IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: AC5/2020

In the matter between:

MV "CAPE PROVIDENCE"	1st Applicant/ 1st Defendant
PROVIDENCE NAVIGATION LTD	2nd Applicant/ 2nd Defendant

and

NASSUA MARITIME HOLDINGS DESIGNATED ACTIVITY COMPANY	Respondent/Plaintiff

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JUDGMENT DELIVERED ELECTRONICALLY ON 11 SEPTEMBER 2020

INTRODUCTION

[1] There are two applications in front of this court.

[1.1] The first is an application in terms of rule 30A of the Uniforms Rules of Court ("the Rules") for an order directing that the respondent

make the complete texts of three documents available for inspection, such documents having been referred to in a document annexed to the particulars of claim of the plaintiff (the respondent in the present matter) in the main action. These documents were requested in terms of Admiralty Rule 15 read with rule 35(12). After delivery of the relevant notice in terms of the Rules, the respondent produced redacted versions thereof which are not to the satisfaction of the applicants.

[1.2] The second is a supplementary application for the production of the complete texts of two further documents. These documents are referred to in the redacted versions of the documents which were produced in terms of rule 35(12) in relation to the first application. This application is brought in terms of Admiralty Rule 25 and in terms of the court's inherent powers to grant relief not specifically provided for in the Rules.

BACKGROUND

[2] During March 2020, the first respondent in the present application ("Nassau") caused the first applicant, the mv "Cape Providence" ("the vessel") to be arrested at the Port of Saldanha Bay and thereby instituted an action *in rem* against the vessel. The second applicant (the second defendant in the main action), is the owner of the vessel ("the owner").

[3] Nassau avers that its claim is based on a loan agreement ("the loan agreement") concluded between the owner and NHS Nordbank AG ("the Bank"). It is further averred that "all rights and obligations arising from the loan agreement" were assigned to Nassau on 21 June 2019 ("the loan assignment agreement"). The loan assignment agreement, together with its addenda are attached to the summons in the main action.

[4] It is common cause that during 2008, the Bank provided loan finance to a group of companies, of which the owner was one, in the amount of US$418 441 800.00 for a fleet ship building project. The loan was secured by, amongst other, mortgages over the vessels to be built, including the vessel.

[5] Nassau avers that prior to the assignment of the loan, the owner persistently failed to make payments under the loan agreement. This failure to pay continued after the assignment, and by virtue of the loan agreement, the full outstanding amount became due by 9 March 2020. Shortly thereafter, on 13 March 2020, the vessel was arrested in the Port of Saldanha Bay at the instance of Nassau.

[6] The owner attacks the standing of Nassau to have brought the in rem proceedings, by amongst other, disputing the validity of the loan assignment agreement and averring that there could be no valid transfer of rights under the loan agreement as a matter of German Law.

THE RULE 30A APPLICATION

The relevant law

[7] The three documents which are the subject of the rule 30A application have been requested in terms of rule 35(12). These documents have been provided under the rule, but not to the satisfaction of the owner, as the documents, it is claimed, have been severely redacted to the extent that they are almost completely obliterated.

[8] For the sake of completeness, it should be mentioned that since these are admiralty proceedings, rule 35 (with the exception of sub rule 5) is applicable by virtue of Admiralty Rule 15 which provides that discovery of documents in admiralty proceedings shall be in accordance with rule 35.

[9] Rule 35(12) provides:

> *"Any party to any proceedings 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 documents or tape recordings 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 proceedings provided that any other party may use such document or tape recording"*

[10] It is trite that where the party seeking the production of documents in terms of Rule 35(12) and where such party is not satisfied with the negative sanction provided for in the Rule in the event of non- compliance, such party may resort to Rule 30A for positive relief. Documents that can be sought in terms of Rule 35(12) are not only documents that are referred to in the pleadings or affidavit themselves, but also document referred to in annexures to such pleadings or affidavits. In this regard, see **Universal Studios v Movie Time** 1983 (4) 736 (D) at 750 D where Booysen J said the following:

