Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 10038/2014

Before: The Hon. Mr Justice Binns-Ward

Hearing: 11 November 2020
Judgment: 16 November 2020

In the matter between:

INVESTEC BANK LIMITED Plaintiff

and

SIOBHAN LEE O'SHEA N.O. Defendant
(in her capacity as trustee of the St John Trust IT 2429/1998)

JUDGMENT
(Delivered by email to the parties and release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on 16 November 2020.)

BINNS-WARD J:

[1] In this matter the defendant in a pending action has applied, in terms of rule 35(7) of the Uniform Rules, to compel compliance by the plaintiff in the action with the terms of a demand for additional discovery made by the defendant in terms of rule 35(3). The plaintiff

is a bank. The defendant is the trustee of a trust (to which I shall hereinafter refer as 'the Trust'); she is joined in the action in her official capacity as the trustee of the Trust. The application, which was heard by me as the case manager judge in the pending action, is opposed.

[2] The plaintiff's claim against the defendant arises out of the alleged liability of the Trust in terms of two deeds of suretyship that the Trust and certain other parties executed in favour of the plaintiff in respect of indebtedness to the plaintiff of the principal debtor, the Plettenberg Golf Estate (Pty) Ltd (PGE). The sureties' joint and several exposure under both deeds of suretyship was in each case in a limited amount stipulated in the respective deeds. The parties, qua sureties, to the two deeds in terms of which the Trust was bound were not entirely the same; some parties that had undertaken suretyship obligations in terms of the first of the aforementioned deeds were not party to the second deed, and *vice versa*.

[3] In respect of the first deed of suretyship that is relevant in the action (annexure F1 to the plaintiff's particulars of claim), which was executed in 2006 and described itself as a 'limited continuing suretyship', the limit of the sureties' joint and several exposure was R18 425 000. The first deed of suretyship was that referred to as having to be provided in terms of clause 2.1.4.1 of an agreement of loan entered into between the plaintiff and PGE on 23 January 2011 (annexure A to the particulars of claim). The loan agreement is identified according to its tenor as 'Contract no. 218228/001'. The prefixed numbers apparently identify PGE's client number in the plaintiff bank's records, and the suffixed number identifies a contract entered into between the plaintiff and PGE. According to the copy of the loan agreement annexed to the particulars of claim the principal debt owed by PGE to the plaintiff in terms thereof was R54 062 100. The two other deeds of suretyship to be furnished by other parties in terms of clause 2.1.4 of the loan agreement were limited in the amounts of R3 797 000 and R30 000 000, respectively.

[4] In addition to the provision of the aforementioned deeds of suretyship, the loan agreement (contract no. 001) was also conditional, in terms of clause 2.1.5 thereof, upon the following 'security conditions':

> 2.1.5.1 Execution of a cession and pledge of 50% (Fifty percent) of the shares held by the Plettenberg Golf Estate Pty Ltd in Keurbooms Water Investments (reg no. ...) in favour of Investec in a form acceptable to Investec.
>
> 2.1.5.2 Execution of a cession and pledge by the Plettenberg Golf Estate Pty Ltd (the "Borrower") of all present and future right, title, benefit and interest ("right") in, to and under any agreement/s for the disposal of the Properties concluded between the borrower and any third party, including without limitation, all right in, to and under any and all proceeds and income received or receivable by the Property thereunder, whether on account of deposit or otherwise, in favour of Investec in a form acceptable to Investec.
>
> 2.1.5.3 Receipt by Investec of an unconditional irrevocable guarantee by Mr BM Clark ... for an amount of R1 833 333 (...) in favour of Investec in a form acceptable to Investec. The expiry date of the guarantee should be three months after the expiry date of this facility.
>
> 2.1.5.4 Receipt by Investec of an unconditional irrevocable guarantee from Graydon Property Projects CC for an amount of R5 500 000 (...) in favour of Investec in a form acceptable to Investec. The expiry date of the guarantee should be three months after the expiry date of this facility.

