

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

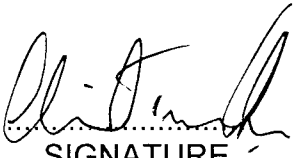
25/4/2016
CASE NO: 23898/15

In the matter between:

POTCH BOUDIENSTE CC

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	22/04/16 DATE	 SIGNATURE

FIRSTRAND BANK LIMITED

Respondent

JUDGMENT

Tuchten J:

- 1 This is an application for production of documents, under rules 35(14) and 35(12) respectively. In addition, the relief sought is that production be effected under oath, pursuant to rule 35(11). The present application is interlocutory to an application under the same case number (the main application) by the respondent (the Bank) for the liquidation of the applicant (Potch).

- 2 The Bank has delivered a lengthy founding affidavit in the main application, replete with documentary annexures. In fact the main application was preceded by an earlier liquidation application which was withdrawn.
- 3 The essence of the Bank's case for liquidation is simple: it lent, it says, and advanced to Potch some R37 million in 2007. Potch has failed to repay the loan as required under the loan agreement and is presently indebted to the Bank in an amount, as at 4 April 2013, of over R45 million. Subject to the *in duplum* rule, any amount owed to the Bank of course carries interest so the amount of the debt, on the Bank's analysis, would today exceed R50 million. The Bank sent Potch a letter under s 69 of the Close Corporations Act, 69 of 1984, demanding that Potch pay this sum to the Bank. Potch has not done so, raising the inference, thus the Bank, that Potch is unable to pay. In addition, the Bank relies on an alleged factual inability to pay.
- 4 Potch has not yet delivered an answering affidavit. This is important because the issues raised in the main application have therefore not been identified. Potch has, though, in correspondence, identified some areas which might be in contention.

- 5 From an early stage Potch has sought access to documents which it says will inform its defences. Indeed, during oral argument, counsel for Potch said that although Potch could assert its defences, it could not prove them without documents. But until the defences have been identified in an answering affidavit, there is no way of knowing with precision what these defences are. And because one does not know precisely what these defences are, one does not know what is genuinely in issue between the parties and what documents might be necessary to achieve the fair resolution of each such issue.¹
- 6 The main application was instituted by notice of motion dated 1 April 2015. By notices dated 3 June 2015, Potch sought access to a long list of documents. There has been correspondence between the attorneys for the parties. By notice dated 4 August 2015, Potch called upon the Bank under rule 30A to supply the documents on pain of an application to compel production. The Bank's responses did not satisfy Potch. It launched the present application by notice of motion dated 21 August 2015. The Bank delivered an answering affidavit setting out its defences to the present application. Potch replied. On these papers I am asked to order production of the documents mentioned.

¹

Compare the language in s 34 of the Bill of Rights.

- 7 I shall deal first with the application under rule 35(14). The subrule reads:

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.

- 8 Rule 35(14) does not apply to motion proceedings but can be made applicable to motion proceedings by special order under rule 35(13). The subrule similarly does not provide for production under oath. But Potch relies on rule 35(11) which reads:

The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his power or control relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet.

- 9 Rule 30A, to which I referred earlier, reads:

- (1) 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, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

- (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.

10 Two trite but important principles underlie the present application. Firstly, unless exceptional circumstances are present, a court will not direct discovery at all in motion proceedings. Secondly, absent exceptional circumstances, the production of documents in any case will not be ordered until the issues have been delineated by pleadings or, by extension of reasoning applicable to motion proceedings, the filing of affidavits.

11 Counsel for Potch urged upon me in both written and oral argument the factors which courts have taken into account in exercising their powers under rule 35(14). I have considered all the factors advanced. It seems to me that the failure to deliver an answering affidavit must be decisive against Potch in the present case. This means that court cannot presently assess the *bona fides* of the request for discovery or the need for it in the context of the case as a whole. This is because I do not have a comprehensive statement of Potch's defences to the Bank's claim. It is true that Potch has selectively addressed issues which might, if advanced in an answering affidavit, raise a genuine

dispute as to parts of its indebtedness. But I decline to exercise my discretion in favour of Potch while it declines comprehensively to address the allegations made against it.

- 12 There is authority for the proposition that the obligation of a party seeking the production of documents under rule 35(12) to deliver its answering affidavit is suspended by the request for and the adjudication of its claim for production of documents. There is a risk that an adroit lawyer, acceding to the instructions of a cynical or desperate litigant to invoke the machinery of rule 35(12) without just cause, can delay the resolution of the true dispute between the parties.² The legal profession calls the technique of using procedural and interlocutory mechanisms to delay the resolution of the merits of a dispute, a technique admired or deplored according to the individual lawyer's ethical values, ducking and diving.³

² And thereby frustrate the core value sought to be protected and promoted by s 34 of the Bill of Rights: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

³ Compare the remarks of Didcott J in the unreported judgment of *Raydean Investments (Pty) Ltd v Shire Plant Hire (Pty) Ltd and Another*, delivered on 25 October 1979, referred to in *Webb and Others v Botha* 1980 3 SA 666 N 672.