> *"An annexure to a pleading or an affidavit seems to me to be as much part of the pleading or affidavit as the body itself. Many references to documents in annexures to pleadings are probably irrelevant to the proceedings and would for that reason not have to be produced but it does not follow that the Rule does not apply to documents to which reference is made in annexures."*

[11] The above approach was also confirmed by Van Oosten J in **Mutch Building Materials CC v John Hanekom** (unreported GJ case number 2013/45313 dated 6 October 2014 at para [5] as well as in **Waldeck NO v The Land and Agricultural Development Bank of South Africa** (unreported GJ case number 4013/18 dated 14 October 2019) at paragraph [40] where it was held that *"Rule 35(12) also covers documents of which reference is made in annexures to the pleadings,…"*

[12] It was however stated as obiter in **Contago Trading v Central Energy Fund** 2020 (3) SCA 58 by Cachalia JA that rule 35(12) *"requires a reference to a document in*

'pleadings or affidavits' – not in its annexures – before its discovery is sought…" I am mindful that this was said in obiter and the issue cannot be regarded as settled, but for now I am swayed by what has been said in the **Universal Studio** case, the **Mutch Material** case and the **Waldeck** case discussed above. I am also mindful that the mere request for production in terms of the rule is not definitive to entitlement to the production of the requested documents, this always being subject to the ability to produce the documents, to privilege and to relevance.

[13] For a court to order discovery, the party applying must show that the documents sought to be discovered can be produced, are not privileged and are relevant. In this regard, it was held by Ponnan JA in **Centre for Child Law v Hoerskool Fochville and Another** 2016 (2) SA 121 (SCA) at [18] as follows;

> *"In my view the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant."*

[14] It is not only during the Constitutional era that the role of discovery has been emphasised, but the importance thereof has been recognised in the pre-Constitutional era. In **Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd and Others** 1980 (3) SA 1093 (W), at p1100 B-C, it was held:

> *"But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's rights to a fair trial, of which the discovery procedures often form an important part. I trust that by holding what I have I have not opened a new door to interlocutory litigation or to a flood of ill-founded objections on grounds of confidentiality. Practitioners would do well to remember that the normal rule is full inspection."*

[15] In the present matter, Nassau does not claim privilege but rather that the documents in question are not relevant and furthermore that it is in possession only of "lightly redacted" versions of the documents sought.

[16] The question of relevance in the above context was considered in **Rellams (Pty) Ltd v James Brown and Hamer Ltd** 1983 (1) SA 556 (N) where it was held at 562 H - 564A that:

> *"The question remains whether the documents called to be produced are relevant to any matter in the action. The test for the determining this, as laid down in* ***Compagnie Financiere et Commerciale du Pacifique V Peruvian Guano Co*** *(1882) 11 QBD 55, has often been accepted and applied in our courts. After remarking that it was desirable to give a wide interpretation to the words 'a document relating to any matter in question in the action', Brett LJ stated the principle as follows:*
>
> *'It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may-not which must-either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.'"*

[17] Whether documents are relevant or not is a question for the court to decide in relation to the pleadings. In **Santam v Segal** 2010 (2) SA 160 the following was said:

> *"Apropos relevance, the important point to note is that assessment of relevance is objective and not subjective. It is not for a party's legal representative to decide what he thinks the issues are and what documents are relevant to them. He has to provide access to documents which could be part of the issues and what documents could be relevant to them. The question of relevance is normally answered by reference to the pleadings. The basic principle was formulated in* ***Compagnie Financiere et Commerciale Du Pacifique v Peruvian Guano Company*** *(1882) 11 QBD 55 at 63; and restated in* ***Thorpe v Chief Constable of Greater Manchester Police*** *[1989] 1 WLR 665 at 668 –*

> *'any documents must be disclosed which it is reasonable to suppose contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of those two consequences. Discovery is thus not necessarily limited to documents which would be admissible to evidence."*

The requested documents and relevance

[18] What then are the documents requested under Rule 35 (12) and are they relevant to the issues raised in the pleadings? In considering this question, it is prudent to be mindful of the case that the owner is facing.