[5] In respect of the second deed of suretyship (annexure F2 to the particulars of claim), executed during 2007, which was titled 'suretyship limited to facility and amount' and pertained to a facility identified with reference to 'Agreement No. 218228/005', the limit of the Trust's liability was originally R6 806 250. However, by deed of amendment, dated November 2007 (annexure F3 to the particulars of claim), the extent of the Trust's maximum exposure under that deed was reduced to R1 million plus interest and certain other 'charges, expenses and costs'.

[6] The terms of the November 2007 deed of amendment provided as follows in the operative part:

> 1. The suretyship is hereby amended as follows:
>
> 1.1 By the insertion of the following new clause 1.2A

> "1.2A Notwithstanding close 1.2 above, it is agreed that the amount recoverable by The O'Shea Trust (IT2429/98) In terms of this Deed of Suretyship shall be limited to R1,000,000.00 (One Million Rand) plus such further sums for interest, charges, expenses and costs as may from time to time and howsoever arising be incurred and become payable by Investec in or about the exercise of any of Investec's rights in terms of this Deed of Suretyship".

2. The provisions of this deed of amendment shall be deemed to form part of and to have been incorporated in the suretyship. As set out herein, the provisions of the Suretyship shall remain of full force and effect.

[7] Agreement No. 218228/005 was a written agreement of loan entered into between the plaintiff and PGE on 24 January 2011 (annexure B to the particulars of claim). The principal debt in terms of the copy of that agreement annexed to the particulars of claim was R23 329 100. Clause 2.1.4.1 of the agreement cross-referenced to the aforementioned second deed of suretyship and related deed of amendment.

[8] It will be noted from the various dates mentioned in the preceding paragraphs that the dates of the suretyship agreements precede those of the two agreements of loan to which they allegedly relate. The anomaly is explained in paragraph 5 of the plaintiff's particulars of claim, where it is pleaded that the attached agreements of loan 'record the latest terms of those agreements'. It may be deduced from that allegation that there were earlier versions of those agreements.

[9] It appears from the plaintiff's particulars of claim that it appropriated certain payments received by it in reduction of the debt to which the second deed of suretyship pertained, with the result that the Trust's contingent liability thereunder has been extinguished. Part of the payments received by the plaintiff were also appropriated in reduction of the debt to which the first deed of suretyship pertained, with the result that the Trust's exposure under that deed was alleged to be in the sum of R17 570 210,66 as of

10 April 2013. The plaintiff claims payment of that amount in the pending action, together with mora interest at the contractually stipulated rate from 10 April 2013.

[10] The action is therefore concerned only with the plaintiff's claim against the Trust under the first of the aforementioned deeds of suretyship. The defendant, however, alleges that the aforementioned November 2007 deed of amendment falls to be rectified to provide that the second of the aforementioned deeds of suretyship would stand alone and in substitution of the first deed of suretyship. The implication of the defendant's plea is that as the Trust's liability under the second deed of suretyship has been extinguished, the plaintiff enjoys no claim in terms of the first deed of suretyship.

[11] The alleged rectification was pleaded for the first time in the fourth iteration of the defendant's plea. Paragraph 27A of that plea reads as follows:

> 27A To the extent that the written suretyships dated 25 October 2007 and 15 May 2006, purport to represent that they are separate and independent suretyships concluded by the parties, Defendant pleads that:
>
> 27A.1 This does not reflect the true intention of the parties;
>
> 27A.2 The common continuing intention of the parties, as it existed at the time when the suretyship dated 25 October 2007 was reduced to writing, was that it would replace the suretyship dated 15 May 2006;
>
> 27A.3 There was a mistake in the drafting of the suretyship dated 25 October 2007 document, which was the result of an intentional act of plaintiff, alternatively a bona fide common error;
>
> 27A.4 The actual wording of the suretyship dated 25 October 2007 should have contained a provision recording that it replaced the suretyship in favour of Plaintiff, dated 15 May 2006 and the suretyship should be rectified accordingly.