- 13 I simply do not accept that Potch is unable adequately in an answering affidavit to formulate its answers to the Bank's allegations until it gets the documents. Potch has books and records of its own. So the documents which Potch says it wants are not *essential* for the purpose of "pleading".⁴ What I suspect Potch wants to do is identify, *before it delivers an answering affidavit*, areas in which it thinks the Bank's case might be assailable and then, opportunistically, make those areas the basis for a defence.
- 14 Whether or not this suspicion is grounded, the absence of an answering affidavit opens the way for abuse, regardless of the motives of an applicant in seeking discretionary production under rule 35. The purpose of the rule is to facilitate the ventilation of disputes. The rule is not meant to be an end in itself.
- 15 Another problem facing Potch is the very large amount of the claim that the Bank asserts. While the correspondence suggests that Potch asserts defences in relation to R6 million and R12 million of the claim against it, it is less than forthcoming in relation to its defences to the balance of the claim. I can see no reason why Potch, with the help of its accountant, cannot calculate what (if anything) it says, on the

⁴ Which, adapted for motion proceedings, translates to the delivery of an answering affidavit. See *Erasmus*, Superior Court Practice, vol 2 (looseleaf ed) notes sv rule 35(14).

information available to it, is owing or, depending on identified contingencies, would not be owing. This is important because the Bank's claim is not for a money judgment by for liquidation which depends on the Bank proving an indebtedness of no more than R100.

- 16 The question whether I should order production on oath is still alive in relation to the request for documents under rule 35(12). This is important because the Bank has firstly responded to the notices by letter dated 9 July 2015 and secondly tendered in a letter dated 18 May 2012 to allow Potch "insae in hierdie aangeleentheid wat [die Bank] in hierdie aangeleentheid beskikbaar het." Counsel for the Bank has submitted that there is no good reason to order production under oath.
- 17 There seems to me no good reason why in the light of the Bank's attitude, I should exercise in favour of Potch the power to direct production on oath. In any event, the contents of both letters have been confirmed by the Bank under oath in affidavits filed in the present and the main applications. After some urging on my part, the parties informed me that they had agreed on a meeting to take place on 9 May 2016 to implement the undertaking made in the letter of 18 May 2012.

18 For all these reasons, I decline to make the provisions of rule 35(11) applicable to this case or to direct production under rule 35(14).

19 I turn to the notice under rule 35(12). The subrule reads:

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.

20 There is one matter I must first get out of the way: counsel for the Bank submitted that as the subrule had its own self-contained remedy (the inability of the party failing to comply with the notice not being allowed to use the document in the proceeding), it was not competent for me to order production. This submission is against SCA authority.⁵ The self-contained remedy is described as the negative remedy. In addition, there is a positive remedy: a party using the machinery of

⁵ *Centre for Child Law Hoërskool Fochville and Another* 2016 2 SA 121 SCA para 16, approving *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucorakis and Another* 1979 2 SA 457 W 654C-D.

rule 30A is entitled in a proper case to compel production of the document identified pursuant to rule 35(12).

21 Before I turn to the dreary task of dealing with the many individual documents and categories of documents sought under rule 35(12), I must discuss another matter of principle. A party is entitled only to those documents to which reference is made. This does not include documents which it can inferentially be deduced from the affidavit⁶ must exist or would probably exist.⁷ It is the reference to the document in the affidavit that triggers the obligation, all else being equal, to produce.

22 The courts have described how one must identify whether “reference is made” to a document in an affidavit. It is now settled that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.⁸ I would respectfully add that a court should generally not order the production of a document that has already been provided by the party on whose behalf the affidavit has been made because the repeated request for production will probably constitute an abuse.

⁶ Or, of course, pleading.

⁷ I refer to this class in what follows as a “process”.

⁸ *Centre for Child Law v Hoërskool Fochville and Another* 2016 2 SA 121 SCA para 18

- 23 I agree with those decisions which say that although a reference to a document which is not detailed or descriptive will trigger the obligation to produce, when the existence of a document can only be deduced by a process of inferential reasoning, the rule is not triggered.⁹ From this it follows that where a document identifies a process by which documents can (or even probably or certainly will be or were) created, that by itself does not trigger the obligation under the rule. As I shall show, this is of relevance in the present case.
- 24 I now turn to the 25 categories of documents sought under the rule 35(12) notice. The issues must be determined in the light of the letter dated 9 July 2015. It is trite that the court will not be astute to go behind a party's discovery affidavit. On the same principle, the court should not go behind a party's response not made on oath to a request for production of documents where there is no obligation to respond on oath.
- 25 Items 1 and 25: These were produced before the present application was launched.

⁹ See eg *Penta Communication Services (Pty) Limited v King and Another* 2007 3 SA 471 C paras 15-17. See also *Holdsworth and Others v Reunert Ltd* 2013 6 SA 244 GNP para 12.