[19] During May 2008 the owner entered into a contractual relationship with the Bank when the loan agreement was concluded. The loan was secured by way of a mortgage over the vessel. Nassau's claim against the owner is based on a loan assignment agreement in terms of which all the Bank's rights and obligations were assigned to Nassau. Needless to say, the owner is not a party to the loan assignment agreement. The owner denies that there was a valid assignment by the Bank to Nassau, which if true, may put an end to Nassau's standing in the main action. The owner's denial of a valid assignment is set out in a great amount of detail in paragraph 12 of its plea, which I find unnecessary to repeat, save to mention the two grounds repeated by Nassau in paragraph 13 in its answering affidavit in this application, namely firstly that the loan agreement excluded assignment more particularly as Nassau was not a "*Syndicate Member*" and as at the date of the assignment, the loan had been paid in full, and secondly that the owner had a personal relationship with the Bank and the purported assignment to Nassau resulted in a *"change of the contents of the Borrower's rights under the Loan Agreement."*

[20] Nassau avers that the document that establishes its standing is the assignment agreement and in any event, the defences raised by the owner concerns the personality of the creditor.

[21] I must pause to mention that the documents sought are all governed by German law, in terms of which the principles of assignment, as an example, may differ materially from the understanding of this and other legal concepts in South African law. Nassau, in its answering affidavit, and also during argument Mr Irish who appeared for Nassau, went into great detail of the principles of German law. This court, however, is in no position to make any findings in this regards without the evidence of experts on German law, which no doubt may have to be dealt with eventually in the main action.

[22] It is now opportune to consider the documents which are subject to the Rule 35(12) request and also their nature and function. It is neatly summed up in Nassau's heads of argument from which I borrow:

> [22.1] The first is the loan, sale and purchase agreement (the LSPA") dated 28 February 2018 referred to in paragraph (D) under the heading "BACKGROUND" of the loan assignment agreement attached to Nassau's summons as annexure "A". In terms of the LSPA, the Bank sold and undertook to transfer to Promontoria Holding 260 B.V. ("Promontoria 260") the "full contractual position" or, if such transfer was not legally possible, to assign certain rights.
>
> Promontoria 260 in turn designated Promontoria North Shipping Designated Activity Company ("Promontoria North") to take transfer of a component of the rights and obligations under the LSPA (ie the Shipping Portfolio) including the loans in question.

> [22.2] The second is the nomination of Promontoria Maritime Holdings Designated Activity Company (the plaintiff, referred to as "Nassau" after a name change) by Promontoria North ("the Nomination"), also referred to in the loan assignment agreement under the heading "BACKGROUND". Pursuant to this nomination, and on 13 June 2019, the Bank, Promontoria North and Nassau agreed that Nassau shall assume the position of Promontoria North under the LSPA by way of assumption of contract with regard to the portfolio items.
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> [22.3] The third is the funded sub-participation agreement ("the FPA") dated 28 November 2018 referred to in the definition section of the loan assignment agreement, which regulated the transfer of the commercial (not legal) title in the Shipping Portfolio, including the loan agreement, from the Bank to Promontoria North. This document is actually titled "Master Funded Sub-Participation and Trust (Vereinbarungstreuhand) Agreement" but I shall continue to refer to it as the FPA.

[23] It is Nassau's case that the loan assignment agreement superseded the LSPA and the transactions concluded pursuant thereto, including the FPA and the Nomination, thus rendering those agreements more "*of an historical footnote*" and consequently of no relevance to the current proceedings in the main action.

[24] The owner, however contends that since it is contesting Nassau's standing in these proceedings, it is important for it to have sight of the three requested documents. The validity of the assignment of the Bank's rights and obligations under the loan agreement will depend upon the provisions of both the LSPA and the FPA, as well as the document in which Nassau was nominated by Promontoria North as assignee of the rights in question.