The plea does not specify with any precision how the wording of the second deed of suretyship falls to be changed for the purposes of the pleaded rectification. It says nothing at all about how the rectification of the second deed might affect the first deed, in which the Trust is but one of a number of co-sureties, some of which are not party to the second deed.

It also does not contain any factual allegations in support of the pleaded 'common continuing intention of the parties'.

[12] So much for the background to the current application. Before I turn to address the detail of the defendant's demand for further discovery, it will be useful to shortly rehearse the applicable legal principles.

[13] The test as to what is discoverable is, in its essence, relevance. Rule 35(1) speaks of 'documents and tape recordings relating to any matter in question in such action'. Relevance cannot be determined in the abstract. The jurisprudence tells us that it is to be determined with reference to the issues as they appear from the pleadings.[1]

[14] The purpose of discovery, or 'disclosure' as it is called in the English civil procedure, is to assist in the ascertainment and proof of the facts that are relevant to the determination of the issues that are in dispute in the action, and also in the clarification or settlement of issues in the case so as to narrow the scope of disputatious matter and facilitate the more efficient conduct of the trial. A party is required to discover all the documents that are favourable to his or her case that he intends to use in the trial and all those that may favour the case of the opponent.

[15] Discovery works on the basis of honesty and good faith, which explains why, if a party alleges that his or her opponent has been mala fide in failing to disclose any document that the opponent demands to have discovered, the onus is on the party demanding further discovery to establish such mala fides or to demonstrate that the party that has failed or refused to make the additional discovery is misguided as to the relevance of non-discovered material.

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[1] *Schlesinger v Donaldson and Another* 1929 WLD 54 at 57, SA *Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385A-C and *Swissborough Diamond Mines (Pty) Ltd And Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T* at 316 -317, amongst other cases.

[16] In *The MV Urgup: Owners Of The MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C), at 515D, Thring J noted, with reference to requests for further discovery in terms of rule 35(3), that the subrule is not intended to '*afford a litigant a licence to fish in the hope of catching something useful*'. That said, 'relevance' is given a generous meaning for the purposes of discovery, and in this regard mention is often made, with approval, of the dicta of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 that '*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] Nevertheless, the non-specificity or unbridled breadth in which a request for further discovery is couched may serve as an indicator of an abuse of the procedure. In *Swissborough Diamond Mines (Pty) Ltd And Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T)* at 310G-I, Joffe J considered the following remarks in the appeal court's judgment in *Beinash v Wixley* 1997 (3) SA 721 (SCA),[2] which concerned the enforcement of subpoenas *duces tecum*, to relate by analogy to the assessment of a request for further discovery of unrestrained breadth as an abuse of the process:

> The language used is of the widest possible amplitude, including within its sweep every conceivable document of whatever kind, however remote or tenuous be its connection to any

[2] At p. 735C-D.

> of the issues which require determination in the main proceedings. The possible permutations are multiplied with undisciplined abandon by a liberal and prolific recourse to the phrase "and/or". Its potential reach is arbitrarily expanded by the demand that the documentation must be produced whether it be "directly or indirectly" of any relevance to a large category of open-ended "matters".

(My underlining for emphasis on account of the liberal use of those expanding and multiplying phrases in the defendant's rule 35(3) notice in the current matter, quoted in paragraph [21] below.)

At p. 323A-C, the learned judge proceeded:

> As appears from the judgment in *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) and *Maxwell and Another v Rosenberg and Others* 1927 WLD 1, the Court ordered additional discovery of documents by referring to the genus of the documents. Although the genus may be wide, the documents are determinable within it.
>
> A notice in terms of Rule 35(3) is accordingly not limited to a specific document. The notice may require production of any number of documents. Whilst a document need not be described specifically within the notice, it must be described with sufficient accuracy to enable it to be identified. This will occur where the document is described within a genus enabling it to be identified.

