of the list of all book debts sold by GroCap to the plaintiff as referred to in Paragraph 1.3.3 on pages 7 of the Summons.
7. Copies of all the documents related to all the properties and/or rights sold by GroCap to the Plaintiff as referred to in paragraph 1.3.4 on pages 7 of the Summons.
8. A copy of the complete Service Level Agreement together with all and or any annexures attached thereto dated the 17th of November 2011 as referred to in Paragraph 1.4 on pages 7 of the Summons and paragraph 1.3 of the Recordal on pages 16 of the Summons.
9. A copy of the complete Sale of Business agreement together with all and or any annexures attached thereto dated the 27th of September 2011 between GroCap and Unigro, as referred to in Paragraph 1.5 on pages 8 of the Summons and paragraph 1.4 of the Recordal on pages 16 of the Summons.
10. A copy of the complete Cession and Delegation Agreement together with all and or any annexures attached thereto entered into between GroCap and Unigro which was signed on the 27th of September 2011, as referred to in Paragraph 1.6 on pages 8 of the Summons and paragraph 1.5 of the Recordal on pages 16 of the Summons.

11. A copy of the complete Sale Agreement together with any and or all annexures attached thereto in terms of which the book debts pertaining to this claim, were sold, ceded and delegated by GroCap or Unigro to the Plaintiff, as referred to in paragraph 1.8 on pages 8 of the Summons and paragraph 1.2 of the Recordal on pages 16 of the Summons.
12. A copy of the signed schedule, that is signed either by the Financial Director or UniGro or the Manager of Operations of UniGro, as referred to in paragraph 2.2 of the Recordal on pages 17 of the Summons.
13. A copy of the signed schedule, that is signed either by the Financial Director or UniGro or the Manager of Operations of UniGro, as referred to in Paragraph 2.2 of the Recordal on pages 17 of the summons.
14. A copy of the Plaintiff's Summer Month account (Nr: 331254), as referred to in Claim 1 on pages 11 of the Summons."

[10] The respondent conceded that the applicants are entitled to the information as set out in paragraph 1, 13 and 14 and that the

documents were provided to the applicants, but refused to allow copies of items 2 to 12 of Annexure F to applicants' founding

affidavit to be made by applicant's attorneys, despite a tender by applicants to pay for the making of the copies. Respondent was prepared to make copies of the relevant portions of the documents (dealing with the cession of debts between Unigro and applicants),

but as at date of the hearing of the application these documents were not provided as undertaken by respondent.

[11] The applicants therefore launched this application to compel discovery in terms of Rule 35(12) of the Rules of items 2 to 12 in Annexure F to their founding affidavit.

[12] The respondents counsel, Mr Goosen, conceded that applicants will not rely on privilege as an objection to the provision and copying of the documentation in terms of Rule 35(12), but only on the confidential nature of the documentation sought to be copied and the relevance thereof.

THE DISPUTE

[13] The nub of the dispute in this matter is the following:

1. Whether the applicants are entitled to discovery of items 2-12 in Annexure F to their founding affidavit, and whether they are entitled to make copies thereof;
2. Whether the respondent, relying on confidentiality of the documentation, is entitled to refuse the inspection and making of copies of the said documentation;
3. Whether the documentation sought to be discovered is relevant to the dispute; and

4. Should this court find that the documentation is confidential, whether it is competent for this Court to make an order qualifying access to the documentation, alternatively refusing access thereto, and in the event that such documents are irrelevant, the court may refuse to order the respondent to avail inspection or making of copies thereof as sought by applicants.

THE

FACTS

- [14] Respondent issued summons against the applicants in the action under the above case number (main action) during October 2018 and the applicants have defended the main action. The action is based on credit granted by Unigro to applicants, which loan the applicants allegedly failed to repay to the respondent as the cessionary of the debt.
- [15] In terms of its declaration, the respondent purports to act, in the main action, as a cessionary in terms of several written agreements referred to in its simple summons and declaration. These agreements were entered into between several parties that were not all parties to the main action. It is also common cause that the applicants never contracted with the respondent.
- [16] The respondents therefore rely on the agreements for its locus standi in the main action.
- [17] Paragraph 1.2 to 1.14 of the respondent's simple summons refer directly to written agreements that the respondent relies upon for its locus standi. The respondent failed to attach the said documentation to its particulars of claim and stated that:
- "1.7 the documents refer to in 1.2, 1.4, 1.5 and 1.6 above are not attached hereto as same are voluminous, confidential, partly irrelevant and will render the papers unnecessarily prolix, but had been made available for inspection at the offices of the plaintiff's*

attorneys of record on request of the defendant in terms of rule 35 of the rule of the Honourable Court". [Own underlining]

- [18] It is common cause that the applicant's attorney of record, Mr Neuhoff, attended the offices of Mr Oosthuizen, the respondent's attorney of record, and inspected the documents on 15 January 2019 but was allowed only one hour to peruse the documents consisting of a total of 217 pages.