[25] It is clear that the rights which Nassau relies upon in its action against the owner are of those rights which were the subject matter (or at least part of the subject matters) of the agreements that have been requested in terms of Rule 35(12).

[26] What is also evident is that for the assignment agreement on which Nassau relies to be valid, the assignor, namely Promontoria North (who was also an assignee, referred to as the original assignee) must have been legally entitled to assign the rights in question. And for Promontoria North to have been legally entitled to assign rights to Nassau, it must have obtained those rights validly, which it avers it did (from the Bank) in terms of the FPA. Tracing the rights on which Nassau relies back even further, it seems that those rights originally vested in the Bank by virtue of the loan agreement. In terms of the LSPA, the Bank sold and undertook to transfer the full contractual position emanating from the loan agreement to Promontoria 260, and if this was not legally possible, it was to assign certain rights in terms of the LSPA, to Promontoria 260, who in turn designated Promontoria North to take transfer of a component of the rights and obligations under the LSPA, namely those relating to the Shipping Portfolio, including the loan in question. This transfer, according to Nassau, took effect on 28 November 2018.

[27] With the owner putting the standing of Nassau in question in the pleadings, it can hardly be disputed that all three documents discussed above, either each on its own or all three collectively, can potentially be determinative of the question on standing. There is no question that these documents are indeed relevant in relation to the pleadings in the main action, both by the pleadings filed by Nassau who relies on rights assigned to it, and by the owner who questions Nassau's standing and who is entitled, in my view, to interrogate the validity of the documents and the contractual consequences which they sought to effect.

Discretion

[28] Mr Irish, argued that even if this court finds that one or more of the documents in question are relevant, I should nonetheless dismiss the application in the exercise of my discretion. Two factors are offered as to why the application should be dismissed in the exercise of discretion. The first is that that pleadings have closed, or will close shortly, whereafter the parties will call on each other to discover. If any party is not satisfied with discovery, such party may resort to Rule 35(3) to request further discovery. I do not regard this as a good reason to exercise my discretion in favour of dismissing the application. All that it would result in is a proliferation of processes. With the attitude adopted by Nassau in this application, it seems unlikely that it will volunteer to production of the requested documents in terms of rule 35(1) and (2) without more.

[29] I am also mindful that Rule 35(12) provides that a party may resort to the rule "*at any time before the hearing*" and is not precluded from doing so before or after the close of pleadings.

[30] The second reason proffered for the dismissal of the application in accordance with discretion, is that the Bank is not a party to this application, and it is the Bank that is refusing to provide the documents in an unredacted form. It is argued further that Nassau owes the Bank a contractual duty of confidentiality and the Bank has refused to release Nassau form this obligation, and the disclosure of the full portfolio items into the public domain could have a direct adverse impact on the unrelated commercial dealings of the Bank, its clients and Nassau. As is the norm with contractual obligations of confidentiality, there is an exception in the LSPA, in clause 15.1(vi) thereof, in respect *of "any information disclosed pursuant to any law, regulation or binding order, decree or directive of any court, arbitral tribunal, …"* In terms of clause 16.2 of the FPA, the confidentiality obligations of the LSPA remains in place, which of course is subject to the exception as discussed.

[31] It goes without saying that this court is not bound by the contractual confidentiality obligations, but it is certainly a factor to be taken in consideration when exercising its discretion on disclosure, especially where disclosure implicates confidential information of a third party. In **Santam v Segal** (supra), the following was held in para [9]:

> *"In event of a challenge a court will only order production of documents for inspection if this is necessary either for disposing of the matter or for saving costs. The burden of proof must be on the party making the challenge. The court has a discretion to order production which discretion must be exercised judicially. A court will in each case have to strike a balance between the importance of ordering production from the point of view of doing justice or saving costs in the proceedings in question and respecting confidentiality. A distinction must be drawn between confidentiality as between the immediate parties to the litigation and confidentiality involving third parties. In my view the discretion to refuse production of documents should most commonly be applied where disclosure would breach confidentiality involving a third party."*

[32] In the present matter, the requested documents can be determinative of the standing of Nassau in these proceedings and therefore potentially dispositive of the matter. This justifiably directs, and fairness dictates, that discretion must be exercised in favour of making the documents available.