(The order made in *Maxwell*'s case illustrates how reference to a genus of documents for the purpose of discovery is by no means inconsistent with a measure of specificity. In that case, Tindall J made an order in the following terms: 'The first and third respondents are directed to make a further affidavit of discovery of such of the letters written by them and referred to in par. 5 of the second part of the schedule to their affidavit of 11th September, 1926, as mention the loan of £50,000 from the British Treasury and to afford inspection of such letters'. The letters were the genus, and the underlined words as to content provided the specificity necessary to prune the broadness of the genus down with reference to items thereof of relevance.)

And at p. 326 B-D of *Swissborough*, Joffe J held:

> The inordinate breadth of the notice in terms of Rule 35(3) has already been adverted to. Notwithstanding the definition of relevant documents (read with all the other definitions relevant thereto), it cannot be held that the documents which plaintiffs' require inspection of are adequately described. Although inspection may be obtained of documents described as a genus, the description of the documents in the present application is so wide and all inclusive that it would not be possible to determine objectively what is or is not included therein. This in itself would preclude relief being granted in terms of para 3 of the notice of motion as presently formulated. It may, however, be possible to prune the notice in terms of Rule 35(3) so as to be left with an enforceable notice. Plaintiffs' counsel did not make any submissions in this regard.

[18] The party seeking further discovery in respect of a document the existence of which is in doubt ordinarily bears the onus of the proving its existence before a court will grant an order compelling its discovery; cf. *Swissborough* supra, at 320B.

[19] The following statement of the position in *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 598E – F is pertinent in the context of the current application

> The test of discoverability or liability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still prima facie conclusive, unless it is shown on one or other of the bases referred to above that the court ought to go behind that oath; and the onus of proving relevance, where such is denied, still rests on the party seeking discovery or inspection.

[20] In *MV Alina II: Transnet Ltd V MV Alina II* 2013 (6) SA 556 (WCC), at para 26, Goliath J, citing *Continental Ore Construction* supra, at 597H-598A observed that '*The courts are generally reluctant to go behind a discovery affidavit. …*

'The court will go behind the affidavit only if it is satisfied —

(i) from the discovery affidavit itself; or
(ii) from the documents referred to in the discovery affidavit; or
(iii) from the pleadings in the action; or
(iv) from any admissions made by the party making the discovery affidavit; or
(v) from the nature of the case or the documents in issue,

that there is a probability that the party making the affidavit has or has had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made.' [Also see *Federal Wine and Brandy*[3] supra at 749G.][4] [5]

I have not been provided with the plaintiff's discovery affidavit in the action; only with its response to the defendant's notice in terms of rule 35(3) demanding further discovery, the material part whereof is quoted in full below.

[21] It is convenient, against the background of the principles that I have outlined, to set out the body of the defendant's notice in terms of rule 35(3) in full because, in dealing with her application to compel compliance by the plaintiff therewith, I propose to deal with the demand for further and better discovery item by item. The nature of the further discovery that is required is set forth in the notice as follows:

1. Any and all term sheets, pre-agreements, loan and/or mortgage agreements, including amendments thereof ("the loan agreements "), as well as all the bank statements issued pursuant to such loan agreements, concluded between the plaintiff and Plettenberg Golf Estate (Pty) Ltd (registration number 2003/014061/07) ("PGE"), or PGE under acting under any of its former names, under the following account numbers:
   1.1 218228 / 001
   1.2 21822 8 / 002
   1.3 218228 / 003
   1.4 218228 / 004
   1.5 218228 /005
   1.6 218228 /006
2. Any and all bank statements of PGE, pertaining to bank accounts held with the plaintiff, from the inception of such bank accounts, to date of issue of summons under the above case number (excluding the loan agreements annexed to the particulars of claim).
3. Any and all suretyship agreements concluded between the plaintiff and the defendant, from the inception of PGE, to date of issue of summons under the above case number (excluding the suretyship agreements annexed to the particulars of claim).