- [19] It is also common cause that certain photographs were taken of the documentation by Mr Neuhoff during such inspection, but according to Mr Neuhoff that only consisted of the first and last pages of each document, and does not assist the applicants in establishing whether the respondent indeed has locus standi.

[20] It appears from the papers, and letters annexed thereto, that prior to the inspection of the documents by Mr Neuhoff, and a candidate attorney from his correspondent's office in Pretoria, no restrictive conditions were set by the respondent, or respondent's attorneys, as to the access that was afforded to applicant's attorney to the documentation. They were only not allowed to make copies of the documents.

[21] The respondent alleges that the documentation contains confidential information, and relying on the said confidentiality it states that it is furthermore submitted that the applicants have:

'no vested interest in what was agreed between the different parties as contained in the aforementioned written agreements – excluding the provisions thereof that deal with the relevant session. [Own underlining]. The nature thereof is confidential and/or privileged – the agreements inter alia deal with the sale of book debts and what it comprised of, as well as the prices paid thereof and what it comprised thereof. Such information can be abused by competitors operating in the same field to the detriment of the parties to the relevant agreement. There is absolutely no legal basis why copies of the content thereof should be placed in the hands of third parties. The applicants were however allowed, merely to show the bona fides in this regard, to inspect and peruse the relevant agreements. No permission was granted to make copies, in whatever format, of the relevant agreements, except for those portions that deal with the session of the book debts, which is however fully covered in the aforementioned recordal'[1]. The respondent then relies on a recordal that is annexed to its opposing affidavit, which is also annexed to the simple summons suffices to prove the respondent's locus standi as well as the fact that the cession took place. The recordal is a joint confirmation issued by

1. The land and agricultural development bank of South Africa;
2. Grow capital financial services (Pty) Ltd;
3. UniGro financial services (Pty) Ltd

regarding the Land Bank's locus standi in legal proceedings regarding various book debts which has been sold to the Land Bank. It also deals with the various other agreements that were entered into between the above parties in terms of where of book debts were ceded to the respondent.

[22] As stated earlier it is common cause that the applicants have never done business with the respondents.

[23] The respondent's case is that this recordal should suffice as proof of the existence of the cession as well as the validity

thereof.

[24] In this regard the respondent referred in his heads of argument, to the fact that the main purpose of the duty to prove a cession is to protect the debtor from paying the wrong creditor. In this regard to the Court was referred to the following "Rothschild v Lowndes where Innes CJ accepted that the cessionary becomes the creditor through cession, and that

notice is required only to prevent a debtor from discharging his obligation of payment to the cedent. He held that the cessionary is the only person who can compel a debtor to pay. This is true, but the cessionary can only compel the debtor to pay if the debtor is satisfied that the session was affected[2]. [Own underlining].

- [25] Respondent also submitted that the recordal in itself stated that the underlying agreements contained confidential information pertaining to the respective parties[3]. It is important to note the contents of this paragraph, but it should also be stated that the respondent did not rely on this clause in the recordal. Even if it did, the applicants were not parties to the agreements they now seek to be discovered, and is in consequence not binding, or applicable on and to them. This clause states:

“2.1 The sale agreement, the SLA and the sale of business agreement all contained confidential information pertaining to the respective parties. In view of the aforementioned the contents of the aforementioned agreement are incapable of being disclosed to third parties.”

The recordal, in short records various cessions, sales of business and agreements entered into between the respondent, Grow Capital and UniGro.

- [26] The recordal is no proof of the fact that valid cessions were entered into between UniGro (the applicant's initial creditor) and the respondent.
- [27] The respondent wants this Court, and the applicants, to accept the “say so” of the respondent that there are valid cession agreements giving respondent locus standi to act against the applicants..
- [28] Plaintiff bears the onus to prove his locus standi before he can be successful in any action.
- [29] A cessionary will only have locus standi if a valid cession was concluded.
- [30] The respondent bears the onus of proving such cession, and such onus was not denied by respondent during argument before me.
- [31] From the respondent's opposing affidavit it appears that the objection raised (confidentiality and relevance) is trumped by a concession in the opposing affidavit that if this Court comes to a decision that the referred to agreements, or parts thereof, should be made available to applicants, the Court must impose certain conditions on the discovery thereof. Amongst others, so the

respondent's argument goes, that the applicants and/or their attorney of record must not be allowed to make such information

available in any format, directly or indirectly to any third parties a condition. I pause to mention that the applicants, in their replying affidavit, although they were advised that there was no need to give an undertaking as required by respondent, gave the undertaking under oath to respondent, but respondent still failed to allow proper inspection, and copies to be made of the documents by applicants.