The issue of Redaction

[33] I now address the issue of the format in which the three requested documents should be made available. Nassau avers that it is not in possession of the "clean" versions of the documents sought, but that it has only "lightly redacted" versions available, whereas the owner argue that Nassau should be ordered to produce the complete texts of the documents and that although the full texts may not be in Nassau's actual possession, it does not suggest that it cannot obtain the full texts from one of its affiliated companies.

[34] There is a general rule that where a party is unable to produce a document not in his possession, the court will not make an order against him in terms of Rule 35(12).

[35] In **Gorfinkel v Gross, Hendler & Frank** 1987 (3) SA 766 (C) Friedman J had this to say, at 774G:

> *"[P]rima facie there is an obligation on a party who refers to a document …to produce it. That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so."*
>
> *See also* ***Moulded Components v Coucourakis and Another*** *1979 (2) SA 461 (WLD), at 461 D-E and the* ***Centre for Child Law*** *case (supra), at paragraph [18].*

[36] The above principle must surely also apply where a party has in its possession only a certain version, as in this case, a "lightly redacted" version of the document in question. I must accept that Nassau has only "lightly redacted" versions of two of the documents requested, the exception being the third document, namely the Nomination to which it was a party. That it was a party to the Nomination is undisputed (admitted in paragraph 29 of the answering affidavit to this application) and plainly it must be in possession of the clean version of this tripartite agreement.

[37] As for the other two documents, I agree with Mr Irish that the owner has not shown that Nassau is in control of associated companies who are parties to the agreements and can therefore demand clean copies from them. I can therefore only order the production of these documents as per the versions ("lightly redacted") in the possession of Nassau.

[38] I have taken note of the contention that because in an email from Nassau's attorneys dated 29 May 2020, Nassau requested whether the owner would agree to full disclosure of the documents subject to conditions, this is an indication that Nassau is in possession of unredacted versions of the documents. I cannot make this inference as it is not indicated that the attorneys were in fact in possession of unredacted documents at the time, and it is not clear exactly what has been communicated by Nassau to its attorneys before the tender was made. I cannot dispute the *bona fides* of the attorney who deposed to the affidavit

on behalf of Nassau, and I am sure Mr Wragge who appeared for the applicants also does not do so. The attorney, Ms Jacobs of Bowman Gillfillan Inc. states in her affidavit that they are in possession of only "lightly redacted" versions of the documents, which I accept to be the case. Mr Wragge did not take the matter further during oral argument.

THE APPLICATION IN TERMS OF ADMIRALTY RULE 25 AND THE COURT'S INHERENT JURISDICTION

[39] The second application is brought in terms of Admiralty Rule 25 which provides:

> *"(1) The court may in any admiralty proceedings* mero motu *or on the application of any party or other person having a sufficient interest give any direction which it considers proper for the disposal of any matter before it.*
>
> *(2) Any such direction may deviate from or supplement any provision of these rules, or of the Uniform Rules, or of any other rules relating to the division in question."*

[40] In addition to the very wide discretion with which the court is entrusted by virtue of Admiralty Rule 25, the owner also relies on the inherent power of the court to order a party to produce for inspection documents not referred to in that party's pleadings or affidavits (with reference to **Moulded Components** (supra) at 461 F-H).

The documents

[41] The documents sought are;

(1) The Transfer Certificate pursuant to which Promontoria North assumed from Promontoria 260 by way of assumption of contract any and all rights and obligation under the LSPA pertaining to the Shipping Portfolio, dated 28 February 2018. This certificate is an appendix to the Nomination dealt

with hereinbefore, a redacted copy of which was provided under rule 35(12); and

(2) The tripartite servicing agreement concluded between the Bank, Promontoria North and an external signing agent, pursuant to which the Bank continued to service the Corporate Portfolio and the Portfolio Items relating to the Shipping Portfolio Entities. This document is referred to in the recitals forming part of the FPA, a redacted copy of which was also provided in terms of rule 35(12).