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[3] *Federal Wine and Brandy v Kantor* 1958 (4) SA 735 (E).

[4] See also *Marais v Lombard* 1958 (4) SA 224 (E) at 227G, quoted in *Swissborough* supra, at 317F.

[5] See also *Swissborough* supra at 320G.

4. All documents which show security and/or cash held as security in favour of the plaintiff, related directly or indirectly to any amounts owing by PGE to the plaintiff, since the inception of PGE, to date of summons under the above case number.
5. Any and all email correspondence between the plaintiff or its representatives and the directors and sureties of PGE or their representatives, from the inception of PGE, to date of summons under the above case number.
6. Any and all email correspondence between the plaintiff or its representatives and the Business Rescue Practitioner, Mr Neil Michael Hobbs or his representatives.
7. Copies of all mortgage or other bonds held and registered over any property of PGE and the defendant, from the inception of PGE to date of summons, including the underlying loan agreements, if such loan agreements are not reflected in the documentation sought in paragraph 1above.
8. All documentation recording:
   8.1 any and all sales of erven at, or relating to the immovable property / development known as "*Brackenridge*" and the proceeds thereof, as paid to or for the benefit of PGE and/or the plaintiff and/or any third parties;
   and
   8.2 the sale of the immovable property / development known as "*Geelhoutboom*" and the proceeds thereof, as paid to or for the benefit of PGE and/or the plaintiff and/or any third parties; and
   8.3 the sale of the water rights pertaining to "Keurboom Water" as reflected in the accounts of PGE, as well as documents recording the proceeds of such sale/s, as paid to or for the benefit of PGE and/or the plaintiff and /or any third parties.
9. Any and all:
   9.1 sale agreements concluded by the business rescue practitioner, Mr Neil Hobbes (sic) ("the BRP"), for or on behalf of PGE and/or relating to any assets of PGE, including documents reflecting a full disclosure of all related party transactions ;
   9.2 documents reflecting details of persons and/or entities who concluded such sale agreements with the BRP, including the documents reflecting the shareholding (direct or indirect) of such persons and entities at the time that such agreements were concluded.
10. A list of all payments made by the plaintiff, by or on behalf of PGE (including under PGEs former name/s), from the inception of PGE, to date of summons, as well as all documents showing the basis of such payments.
11. Copies of any and all documentation showing the securitization or sale/s of (including the terms thereof) or relating to:
    11.1 any mortgage/s held by the plaintiff over any property of PGE (including under any of its former names); and
    11.2 any amounts owing by PGE to the plaintiff, at any time from its inception to date of summons under the above case number.

12. Copies of any and all documentation showing any insurance/s by the plaintiff, of any amount owing by PGE to the plaintiff, at any time from PGE's inception to date of summons under the above case number, including any payments made to the plaintiff pursuant to such insurance.

[22] The plaintiff responded to the defendant's rule 35 (3) notice in the following terms:

Ad paragraph 1

3.1 Save for the loan agreements annexed to the particulars of claim marked A and B ("the first and second loan agreements"), and subject to what is stated in paragraph 3.2 hereunder, it is denied that any of the documents described in this paragraph are relevant to any matter in question.

3.2 The bank statements issued pursuant to the first and second loan agreements are available for inspection and copying in terms of rule 35(6) at the offices of the plaintiff's attorneys on a date which is mutually agreeable to the parties' attorneys, **alternatively**, they can be emailed to the defendant's attorneys on request.

