REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓

Date: ***22nd February 2023*** Signature: _____

CASE NO: 13311/2020

DATE: 22nd FEBRUARY 2023

In the matter between:

WHITE OAK TRADE & SPECIALTY FINANCE CAYMAN LLC Plaintiff

and

SANTAM STRUCTURED INSURANCE LIMITED First Defendant

CREDIT INNOVATION (PTY) LIMITED Second Defendant

HARPER, JANSEN Third Defendant

Coram: Adams J

Heard: 3 and 10 February 2023

Delivered: 22 February 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 22 February 2023.

Summary: Practice and Procedure – applications to compel better discovery – rule 35(3) discussed – relevance of documents requested – insurance documents generally relevant for discovery purposes – professional legal privilege claimed by respondent – insurance documents not privileged – a courts cannot generally go behind a discovery affidavit which is regarded as conclusive, re access to and possession of document and relevance –

Plaintiff's application to compel better discovery granted – that of defendants refused.

ORDER

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(1) The first and second defendants be and are hereby compelled, in terms of Uniform Rule of Court 35(7), to make further and better discovery within five days from the date of this order, by replying to the following paragraphs referred to in the plaintiff's notice in terms of rule 35(3) dated the 7th of November 2022 and by making available for inspection in accordance with rule 35(6) the documents referred to in those paragraphs, namely: -

(a) Paragraphs 50 and 51 ('the insurance documents') – Any and all correspondence exchanged between the first and/or the second defendant and representatives of Marsh after 11 September 2019 in relation to the suspected fraud of the third defendant and in relation to these proceedings, including but not limited to all notifications of loss claims, which shall include the correspondence between ENSafrica and/or Marsh, acting on the instructions of or on behalf of the first and/or the second defendant, with their insurers in relation to any claim or prospective claim lodged or to be lodged by the first and/or the second defendant as a result of their suspicion of a fraud having been committed by the third defendant, between 4 December 2019 and the present date;

(b) Paragraph 70 ('the FAIS and related documents') – Any and all policies of the first and/or the second defendant pertaining to client relations,

standard disclosures when engaging with clients, written mandate documents, engagement letters, know-your-customer (and similar) policies, documents or training guides to employees or agents, including but not limited to measures to disclose whether or not employees or agents are operating under supervision for the purposes of FAIS; and

(c) Paragraphs 84, 87 and 94 – Any briefs or instruction letters (or emails) to Hogan Lovells, Norton Rose Fulbright or Cliffe Dekker Hofmeyr in relation to the note programme and/or the Guarantee Policy generally,

alternatively, to state on oath within ten days from the date of this order that any such documents are not in their possession and, in which case, to state the whereabouts of the documents, if known to them.

(2) In the event of the first and second defendants' non-compliance with the order in paragraph (1) above, the plaintiff is hereby granted leave to apply on the papers in this application, duly supplemented, to have struck out the first and second defendants' defence and for judgment against the said defendants.

(3) The first and second defendants, jointly and severally, the one paying the other to be absolved, shall pay the plaintiff's costs of its application in terms of rule 35(7) to compel better discovery, including the costs consequent upon the employment of two Counsel (where so employed).

(4) The first and second defendants' application in terms of rule 35(7) to compel plaintiff to better comply with defendant's rule 35(3) notice is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel.

JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action, in which the

plaintiff claims from the first defendant, alternatively, from the second defendant, further alternatively, from the third defendant payment of US$4.3 million, alternatively, AU$7.3 million, further alternatively other sums, on the basis of an 'ex gratia settlement' agreement between the plaintiff and the first defendant, alternatively, on the basis of a 'Guarantee Policy' issued by the first defendant in favour of the plaintiff. The aforegoing is a simplification of the cause or causes of action of the plaintiff, who, in sum, contends that it, as an innocent party, contracted in good faith with the first defendant, represented by the third defendant. And the plaintiff simply seeks relief against the defendants on the basis of the binding contractual relationships with the defendants. The first and second defendants aver that the third defendant, whom they accuse of fraud, was not authorised to bind the first defendant and they therefore deny that his conduct can be attributed to either the first or the second defendant. And on this basis the claims by the plaintiff are resisted in the main action.