[42] Neither of the two documents are referred to in Nassau's particulars of claim and it is for this reason that the applicants request these documents under Admiralty Rule 25 and in terms of the court's inherent jurisdiction.

[43] Nassau attacks this application on two grounds, namely that the relief sought is not competent under Admiralty Rule 25, and on the basis of relevance. I will deal with the issue of relevance first.

Relevance

[44] Nassau contends that that since the Transfer Certificate pertains to the transfer from Promontoria 260 to Promontoria North and the assignment was not made pursuant to this transfer, the Transfer Certificate is irrelevant. The applicants, however contends that the Transfer Certificate is relevant in that it forms part of a suit of contracts to which the Bank purported to sell its rights and obligation under the loan facility which is the basis upon which Nassau's claim is based. It is evident from the owner's plea that it denies that a valid assignment took place. It also put Nassau's standing in issue as a result. Based on this stance,

I am of the view that the Transfer Certificate is indeed relevant to the pleaded case of the owner who is entitled to call for its production for purpose of interrogating its validity.

[45] As for the servicing agreement, Nassau contends that it concerns services provided by the Bank to its clients and has no relevance to Nassau's title to enforce its claim in South Africa. Contra to this stance, the owner's case is that it appears that the Bank concluded an agreement in terms of which it continues to service the loan on which Nassau relies for its standing, and this seems to contradict the averments made in the particulars of claim that all rights and obligations had been assigned to Nassau. For this reason, the owner avers, it is vital for purposes of its defence to the respondent's claim that its legal representatives have sight of the servicing agreement. I agree with this contention especially in the light of the owner's right to be afforded a fair opportunity to present its case and given that the rights on which Nassau relies, are rights which emanated from a contractual arrangement between the Bank and the owner, which rights now seem to have been assigned without the participation of the owner. It is only fair that the owner have sight to the documents to trace the validity of the transfer of the rights from one entity to another. Surely it must be granted the opportunity to make sure that it is being sued by the correct party on the basis of a valid assignment of rights on which the claim it is facing is based.

The competency of the relief in terms of Admiralty Rule 25 and the court's inherent jurisdiction

[46] In terms of Admiralty Rule 15, rule 35 of the Rules, with the exception of sub-rule 5, is applicable to admiralty proceedings. According to Mr Irish, Admiralty Rule 25 is designed to cater for extraordinary situations, peculiar to admiralty, which are not covered by the Admiralty Rules. Can Admiralty Rule 25 therefore be invoked any purpose for which provision is made under the Admiralty Rules or the Rules? More specifically, can Admiralty

Rule 25 be relied upon for purposes of discovery when rule 35 is explicitly available for this purpose?

[47] In **Rizcun Trades (1) mv Rizcun Trader v Manley Appledore Shipping Ltd** 1988 (3) SA 953 (CPD), Conradie J held at 955 D:

> *"I do not believe that the provisions of Rule 25 of the Rules Governing the Conduct of Admiralty Proceedings should be invoked where there is a perfectly acceptable remedy in Rule 47."*

[48] In **Rizcun**, Conradie J dealt with an application for security for costs brought by the applicant in terms of rule 47 of the Rules. The respondent, seeking security for costs by way of a counter-application in its answering affidavit, sought to rely on section 5(2)(b) and (c) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Admiralty Act") read with Admiralty Rule 25. The section relied on allows for a court, in exercising its admiralty jurisdiction, to order any person to give security for costs. The court correctly concluded that the respondent in that matter should not be permitted to use this unusual procedure to secure security for costs where there is *"a perfectly acceptable remedy in Rule 47"*