- 26 Item 2: This is described as the documentation which was provided to the State as referred to in paragraph 93 at p49.¹⁰ The Bank has stated on oath that this documentation was given to a representative of Potch, Mr Prakke. The Bank's attorney asserted this through a letter to Potch's attorney dated 17 March 2013. The assertion was never disputed. I decline to order production of a document already provided by the Bank to Potch before the present application was launched.
- 27 Item 3: Copies of documents provided to Prakke as referred to in paragraph 96.3 at p50. As these documents have been provided, I decline to order that they be again provided.
- 28 Item 4: Copies of loan agreements and underlying documentation in respect of such loan agreements in respect of the loan provided to Turquoise Moon as referred to at p57. This is a reference to paragraph 100.6. The reference is not to a document but to a loan. I decline to order production under this item.
- 29 Item 5: copies of certifications referred to in paragraph 2.1 at p84. The reference there is to a process, not a document. I decline to order production under this item.

¹⁰ In this context, the references are to paragraphs and paginated pages in the founding affidavit in the main application.

- 30 Item 6: copies of necessary delegations referred to in paragraph 3.1 at p84. The reference there is to a process, not a document. I decline to order production under this item.
- 31 Item 7: the publication of effective change of prime rate referred to in paragraph 6.3 at p105. The reference there is to a process, not a document. I decline to order production under this item.
- 32 Item 8: A copy of any notice to remedy a breach as proposed in clause 12.1.1 at p 108. The reference there is to a process, not a document. I decline to order production under this item.
- 33 Item 9: A list of standard fees as referred to in clause 8.5 on p107. The reference there is to a process, not a document. I decline to order production under this item.
- 34 Item 10: A copy of the signed agreement of pre-sales as referred to in the release schedule (p116) and as stipulated in the first paragraph of the repayment schedule at p115. The reference there is to a process, not a document. I decline to order production under this item.

- 35 Item 11: Suitably assessed security assessment reports referred to in clause 1 of the valuation conditions at p117. The reference there is to a process, not a document. I decline to order production under this item.
- 36 Item 12: A copy of the study referred to in clause 2 if the valuation conditions at p 117. The reference there is to a process, not a document. I decline to order production under this item.
- 37 Item 13: A copy of the conveyance certificate as set out in clause 1 under property conditions at p117. The reference there is to a process, not a document. I decline to order production under this item.
- 38 Item 14: A copy of the written confirmation as referred to in clause 1 under financial information conditions at p117. The reference there is to a process, not a document. I decline to order production under this item.
- 39 Item 15: Updated statements of assets and liabilities of four named persons as referred to in clause 2 of the financial information conditions at p117. The reference there is to a process, not a document. I decline to order production under this item.

- 40 Item 16: Copies of signed agreement as referred to in clause 1 of the pre-sales conditions at p 117: The reference there is to a process, not a document. I decline to order production under this item.
- 41 Item 17: Written evidence in relation to the fact that conditions had been met as referred to in clause 1 of the pre-sales conditions at p 117: The reference there is to a process, not a document. I decline to order production under this item.
- 42 Item 18: A copy of the draft agreement referred to at p118: The reference there is to a process, not a document. I decline to order production under this item.
- 43 Item 19: Copies of proof acceptable as referred to in clause 2.3 at p118. The reference there is to a process, not a document. I decline to order production under this item.
- 44 Item 20: Copies of engineering clearance certificates as referred to in clause 1.1 of other conditions at p118. The reference there is to a process, not a document. I decline to order production under this item.

- 45 Item 21: Copies of clearance certificates as referred to in clause 1.2 under other conditions on p118. The reference there is to a process, not a document. I decline to order production under this item.
- 46 Item 22: Copy of an engineering clearance certificate as referred to in clause 1.3 on p118. The reference there is to a process, not a document. I decline to order production under this item.
- 47 Item 23: Copy of an approved general plan referred to in clause 1.4 at p118. The reference there is to a process, not a document. I decline to order production under this item.
- 48 Item 24: The documents referred to in the letter at p 245. This is a letter dated 13 April 2012 by Potch's attorney in which Potch's attorney sought the production of documents by the Bank. The reference, in paragraph 80 at p45 is to the letter, not to the documents referred to in the letter. The letter was attached at p244. I decline to order production under this item.
- 49 Items 25 and 26: Signed affidavits and annexure A to a letter at p324: These were provided before the present application was launched.

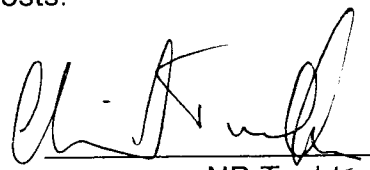
50 Item 27: Copies of documentation pertaining to or in support of any proof of an existing mortgage bond which necessitated the issuing of the letter of guarantee as referred to in the letter of guarantee at p339. The reference there is to a process, not a document. I decline to order production under this item.

51 Potch has therefore failed to obtain any relief at all in the present application. This is not necessarily the end of the road for Potch in its alleged quest to obtain documents. I have referred to the tender by the Bank to allow Potch's representative to view its documentation. In addition, if at any stage during the proceedings, the production of an identified document is legitimately required by Potch for the protection of its rights, Potch will have remedies available to it under the Rules.

52 Finally as to costs: counsel for the Bank asked for a punitive order. I carefully considered this request but decided in the exercise of my discretion not to accede to it.

53 I make the following order:

The application is dismissed with costs.


NB Tuchten
Judge of the High Court
22 April 2016