[2]. Before me are two interlocutory applications, one by the plaintiff and one by the first and second defendants. In the first application the plaintiff applies in terms of uniform rule of court 35(7) for an order compelling the first and second defendants to comply with one of its rule 35(3) notices, being the one dated 7 November 2022. In the second application the first and second defendants apply in terms of the same rule for an order compelling the plaintiff to comply with their (the first and second defendants') rule 35(3) notice.

Plaintiff's Application to Compel Better Discovery

[3]. On 7 November 2022, the plaintiff delivered its rule 35(3) Notice, calling upon the first and second defendants to make available for inspection further documents in its possession, which documents the plaintiff believed to be in possession of the first and second defendants and which are relevant to matters in question in the main action. On 25 November 2022, the first and second defendants replied by serving their affidavit in terms of rule 35(3). With reference to each and every one of the documents requested to be inspected by the plaintiff, the first and the second defendants gave responses ranging from the plaintiff being referred to documents previously discovered by them to requested

documents being attached to the said affidavit and to confirmation that the documents requested were not in the possession of the first and second defendants nor under their control. In respect of some of the documents requested, the first and second defendants refused to make available to the plaintiff those because, so the defendants allege, they are not relevant to any of the matters in the action in addition to being confidential and/or privileged. And in some cases, discovery was refused on the basis that the request for the discovery of certain documents was framed too widely.

[4]. For the most part, the plaintiff was satisfied by the responses provided by the first and second defendants, excepting only responses to about sixteen paragraphs, in respect of which the plaintiff, being dissatisfied with those replies, persist in this application for an order compelling the defendants to discover those documents. I deal with those specifically requested documents later on in this judgment.

[5]. Rule 35(3) provides as follows:

‘(3) If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state under oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.’

[6]. In the case of those paragraphs not responded to by the first and second defendants to the satisfaction of the plaintiff, the first and second defendants in the main object to the production of the documents on the basis that they are irrelevant or privileged. I interpose here to mention that in their formal replies to these paragraphs, as well as in their answering affidavit in this application to compel, the defendants also objected to the production of the said documents on the basis of confidentiality. However, during the hearing of the application on 7 February 2023, Mr Ismail, who appeared on behalf of the first and second defendants, indicated that in respect of all the items in question, they were no longer persisting with confidentiality as a ground of objection to the production of the documents. This, in my view, was a prudent approach especially if regard is

had to the fact that it is trite that confidentiality, on its own, does not trump a party's obligation to make discovery of documents relating to any matter in the action[1].

[7]. The first set of documents which the plaintiff requires of the defendants is as per paragraphs 49 to 51 of its rule 35(3) notice dated 7 November 2022, in which was requested certain email or other correspondence between the first defendant and its insurer/s. The request was triggered, *inter alia*, by an email from the first defendant to its insurer on 11 September 2019 in terms of which its Executive Head of Operations, a Ms Paula Meyer, advised the insurance company that the second defendant had reason to suspect that a fraud had been committed by the third respondent, who was, at that stage or shortly before then an executive director of the first defendant. The defendants resisted the production of further insurance-related documents on the basis that they are irrelevant to the pleaded issues and/or that they are legally privileged, which include, so the defendants aver in their answering affidavit, 'common interest' or 'joint' privilege.

[8]. It was contended by Mr De Oliveira, who appeared on behalf of the plaintiff, that these insurance-related documents sought (comprising of the correspondence and other documents between the defendants and their insurers) are relevant to the matters pleaded in the main action as they speak to the relationship between the first and second defendants, and indeed to the liability assumed by one in relation to the conduct of another. I agree. There can, in my view, be little doubt that these documents are plainly relevant to, *inter alia*, one of the triable issues as set out in the list of triable issues agreed upon between the parties, that being whether the second defendant and/or the third defendant were authorised to represent the first defendant in presenting or concluding the 'Guarantee Policy' and/or the 'Ex Gratia Settlement' offer to/with the plaintiff.

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[1] See for example *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at [27];

[9]. In that regard, Mr De Oliveira, referred me to the case of *Rellams (Pty) Ltd v James Brown & Hamer Ltd*[2], in which the Full Court accepted the following dicta with approval:

'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.'