[49] More to the point relating to discovery, is the judgement of Thring J in **MV Urgup: Owners of the mv Urgup v Western Bulk Carriers (Aust)** 1993 (3) SA 500, where the judge declined to apply Admiralty Rule 25 *"...to compel the applicant to disclose the existence or non-existence of documents to which the respondents claim no proprietary or other right or interest, but simply for the purpose of assisting the respondents, in an interlocutory application, to establish the jurisdiction or power of this Court to order the arrest of the vessel; still less to order their production for inspection and copying."*

[50] In my understanding of Thring J's judgement, he did not conclude that Admiralty Rule 25 can never be utilised for purposes of discovery. In recognising the wide

discretion to *"give any direction which it considers proper for the disposal of any matter before it",* the learned judge was of the view that it was not appropriate in the circumstances of the matter before him to apply the rule. In my view, in considering whether Admiralty Rule 25 should be applied for purposes of discovery, each case should be considered on its own merits, keeping in mind the applicability of rule 35 which is specifically designed for discovery, and considering whether this rule should be deviated from as allowed for by Admiralty Rule 25 (2).

[51] In the present matter, Mr Wragge appearing for the applicants raised both urgency and convenience as grounds for the determination of this matter together with the Rule 30A application.

[52] I have little doubt that there is urgency to this application. The vessel has been under arrest for some time, and Nassau has now brought an application in terms of section 9 of the Admiralty Act for the judicial sale of the vessel. The owner is resisting the sale, and the requested documents (both in terms of the Rule 30A application as well as the Admiralty Rule 25 application) are essential for purposes of the owner's defence. Discovery and subsequent interrogation of the documents may well dispose of the issue of standing, either in favour of the owner's case, or against it.

[53] Even if I am wrong in concluding that in the circumstances of this matter, given the urgency, that discovery should be allowed by Admiralty Rule 25, I would allow discovery of the documents by virtue of the court's inherent jurisdiction. I say so in the belief that rule 35 provides for a very detailed discovery process, involving notices and allowances for parties to respond thereto within twenty days. If thereafter a party is not satisfied with discovery, such party may call for further and better discovery in terms of rule 35(3) and if a party is still not satisfied with compliance, an application to compel may follow. This can be

a rather cumbersome process which is clearly not suitable in the circumstances of the current matter.

[54] In **Continental Illinois Bank v Greek Seaman's Pension Fund** 1989 (2) SA 515, Thirion J described the Admiralty Act as *"a statute which eschews formalism and technicality and which aims at the expeditious and efficacious determination of claims."* In his works, "Admiralty Jurisdiction Law and Practice in South Africa" G ys Hofmeyr has the equivalent to say about the Admiralty Rules, as follows (at page 13):

> *"The Admiralty Rules contain innovative provisions designed to give effect to the underlying philosophy of the admiralty, namely, the avoidance of unnecessary formality and the promotion of expedition."*

[55] In my view, Admiralty Rule 25 is a stand-out example of such innovation and is tangibly more suited to the current matter, in the current circumstances than rule 35.

Should conditions be imposed upon the production of the documents?

[56] In **Crown Cork** it was held by Schultz AJ:

> *"…our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part."*

[57] Nassau argued that should the production of the documents be ordered, that this is a case where the imposition of conditions limiting the use and disclosure of the documents would be appropriate. It seeks conditions to be imposed that;

[57.1] the documents are only disclosed to the applicants and their legal advisors and/or experts in the matter, who are properly identified, whether in South Africa or elsewhere;

[57.2] those advisors and experts undertake not to disseminate the documents to any third parties; and

[57.3] that the documents are only utilised for the purpose of this litigation in South Africa.

[58] The owner is dead set against the imposition of any conditions on the disclosure of the documents, arguing that the conditions proposes are unworkable for the following reasons:

[58.1] if the owner compelled to identify its advisors and experts to Nassau before disclosing the documents to them, this will give Nassau an unfair advantage. Normally the identities of experts need only be disclosed at the time of delivery of expert notices in terms of the Rules when it advises on the intention to call a particular expert;

[58.2] it may be necessary to disclose the documents to third parties for purposes of gathering evidence, for example ex-employees of Nassau, Promontoria North or the Bank who may be prepared to give evidence relating to the documents; and

[58.3] the documents will have to be disclosed to the owner's German lawyers who are advising the owner in proceedings against the Bank and other entities in other jurisdictions. It is not possible for the German lawyers to ignore the contents of the documents when furnishing advice on litigation in

other jurisdictions because this court has precluded them from disclosing the documents in relation to proceedings in such other jurisdictions.