- [32] During argument Mr Goosen also argued that the respondent has to prove its locus standi, but only have to do it at the trial stage. At that stage the documentation (the agreements required by the applicants) will be provided to the Court with a request that such documentation not be disclosed to any third party.
- [33] The Court finds it difficult to understand the respondent's argument in this regard.
- [34] The respondent does not have any objection to the inspection of the documentation by the applicants or their legal representatives, but does not want to afford the applicants the opportunity to make copies of it as they don't want it to land into the hands of third parties.
- [35] In principle it seems that the respondent is aware of the fact that it will have to disclose the contents of the documentation required or requested in terms of rule 35(12), by the applicants. The applicants' attorney and counsel is entitled to study such documents at their own pace and use it to establish the respondent's locus standi, or lack thereof.
- [36] The respondent referred me to the judgment in Crown Cork and Seal Company Inc and Another vs Rheem South Africa (Pty) Ltd and Others[4]. What the respondents however did not disclose, nor argued, was that the facts in the Crown Cork matter's facts were totally different to the facts in the current matter. In the Crown Cork matter the Court had to deal with a competitor of the respondent in the case being placed in possession of confidential information in possession of the respondent. In casu we deal with alleged debtors of UniGro (the applicants) who has had no dealings with the respondent who is sued by respondent. The applicants are farmers and not competitors of any of the parties involved in the agreements applicants want discovered.
- [37] Although the applicants are not competitors of the respondents, this Court may, taking into consideration fairness, qualify the disclosure if the Court finds that applicants are entitled to the discovery, and copies of the disputed documentation.
- [38] The applicant's case is simple. The applicant needs the documentation to establish whether the respondents have locus standi to litigate against the applicants as the applicants have no contract with the respondent, and if the respondent's locus standi appears from the documents so discovered, the further use of the documents falls away.

THE LAW

- [39] Rule 35(12) of the rules states that:

"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".

- [40] For Rule 35(12) to vest in a party reference to a specific document is essential. The right to inspection is not dependent upon a detailed or descriptive reference to such documents and no distinction is made between documents upon which the proceedings is actually founded and documents possessing merely evidentiary value[5]. Rule 35(12) also covers documents of which reference is made in annexures to the pleadings, and in this case, the recordal[6].
- [41] The entitlement to seek inspection and copies of documents referred to in pleadings or affidavits arise as soon as reference thereof is made thereto in the pleadings[7].
- [42] The plaintiff is entitled to inspection and copies of these documents prior to filing their pleadings[8].
- [43] It is not the respondent's case that they are not relying on the sought documents. As long as it is contained in their pleadings it should be provided, unless one of the objections referred to hereunder applies.
- [44] A good objection to an application to compel discovery in terms of rule 35(12) will be that the documents are:
1. Privileged; and/or
 2. Confidential; and/or
 3. Irrelevant.
- [45] The respondent allege that the documents are confidential and irrelevant to the dispute between them and the applicants.
- [46] It is however common cause that, once confidential documentation falls into the public domain, the confidentiality cease to exist.
- [47] Where a court may recognise that a wrong has been committed, such as the violation of a person's right to confidentiality, and that person's own information, a court cannot conceive of any utility in an order and which would, if granted be a mere sterile gesture. The approach of the Court has been to refuse the relief in such cases.
- [48] An essential requirement to refuse access to confidential information is that the information is still confidential.
- [49] Once confidentiality is shattered, like Humpty Dumpty, it cannot be put together again. Once the privacy has been waived, individual or a company cannot rely on it any more. A court will also not protect such right once the privacy has been waived[9].

- [50] For the respondent to rely on the confidentiality of the information the respondent must disclose sufficient facts for its reliance on the plea of confidentiality to avoid disclosure and/or copying of the documentation[10]. There is not an onus in the true sense on the party relying on confidentiality but sufficient facts must be set out in its opposing affidavit to trump the applicants request for discovery.
- [51] The respondent relies on the mere “say so” of its deponent in respect of the alleged confidential nature of the information contained in the agreements. The applicants cannot test the allegations, and therefore it follows that the court will also not be in a position to find whether these documents contains confidential information or not. The documents are certainly not irrelevant. The documents, according to respondents own version, is only needed to prove its locus standi.
- [52] The respondents will have to produce these documents at a stage in order to enable them to prove their locus standi.
- [53] The applicants are entitled to these documentations in order to enable them to plead. If the respondents do not have locus standi it is simply the end of the matter.
- [54] The fact that the respondents allowed the applicant’s attorneys to inspect the documentation at their offices, albeit only for an hour, is sufficient to constitute a waiver of the alleged confidential nature of the documents[11].
- [55] It is this Court’s finding that when access that was given to the applicants’ attorneys to inspect the documentation, the respondent waived any confidentiality that existed in the contents of the documentation.
- [56] The reliance by respondent on confidentiality is therefore not good in law.
- [57] The defence of relevance does not make sense, as stated above.
- [58] If the documentation were irrelevant, why would the respondent then plead, and refer to these documentation in its simple summons and declaration.
- [59] The applicant must be placed in a position to dispute, if necessary, the respondent’s locus standi.
- [60] It is this Court’s opinion that the documentation referred to in the Rule 35(12) notice is relevant, and that confidentiality was waived by respondent.
- [61] The documentation must therefore be provided (copies thereof) to the applicants.
- [62] Both parties are ad idem, that this court may make certain reservations or limitations to the right to access to certain documentation.
- [63] This court intend doing so and it will appear from this Court’s order.