[10]. On the basis of this dictum, I reiterate that the insurance documents are relevant. They may, at the very least, by way of example, shed light on the question of the third defendant's conduct, and his ability to conduct himself in the way that he did, for or on behalf of the first and the second defendants, whilst presenting or concluding the Guarantee Policy to/with the plaintiff. This is certainly relevant to the issues as pleaded and agreed upon between the parties. In any event, as correctly submitted on behalf of the plaintiff, if only part of a document is privileged or irrelevant, and the party obliged to produce the document for use in court or for inspection by his adversary wishes to preserve that part as secret, the proper course is for him to cover over or otherwise conceal the portion in question from the adversary.

[11]. The next issue to be considered relates to whether the first and second defendants are entitled to object to the production of the insurance documents on the basis of privilege, in the form of 'common interest' or 'joint' privilege.

[12]. Recently, this Court (per Windell J) in *Anglo American South Africa Limited v Kabwe and 12 Others*[3], had the following to say about 'common interest' or 'joint' privilege:

'Legal professional privilege extends to common interest privilege. Common interest privilege entails the preservation of legal professional privilege where the third party, recipient or creator

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[2] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A; See also *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 316;

[3] *Anglo American South Africa Limited v Kabwe and 12 Others* 2022 JDR 2294 (GJ) at [32];

of a communication has a common interest in the subject of the privilege with the primary holder. The key principle is that privilege is not lost where there is limited disclosure for a particular purpose or to parties with a common interest. In *Turkcell*, the court found that joint and common interest privilege forms part of South African law by virtue of the provisions of section 42 of the Civil Proceedings Evidence Act, but even if it did not, joint and common interest privilege would be an appropriate development of the common law, because it gives effect to the underlying public policy of legal privilege to: a) encourage and promote full and factual disclosure by clients to their legal advisors when seeking legal advice; and b) support the functioning of the adversarial legal system of litigation. I agree with Adv Marcus SC, that the sharing of privileged communications with a third-party funder or insurer can be added to these clear examples of common interest privilege. All have a shared interest in the outcome of the litigation and all have a common interest in ensuring the confidentiality of their communications.'

[13]. On first principles, it cannot possibly be said that the insurance documents are privileged from the point of view of the first and second defendants for the simple reason that, when those documents were generated, the litigation in this action would not have been within the contemplation of the defendants. The purpose of them communicating with their insurer or insurers was probably to report to them an 'insurance event' and to commence the claims process to recoup any possible losses resulting from the fraudulent conduct on the part of the third defendant. Moreover, a proper case has not been made out for the assertion of privilege over the communications between the defendants and their insurers. The simple fact of the matter is that, in this application to compel further and better discovery, the defendants failed to plead that the requirements for litigation privilege have been met. For this reason alone, this ground of objection should fail.

[14]. Secondly, as contended by Mr De Oliveira, the defendants' insurers do not, without more, have a shared or common interest in the outcome of this litigation, at least not without further disclosure justifying such a shared or common interest. The point is that the shared or common interest is, at present, merely inferred (presumably from general commercial practice/s) and not grounded in fact. To further underscore the point, it cannot simply be said that – because the insurance company would prefer not to pay out on a claim (if any) as opposed to doing so – they have a shared interest in this litigation.

[15]. As a general rule, there is no privilege covering communications relating to the matter from an insured person to the company (or its agent) insuring him. So for example, in *Potter v South British Insurance Co Ltd and Another*[4], the plaintiff sued for personal injuries sustained when a motor vehicle, driven by an insured person, collided with another in which the plaintiff was a passenger. The plaintiff subpoenaed a statement made by the driver of the former vehicle to his insurance company. The witness refused to produce the document in question on the basis that it was privileged by virtue of a contract of insurance between the insured and insurer. It was held that, as the statement had not been obtained from the second defendant for the purpose of litigation, existing or contemplated, nor for the purpose of being laid before insurer's legal adviser for advice in the conduct of the defence of that litigation, that the claim based on legal and professional privilege failed. At 7A-D, Boshoff J said the following:

'In the preparation for litigation it is sometimes necessary for the litigant to prepare documents, either by himself or by his agents, for submission to his lawyers, and there is an extension of the scope of the privilege to cover such documents, with safeguards to ensure that the documents covered should fall within the protection of the privilege. Where the communications pass not between the party and his lawyers but between the party and a non-professional agent or third party they are not privileged unless made (1) for the purpose of litigation existing or contemplated, and (2) in answer to enquiries made by the party as the agent for or at the request or suggestion of his legal adviser, and though there has been no such request for the purpose of being laid before the legal adviser with a view to obtaining his advice or to enable him to conduct the action, e.g. to prepare the brief.'

[16]. Applying these principles *in casu*, it cannot be said that a general contemplation of litigation was present at the time of the communication between the defendants and their insurance company.

[17]. In the circumstances, I am of the view that the first and second defendants should provide a full and better response to Items 49 to 51 of the plaintiff's rule 35(3) notice of 7 November 2022.

[18]. The second set of documents which the plaintiff applies to have the defendants compelled to discover are further 'FAIS and related Internal

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[4] *Potter v South British Insurance Co Ltd and Another* 1963 (3) SA 5 (W);

Documents'. In paragraphs 70 and 78 of the plaintiff's aforesaid rule 35(3) notice, it requested further documents relating to first and second defendants' FAIS compliance policies and procedures. The defendants resisted the production of such further documents on the basis that they are irrelevant to the pleaded issues and/or they are legally privileged. In their answering affidavit, the defendants take their grounds of objection a step further and aver that the request is too wide and that the requested documents are irrelevant because the 'FAIS case pleaded by the plaintiff is a narrow one'.

[19]. The plaintiff contends that its request is fair and not over-broad. I find myself in agreement with this contention. The plaintiff's request is most certainly not 'extraordinarily wide and abusive', as alleged by the defendants. All that the plaintiff seeks is documents pertaining to client relations, standard disclosures the first and second defendants are required to make when engaging with clients (these are regulated and may even be standardised in the insurance industry), mandate documents, engagement letters and standard-form KYC documents. These documents (examples will suffice) would not comprise, as submitted by the plaintiff, more than a couple dozen or so pages. They are clearly defined and, one would imagine, very easy to obtain and put together.

[20]. As far as relevance is concerned, the plaintiff's claim, as presently formulated, includes (but is not limited to) 'whether the first defendant breached its duties under section 13(2)(a) and (b) of the FAIS Act and/or 13(1)(b) of the 2017 fit and proper requirements'.

[21]. The simple point is that the obligations on authorised financial services providers (such as the first and second defendants) in terms of the provisions of the FAIS Act are far-reaching. This is particularly so when regard is had to the pleaded sections of the Fit and Proper Requirements, which create an obligation on authorised financial services providers to ensure that their representatives are aware of the procedures that must be followed in discharging their responsibilities and performing their functions. These procedures must necessarily include ensuring that they (representatives) disclose their role as representatives of a particular entity and their relationship with any product provider whose financial

products they are mandated to broker or to sell and ensuring that they act under the appropriate supervision of their supervisors in the event that they are under supervision, as well as ensuring that any forms and disclosures are provided to clients in accordance with the disclosure requirements under FAIS.

[22]. In the circumstances, I am of the view that the plaintiff's request under paragraphs 70 and 78 of its Rule 35(3) notice is relevant to the issues in dispute between the parties. The requested documentation relates to whether the first and second defendants ensured that its representatives (including the third respondent) were aware of, *inter alia*, their duties. This will include whether the third defendant, in particular, observed these duties when dealing with the plaintiff in the transaction in question (the Jurgens Transaction); whether the first and second defendants indeed ensured that third defendant observed these duties when performing his function as a representative in relation to other deals or clients; and whether he was adequately supervised in performing his duties while under supervision. I agree that the plaintiff's request in this regard is certainly relevant to the FAIS case as pleaded.

[23]. The first and second defendants should therefore be compelled to provide a full and better response to items 70 and 78 of plaintiff's Rule 35(3) Notice.