Ad paragraph 2 to 12

3.3 It is denied that the documents described in these paragraphs are relevant to any matter in question.

[23] In her supporting affidavit in the application to compel further discovery, the defendant challenges the ability of the deponent to the plaintiff's affidavit in response to the defendant's notice in terms of rule 35(3) to determine the relevance of the documents sought. It is alleged that the deponent, who is a recoveries manager at the plaintiff bank, does not have first-hand knowledge of the facts of the case and is therefore not qualified to make a proper determination of what might be relevant or not. The contention is misguided. It will be apparent from the principles that I rehearsed earlier in this judgment that relevance is an objective question and that it falls to be determined with reference to the issues identified in the pleadings. One may assume that the deponent, who is the responsible recoveries officer dealing with the plaintiff bank's claim, will have read the pleadings, and that she would have had access to advice from the plaintiff's attorneys of record. She did not require first-hand knowledge of the facts of the case to be able determine which documents in the bank's possession related to the matters in question in the action.

[24] The defendant contrasted the effect of her alleged personal knowledge of the relevant facts in issue with the position of the deponent to the plaintiff's response to the rule 35(3) notice in the following terms in her supporting affidavit in these proceedings:

> I base my allegations to determine the relevance of the documents called for, on the fact that I was a trustee of the applicant at all relevant times. My husband, Patrick Kerry O'Shea was my co-trustee and also a director of the Plettenberg Golf Estate Pty Ltd ("PGE"), the loans and indebtedness of which, as allegedly owing to the respondent, forms the basis of the main action. My husband and I were personally involved in the negotiation/s, drafting and signature/s of the relevant agreements. Therefore, we know what is relevant and what is not relevant, as documents, for purposes of the main action. A confirmatory affidavit of my husband will be delivered simultaneously with this application.

What is immediately striking about the defendant's quoted statement is that the direct and personal involvement in the relevant matters claimed by her should, one would have thought equipped her to be able to identify any documents not discovered by the plaintiff, but alleged to be relevant, with a high degree of specificity. But as reference to the body of the rule 35(3) that was delivered demonstrates, specificity was notably lacking in the request. It is not competent to buttress a deficient notice in terms of rule 35(3) by a supporting affidavit in a rule 35(7) application. If the rule 35(3) notice does not effectively articulate the further discovery that is sought, a proper basis for an application to compel compliance with it is lacking.

[25] The timing and context of the rule 35(3) is also significant in my judgment. As I recorded in my judgment in an earlier interlocutory application in this matter, as the case manager judge I was previously provided with a pre-trial meeting minute, dated 4 December 2018, signed by the parties' respective attorneys that indicated that in the event that the parties could not reach a settlement, and bar a possible application by the defendant for a separation of issues in the action, the action was trial-ready. The minute recorded the following in the relevant respect:

The separation application

2.7 In the event the parties are unable to conclude a settlement of this matter, then the defendant shall deliver its application for separation by 17h00 on Tuesday, 15 January 2019.

2.8 The plaintiff shall deliver its answering/ opposing papers (if any) in the separation application by Friday, 1 February 2019.

2.9 The defendant shall deliver its replying papers (if any) in the separation application by Monday, 17 February 2019.

2.10 The parties shall thereafter agree upon the first available date (where both parties' counsel are available) for the hearing of the separation application.

3. **The trial-readiness of this matter**

3.1 In the event that-

3.1.1 the parties fail to settle this matter in the manner detailed above; and

3.1.2 the defendant fails to deliver its separation application as per paragraph 2.7 above,

then the parties hereby agree that this matter is trial-ready, and that the plaintiff may approach the Honourable Mr Justice Binns-Ward to have the matter certified as such.

[26] It is difficult to understand why, if the matter had been considered trial-ready at the end of 2018, a far-ranging request for further discovery was thought necessary in July 2020. It is notable that no explanation is offered by the defendant in her supporting affidavit. One would also have thought that in the circumstances any belated request for discovery would be directed at obtaining the disclosure of documents that the defendant would be able to identify with much greater specificity than she did in her rule 35(3) notice. The context brings to mind the remarks in *Beinash v Wixley* quoted above[6] that Joffe J considered could be relevant in the assessment of a demand for further discovery. It has certainly made me look critically, even a little sceptically, at the defendant's allegations concerning the alleged relevance of the additional documentation that she says that she requires to be able to inspect.