COSTS

[64] In various letters from the applicant's attorneys to the respondent discovery and copies of the documentation was sought.

[65] Subsequent to the filing of the notice in terms of rule 35(12) the applicant filed a notice in terms of rule 30(2) (b).

[66] Despite the said notices the respondent's attorneys replied on 2 April 2019 in the following tone:

"Ons kliënt se instruksie is dat hulle u kliënte nie gaan antwoord op laasgenoemde kennisgewing nie en dat u 'n aansoek moet bring om ons kliënt te verplig om te antwoord op laasgemelde kennisgewing van u".

[67] In various correspondence after that the applicant sought copies of the documentation after the attorneys of record of the applicants inspected the documents.

[68] In the last letter, from the respondent's attorneys to applicants' attorneys annexed to the applicants founding

affidavit, the applicants were referred to the Crown Court judgment and copies of the documents were refused. As I found, the reliance by respondent on the dictum in the Crown Court judgment was misplaced.

[69] It is clear that the respondents were obstructive and unreasonable in refusing to provide the applicants with copies of the documentation when the applicant, respondent on his own version, already afforded the applicants access to and inspection of the said documents. The respondent even failed to provide copies of the "relevant pages" that it stated it would give to the applicants. The applicants had no choice but to approach this court for the relief sought.

[70] I accordingly make the following order:

1. That the respondent is ordered to comply with the applicant's notice in terms of rule 35(12) dated 14 January 2019, and attached to the founding affidavit on behalf of the applicants as at Annexure F, and more specifically items 2 to 12 of the notice.
2. That the respondent is ordered to provide the applicants with copies of the complete documented list in the said rule 35(12) notice, referred to in paragraph 1 above, within 10 days of the granting of this order and upon payment of the reasonable costs incurred for making such copies to the respondent's attorneys.
3. That the applicants (including their legal representatives) shall not make the agreements and or documentation contained in paragraph 2 to 12 in Annexure F to applicants founding affidavit available in any format, directly or indirectly, to any third party, excluding the use of same in these court proceedings and undertake to destroy such copies upon finalisation of the trial in this matter.

4. In the event respondent fails or refuses to comply with the order in 1 and 2 hereof, the applicants may approach this Court on the same papers, as supplemented, for an order setting aside the respondents simple summons and declaration.
5. That the respondent is ordered to pay the costs of this application on the scale as between attorney and client.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANTS: ADV. N.C HARTMAN

INSTRUCTED BY: NEUHOFF KHOSA INC.

REPRESENTATIVE FOR THE RESPONDENT: ADV. H.S GOOSEN

INSTRUCTED BY: JAN G OOSTHUIZEN ATTORNEYS

DATE OF HEARING: 2 OCTOBER 2019

DATE OF JUDGMENT: 14 OCTOBER 2019

[1] Opposing affidavit par 3.14

[2] Scott on session: a treatise on the law in South Africa, Susan Scott, Juta, 2018 on p312-313.

[3] The recordal paragraph 2.1

[4] 1980(3) SA 1093 (W) p1100

[5] Erasms vs Slomovitz (2) 1938 TPD 242; Adcoc Ingram (Chemists) Ltd vs American Cyanimid Co 1977 DP 172 and Protea Assurance Co Ltd v Waverley Agencies CC 1994 (3) SA 247 (c).

[6] Centre of law vs Hoërskool Fochville 2016(2) SA 121(SCA) and Universal City Studios vs Movie Time 1983(4) SA 736 (D) at 750d.

[7] Protea Insurance Co Ltd supra at 348.

[8] Unilever Plc vs Polagric (Pty) Ltd 2001(2) SA 329 (C) at 336 g-j.

[9] South African Airwaves SOC vs BTFM Publishers (Pty) Ltd and Others 2016(2) SA 561 G-J.

[10] Centre for Child Law vs Hoërskool Fochville and Another.

[11] Bank of Lisbon and South African Ltd vs Tandrien Beleggings (Pty) Ltd and Others (2) 1983(2) SA 626 W.

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