[24]. Lastly, the plaintiff asks that the first and second defendants be compelled to produce specific documents relating to early correspondence with other attorneys before the litigation in this action was contemplated. The initial request was contained in paragraphs 81 to 88 and 94 of plaintiff's rule 35(3) notice of 7 November 2022. In response to this notice, the defendants discovered certain documents and otherwise claimed that they had no further documents in their possession or under their control. Under this heading of documentation, the plaintiff had also requested the first and second defendants to discover any and all engagement letters with the various law firms and/or any all correspondence, engagement letters relative to Hogan Lovells. The response from the defendants was to the effect that these documents are irrelevant and/or legally privileged.

[25]. The plaintiff has narrowed down its request and by the time the application to compel was argued, it was indicated that the plaintiff was only persisting in its application to compel the production of the following further documents:

'[A]ny briefs or instruction letters (or emails) to Hogan Lovells, Norton Rose Fulbright, or Cliffe Dekker Hofmeyr in relation to the note programme and/or the guarantee policy generally.'

[26]. It is the case of the plaintiff that, from the documents referred to in the first and second defendants' answering affidavit, and other documents, it appears that the third defendant instructed attorneys ostensibly on behalf of both of them. Therefore, so the plaintiff argues, these documents therefore do exist. A further triable issue as per the agreement between the parties is whether the third defendant was authorised to represent the first and second defendants in concluding the Guarantee Policy, as well as whether, at all material times, the third defendant was authorised by the second defendant to market and facilitate the conclusion of the Guarantee Policy and whether he was actually or ostensibly authorised by the first defendant to facilitate the conclusion of the Guarantee Policy.

[27]. It is therefore contended, on behalf of the plaintiff that, in light of the aforegoing, it is plainly relevant to the issues pleaded whether third defendant was authorised to give instructions (or whether he in fact did) to attorneys on behalf of the defendants in order to, *inter alia*, facilitate the conclusion of the Guarantee Policy. The extent of such authority to represent the defendants or to communicate with any third parties on either of their behalf, including but not limited to White Oak in relation to the Jurgens Deal (or at all), is relevant to plaintiff's allegations regarding the third defendant's authority, ostensible or otherwise, and the application of estoppel against either or both of the defendants in denying his authority.

[28]. It is clear on the documents discovered by the defendants in the action, and indeed the items of its discovery and the trial bundle to which it refers in the answering affidavit, that the defendants issued instructions to Bowman Gilfillan, Norton Rose Fulbright and Cliffe Dekker Hofmeyr from time to time. These instructions cannot be protected by legal privilege as they were not made in contemplation of this litigation, nor were they at the time covered by any mandate

(as they would have predated formal terms of engagement with the attorneys in question). Moreover, and in any event, the defendants do not expand upon their contention that the documentation is legally privileged.

[29]. During the hearing of the applications, Mr Ismail indicated that any and all of the instruction letters to the said attorneys were in fact discovered and the attention of the plaintiff's legal representatives and that of the court, would have been directed to where in the record that discovery was made. I could not find any indication of those documents in the many pages of discovered documents.

[30]. All the same, I am of the view that the plaintiff is entitled to discovery from the first and second defendants of these documents as formulated above.

[31]. In the circumstances, I am satisfied that the plaintiff has made out a case for the relief sought albeit in a modified form. Accordingly, the plaintiff's application to compel inspection of some the documents listed in its rule 35(3) should succeed.

First and Second Defendants' Application to Compel Better Discovery

[32]. On 7 November 2022, the first and second defendants served their rule 35(3) notice calling upon the plaintiff to make available further documents which they believed to be in the plaintiff's possession and which documents they believed to be relevant to matters in question in the main action.

[33]. On 5 December 2022, the plaintiff delivered its affidavit in reply to the first and second defendants' rule 35(3) notice. In the said affidavit the plaintiff made available to the defendants those documents requested which exist and in some cases, the plaintiff referred the defendants to a previous discovery process or disclosure processes where the requested documents had been discovered. For the most part, the general tenet of the responses furnished by the plaintiff to each and every paragraph in the defendants' rule 35(3) notice was to the effect that the requested documentation had 'already been disclosed by the plaintiff in these proceedings', and, if not, so the Response read, those documents were made available simultaneously with the filing of the said affidavit in reply to the defendants' rule 35(3) notice. Save as aforesaid, so the affidavit read in response

to certain paragraphs, despite a diligent search, the plaintiff had been unable to locate the documents sought. In respect of a number of documents requested, the plaintiff objected to the production thereof on the basis of legal privilege.