[27] Re item 1 of the rule 35(3) notice

The plaintiff has made discovery of what it says are the relevant bank statements. The defendant has not discharged the onus of showing why any other bank statements related to

[6] In paragraph [17].

any of the other contracts between the plaintiff and PGE are relevant. It also not apparent what the relevance of 'any and all term sheets and/or pre-agreements might be.

The only genus of documentation in respect of which further discovery has been demanded that appears to me to be potentially relevant is the previous iterations of the two loan agreements to which the respective deeds of suretyship to which the defendant was party relate; viz. contact no.s 218228/001 and 218228/005. It seems to me that those documents might be relevant in respect of the defendant's claim for rectification. I shall direct that they be discovered. Save as aforesaid, no order will be made compelling the discovery of the other documentation sought in item 1.

[28] Re item 2 of the rule 35(3) notice

It is not apparent on the pleadings how any bank statements of PGE, other than those already discovered by the plaintiff in response to the defendant's request in item of her rule 35(3) notice, might be relevant. The defendant's counsel argued that the debt to which the deeds of suretyship related was not in respect of what he called 'an all-encompassing loan'. The terms of the two loan agreements in issue, annexures A and B to the plaintiff's particulars of claim, do not bear out the contention in my judgment. The terms of both agreements bind the plaintiff to render monthly statements of account in respect of each loan. That indicates that a separate account was to be kept in respect of each of the two debts in issue in the action. I have not seen the plaintiff's discovery affidavit, but I would imagine that the documentation pertaining to the monthly statements of account has been discovered. If it has not, it is remarkable that it was not called for in the defendant's rule 35(3) notice. It may be, however, that such statements took the form of the bank statements discovered in response to item 1 of the rule 35(3) notice.

[29] Re item 3 of the rule 35(3) notice

The defendant's counsel indicated that he could not pursue the request for discovery in terms of item 3 of the rule 35(3) notice 'with any vigour'; understandably so. There is therefore no need for me to say anything about it.

[30] Re item 4 of the rule 35(3) notice

The discovery sought under this item of the rule 35(3) notice appears to me to relate to the documentation evidencing and connected to the security to be furnished in terms of clause 2.1.5 of the first loan agreement, quoted in paragraph [4] above. If I am correct in this interpretation of the request, it might have been far more clearly expressed. On the assumption that my interpretation is correct, and if such documentation has not already been discovered I shall direct that the plaintiff make discovery of it.[7] If the security was provided, and if it has been realised in reduction of PGE's indebtedness, the pertinent documentation would be relevant to the computation of the outstanding indebtedness by PGE to the plaintiff in terms of the loan agreement, which is one of the issues in the action.

[31] Re items 5 and 6 of the rule 35(3) notice

The request for further discovery made under these items is far too vague and non-specific.

[32] Re item 7 of the rule 35(3) notice

It seems to me that although it is clear from the handwritten annotations to the copy of the first loan agreement that is attached as annexure A to the plaintiff's particulars of claim, that the covering mortgage bonds in question, which are common to both the loan agreements in issue (see clause 2.1.2 in each of the said agreements) have been identified by their registered bond numbers and therefore might readily be accessed at the deeds registry, the defendant is

[7] Compare the approach of Colman J to an ineptly drafted request for further discovery in *SA Neon Advertising* supra, at p. 384B-C.

nevertheless entitled to discovery of the mortgage bonds if they are in the plaintiff's possession. The order to be made will provide accordingly.

[33] Re item 8 of the rule 35(3) notice

There is no mention in the pleadings of 'Brackenridge' or 'Geelhoutboom', and their relevance is therefore by no means evident. Insofar as the reference in item 8.3 to 'Keurbooms Water' is concerned, the discovery of the documentation connected therewith that might be relevant in the action, the order that shall I make in respect of item 4 of the rule 35(3) notice, discussed above, will adequately meet the defendant's requirements.