[59] I have given very careful consideration as to whether it is appropriate in this matter to impose conditions on making the documents available to the applicants, being mindful of the nature of this matter, and especially the mainstay of the defence raised by the owner to Nassau's claim relating to the validity of the assignment in favour of Nassau and consequently the latter's standing in these proceedings. The significance (or not) of these issues raised in defence may well be garnered from the requested documents, but then it will most certainly be necessary to discuss the contents of the documents in consultation with experts and/or other potential witnesses.

[60] I am also persuaded by the reasoning of Thring J in **Unilever plc v Polagric (Pty) Ltd** 2001 (2) SA 329 where the judge recognised that there are cases where the imposition of conditions to the disclosure of documents are necessary and can be justified, but went on to say:

> *"However, I do not think that this is one of them. It is unwise, in my view, unless very special circumstances exist, to create a situation in which legal advisers or experts of a party to opposed litigation may find themselves in possession of information which may be highly relevant to the litigation but which they are precluded from communicating to their client. What are they to do with such information? How are they to obtain instructions in relation thereto? How are they to advise their client on the further conduct of the litigation or on whether it should be proceeded with at all? These, it seems to me, are some of the questions which can arise and which, in this case, could potentially place the respondent's legal advisers and experts in an invidious and even untenable position. Serious ethical questions could arise. The interest of the respondent could be prejudiced by the fact that it is unable to receive proper advice based on all the relevant facts."*

[61] Being mindful that the owner, as with Nassau, should be afforded the right to a fair trial in which discovery plays a very important role. Given the potential problems with imposing conditions as articulated in the **Unilever** matter, with which I agree can lead to

serious ethical issues, I am of the view that, in my discretion, no such conditions as proposed should be imposed.

COSTS

[62] The applicants have been substantially more successful in respect of both applications and should be entitled to costs. I have taken note of Mr Irish's contention that in the event that relief is granted to the owner, no costs order should be made against Nassau insofar it acted reasonably having regard to its contractual obligations not to disclose the documents in question. I do not agree that the applicants should be denied the costs which it normally would be entitled to because Nassau acted in accordance with its contractual obligations with a third party. Costs should follow the cause.

[63] In the result, I make the following orders:

1. **In relation to the Rule 30A application:**

1.1 The respondent shall make available for inspection and copying by the applicants, the versions of the documents in its possession, namely the loan, sale and purchase agreement dated 28 February 2018 and the funded sub-participation agreement dated 28 November 2018 as requested in the Rule 35(12) notice dated 22 April 2020.

1.2 The respondent shall make available for inspection and copying by the applicants, the full version without redactions, the nomination as requested in the Rule 35(12) notice dated 22 April 2020.

1.3 Should the respondent fail to comply with sub-paragraphs 1 and 2 above within 5 days of the date of this order, leave is granted to the applicants to apply to the court on the same papers, amplified as may

be necessary, for an order dismissing the respondent's claim with costs.

2. In relation to the supplementary application;

2.1 The respondent shall make available for inspection and copying by the applicants, the Transfer Certificate (roll of deeds No. 3082/2018 D of the acting notary Dr Thomas Diehn) and the tripartite servicing agreement as requested in prayers 1 and 2 in the applicant's supplementary application dated 7 July 2020.

2.2 Should the respondent fail to comply with sub-paragraphs 1 above within 5 days of the date of this order, leave is granted to the applicants to apply to the court on the same papers, amplified as may be necessary, for an order dismissing the respondent's claim with costs.

3. Costs

The respondent shall pay the costs in respect of both applications.

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HOCKEY AJ

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