[34]. Some of these responses, the first and second defendants were not happy with and they allege that the plaintiff has not complied with the provisions of rule 35(3) and that some of the responses are defective and deficient. Hence this application to compel further and better discovery in which the first and the second defendants take issue with the manner in which the responses have been formulated. In most cases, so it is averred by the defendants, the responses are contradictory and equivocal. The point is best demonstrated by what the defendants say in their affidavit in support of their application to compel further and better discovery.

[35]. The defendants state in the said affidavit that they seek an order compelling the plaintiff to provide a better response to each of the requests where the plaintiff alleges that 'to the extent that such documents exist or were in the possession of the plaintiff', it, for example, claims privilege. The point made by the defendants relative to these type of responses is that the plaintiff has equivocated on whether the documents exist, and has said that they have previously been made available without identifying the documents in some instances. This equivocal response, so the defendants contend, is impermissible and is to be contrasted with instances where the plaintiff has said: 'To the best of the plaintiff's knowledge and despite a diligent search, there is no such correspondence ...'.

[36]. The difficulty faced by the first and second defendants is, however, the fact that, in its answering affidavit, the plaintiff deals definitively with these so-called contradictory and equivocal responses. Additionally, in those cases where the defendants complained that the plaintiff made general and sweeping references to documents already discovered and/or disclosed with no specifics, the plaintiff on each occasion goes through the exercise of drawing to the attention of the defendants, where in the discovery and disclosure processes particular documents requested are to be located. The point is best demonstrated by an

extract from the plaintiff's answering affidavit. So, for example, the plaintiff states the following at paragraphs 18 onwards in response to paragraph 13.1 of the first and second defendant's founding affidavit in support of the application to compel further and better discovery: -

'(18) The Plaintiff denies that it "equivocated" in its response to paragraphs 2, 6, 7, 11, 13, 15, 16, 19, 20, 21, 22 and 27 of the request or at all. If the response is read by "a mind willing to understand", no such ambiguity arises.

(19) In amplification of the aforegoing denial, the first and second defendants in the founding affidavit have adopted language that seeks to create the impression that the plaintiff in the Response did not specify whether certain documents exist or were previously disclosed to the first and second defendant. Such impression is plainly false on a proper reading of the responses at paragraphs 2, 6, 7, 11, 13, 15, 16, 19, 20, 21, 22 and 27. In this regard and by way of example:

(19.1) In paragraph 2 of the Request, the first and second defendants request "Any notification by or on behalf of the plaintiff to Jurgens Cl (Pty) Ltd ("Jurgens SA", Mr Pavlos Kyriacou ("Kyriacou") and/or Jurgens Australia (Pty) Ltd ("Jurgens Aus") that it requires any authorisation or other document, opinion or assurance which the plaintiff considered to be necessary or desirable in connection with the entry into and performance of the transactions contemplated by the Master Receivables Purchase Agreement ("MRPA") or for the validity and enforceability of the MRPA or any other Transaction Document (as defined in the MRPA)".

(19.2) The plaintiff's response to paragraph 2 reads: <u>The plaintiff has provided the documentation in question</u> [my emphasis], to the extent that such documents exist or were in the possession of the plaintiff, in its Disclosure Response dated 5 November 2021 (at CaseLines 006-53) ("Disclosure Response'), alternatively, the Plaintiff's witness statements (at CaseLines 018 to 022), further alternatively, in compiling the trial bundle (at CaseLines 024).' Put differently, where documents exist or were in the plaintiff's possession, such documents were previously provided to the first and second defendants. The main response is accordingly unequivocal – "The plaintiff has provided the documentation in question" – and there is no further procedural rule requiring the plaintiff to individually identify and annex documents that have already been identified and discovered to the first and second defendants.