[34] Re item 9 of the rule 35(3) notice

The defendant has not satisfied me as to the relevance of the documentation sought under this item. I am therefore not prepared to go behind the plaintiff's denial that it is relevant. It seems to me in any event that if the defendant genuinely considers the business rescue practitioner's records to be relevant, a more effective means of obtaining them would be to subpoena the business rescue practitioner *duces tecum*.

[35] Re item 10 of the rule 35(3) notice

The defendant's counsel quite correctly conceded that the discovery process does not extend to requiring the opposite party to draw up a list. The request under this item was not pursued.

[36] Re item 11 of the rule 35(3) notice

The defendant alleged in her plea that the plaintiff lacked standing to pursue its claim against her because it had securitised its claim under the relevant loan agreements with PGE. The pleaded allegations in this regard did not comply with Uniform Rule 18(4), which requires that '[e]very pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto'. No particularity

whatsoever was pleaded in support of the bald allegation. The plaintiff did not replicate, and in the circumstances the allegation that the plaintiff's claims against PGE had been securitised is taken to have been denied; see Uniform Rule 25(2). It would follow that the defendant should not have been surprised by the plaintiff's failure to discover any documentation showing that there had been a securitisation. As pointed out above in the course of the rehearsal of the applicable principles, demanding discovery is ordinarily not an appropriate procedural tool when the existence of a document or genus of documentation is in issue, as it implicitly is in the context of the pleadings on the matter of securitisation. If the allegation is that one of the parties is withholding discovery of documentation that it does possess that is related to an issue in the action, there is an onus on the party alleging such mala fides to establish it. The defendant has not alleged that the plaintiff is acting mala fide. A case to compel compliance with the demand advanced in item 11 of the defendant's rule 35(3) notice has not been made out.

[37] Re item 12 of the rule 35(3) notice

The defendant did not pursue her demand for the further discovery sought in terms of item 12 of her rule 35(3) notice.

Costs

[38] The defendant has succeeded in obtaining limited success in her application in terms of rule 35(7), and a material part of the success that she has achieved has been predicated on a benevolent reading by the court of her notice in terms of rule 35(3). The notice was in material respects impermissibly vague and generalised. In the circumstances I consider that it would be fair were the costs of the application to be costs in the cause. An order to that effect will be made.

Order

[39] In the result the following order is made:

1. The plaintiff is directed to make discovery of the following documentation within 10 days of the date of this order:

    a) the previous iterations of the two loan agreements to which the respective deeds of suretyship to which the defendant was party relate; viz. contact no.s 218228/001 and 218228/005, annexures A and B, respectively to the plaintiff's particulars of claim;

    b) if such has not already been discovered, the documentation evidencing and connected to the security required in terms of clause 2.1.5 of the first loan agreement, contact no. 218228/001, including any documents related to the realisation of such security and the application of the proceeds thereof;

    c) the covering mortgage bonds referred to in clause 2.1.2 of each of the loan agreements between the plaintiff and Plettenberg Golf Estate (Pty) Ltd, annexures A and B to the plaintiff's particulars of claim, respectively

2. In the event that the plaintiff fails to comply with the terms of paragraph 1 of this order, the defendant is granted leave to apply on not less than five days' notice to the plaintiff, on the same papers, duly supplemented, for the dismissal of the action.

3. The parties are directed to file an updating pre-trial minute with the case manager judge's registrar on or before 25 January 2021.

4. The costs of the defendant's application in terms of rule 35(7) shall be costs in the cause.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiff / Respondent's counsel:	**R.J. Howie**
Plaintiff / Respondent's attorneys:	**Werksmans Attorneys** **Cape Town**
Defendant / Applicant's counsel:	**Sven Olivier SC**
Defendant / Applicant's attorneys:	**Van Rensburg & Co** **Bergvliet**
	BBM Attorneys **Cape Town**