(19.3) Notwithstanding the aforegoing, I point out that the use by the plaintiff of the wording "to the extent that the documents exist or were in the possession of the plaintiff' (or the like), is intended to deal with circumstances where a document meeting the (very broad) description in the Request, does not exist or is not in the plaintiff's possession. In this regard and without any admission as to the deficiency or otherwise of the Response, the plaintiff confirms that it has discovered the documents sought in the relevant

> paragraphs of the Request, and where it is not in possession of any document captured by the Request, it has no knowledge of the whereabouts of such document.'

[37]. This is the way in which the plaintiff dealt generally with the complaint by the defendants that the responses are contradictory and equivocal. This, in my view, spelt the end of this ground of objection by the first and the second defendants to the plaintiff's reply to their rule 35(3) request.

[38]. The defendants also object to the plaintiff's assertion baldly that they do not have 'access' to certain documents, which are listed. Again, so the defendants contended, the plaintiff has equivocated on whether the documents are or have at any time been in the possession or control of the plaintiff and/or its agent. I cannot agree with the defendants' submissions in that regard. I think that, as submitted by the plaintiff, what is meant by these responses is clear and it cannot possibly be suggested that there is non-compliance with rule 35(3).

[39]. In that regard, I find myself in agreement with the submissions made by Mr De Oliveira that these responses would be clear to 'a mind willing to understand', which is the way in which pleadings should be read[5].

[40]. Importantly, the defendants seek an order compelling the plaintiff to provide a better response to each of the requests where the plaintiff stated that such documents are 'legally privileged in nature'. In these responses, so the defendants submit, the plaintiff has adopted the impermissible approach of generally stating that the documents are privileged. The plaintiff has not separately itemised the documents that exist and set out facts to support its claim for privilege. Again, this complaint is dealt with more than adequately by the plaintiff in its answering affidavit, to which is in fact attached separate listing of documents in respect of which privilege is claimed. That would similarly have dealt the death knell to this complaint by the defendants. The point is that, in its answering affidavit, the plaintiff set out facts that support the claim of privilege.

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[5] See for example, albeit in the context of exception proceedings (i e that pleadings should be read by 'a mind willing to understand'), *Peterson and Another NNO v Absa Bank Ltd* 2011 (5) SA 484 (GNP) at [51]; *Nedbank Limited v Absa Bank Limited* 2017 JDR 1197 (GJ) at para 25.5;

[41]. By the time the defendants' application to compel was heard, the issues had been substantially narrowed, as was the case in the plaintiff's application to compel.

[42]. As regards those instances in which the defendants complain about the manner in which the plaintiff conducted the searches in order to find certain documents requested by the defendants, the plaintiff submitted that, where the context required, it did indicate what kind of search was conducted and stated that, despite a diligent search, the documents requested were not in its possession or under its control. This, in my view, suffices for purposes of the rule 35(3). It is trite that the courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action, (iv) from any admission made by the party making the discovery affidavit, or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents or tape recordings in his possession or power, or has misconceived the principles upon which the affidavit should be made.

[43]. Accordingly, in those cases where the defendants complain about the manner of the searches, their objections should not be upheld and an order to compel further and better discovery than the responses furnished, should be refused.

[44]. As for the 'Original Guarantee Policy', which the defendants requested to be made available for inspection, I am of the view that the plaintiff's response that it was unable to produce the original because it was not in possession thereof, is acceptable as due compliance with the provisions of rule 35(3). Plaintiff stated that, to the best of its knowledge, the original of such Guarantee Policy 'is in the possession of Lawtons Africa', which is its erstwhile attorneys of record, and who have indicated to the plaintiff's present legal representatives that the original Guarantee Policy cannot be released to the plaintiff because a third party, who is party to the Hogan Lovells' mandate, has not as yet given its consent to plaintiff

obtaining the original. I do not believe that there is a justifiable basis on which the court could go behind the plaintiff's answering affidavit. In my view, therefore, an order to compel the production of the original Guarantee Policy should not be granted.

[45]. There are a few other groups of documents requiring special mention, the first being correspondence between Prescient's representative/s and a Mr Lodewyk Meyer, who previously represented the plaintiff. In para 6 of its rule 35(3) notice dated 7 November 2022, the first and second defendants request such correspondence and the plaintiff's response was to the effect that some of the documents had already been discovered. It was also confirmed by the plaintiff that it had given any remaining documentation – not protected by legal advice privilege – to the defendants.

[46]. There is now a residual dispute about such privilege. Plaintiff contends that, by virtue of the joint mandate to Hogan Lovells / Lawtons Africa by it and Prescient, the communications in question are protected by legal advice privilege between attorney and client. The plaintiff is not claiming privilege in relation to the communications between it and Prescient; the request relates to communications between Prescient and their attorney, Mr Meyer. These are clearly protected by legal advice privilege. If the communication was with the legal adviser in his professional capacity and the communication relates to the transaction (i e the Jurgens transaction) upon which the client (i e Prescient) sought advice, the inference is that the communication was made in professional confidence.

[47]. The defendants contend that the plaintiff has waived any such privilege by disclosing certain emails by Prescient's representative, a Mr EB Amien, to Mr Meyer. There is no merit in that argument. As rightly contended by Mr De Oliveira, this contention fails to appreciate that an implied waiver occurs when a party discloses the privileged material with full knowledge of its rights and in a manner which, objectively speaking, it can be inferred that the plaintiff intended to abandon its rights. *In casu*, objectively speaking, no such inference can be made. Therefore, the plaintiff cannot and should not be compelled to produce any further such communications that are protected by legal advice privilege.

[48]. As regards the defendants' request in paragraph 19 of its rule 35(3) notice for correspondence relating to recovery under the Guarantee Policy, the plaintiff's response was to the effect that it had already discovered all such documents in its possession relating to a claim on the Guarantee Policy against the first defendant. The plaintiff, however, then goes to state that: -

'To the extent that any correspondence covered by the request in question exists and is legally privileged in nature, the plaintiff objects to its production.'

[49]. This is one of those responses referred to above, which, according to the defendants, is defective and contradictory. As I have already indicated, there is no merit in these complaints by the defendants. As held above, in its response to this request, it cannot be said that the plaintiff has equivocated on whether the documents exist. Whether or not a document exists has, in my view, been dealt with more than adequately by the plaintiff in his answering affidavit. I therefore find myself in agreement with the plaintiff's submission, in that regard, that defendants' complaint is overly-formalistic, semantic and amounts to an abuse of process.

[50]. Plaintiff should therefore not be compelled to give a better response to this request.

[51]. In paragraph 34 of the defendants' rule 35(3) notice, they requested correspondence between third defendant and Mr Meyer, including from non-work related email addresses, such as WhatsApp conversations. The plaintiff's response thereto was unequivocal and to the effect that it had already discovered all such documents in its possession or under its control. It furthermore and pertinently stated that it does not have access to Mr Meyer's personal email address/es, phone records or WhatsApp conversations. Notably, Mr Meyer is no longer employed by Baker McKenzie.

[52]. That response, in my view, is more than adequate and fully complies with the requirements of rule 35. Importantly, it would be improper for the Court to go behind the affidavit of the plaintiff when it states that plaintiff does not have possession of these documents.

[53]. In sum, the first and second defendants have not, in my view, made out a case for an order compelling further and better discovery by the plaintiff. Their application accordingly falls to be dismissed.

Costs

[54]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[55]. I am also satisfied that, having regard to the complexity of the issues involved in the main action and the quantum of the plaintiff's claim, that the employment by the plaintiff and by the first and second defendants of two Counsel, is justified even in these interlocutory applications relating to discovery. The importance of discovery in the litigation process cannot and should not be underestimated. As was said by the court in *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513G–H: 'Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be, and often is a devastating tool.'

[56]. I therefore intend ordering the costs in each of the applications to follow the suit.

Order

[57]. In the result, I make the following order:

(1) The first and second defendants be and are hereby compelled, in terms of Uniform Rule of Court 35(7), to make further and better discovery within five days from the date of this order, by replying to the following paragraphs referred to in the plaintiff's notice in terms of rule 35(3) dated the 7th of November 2022 and by making available for inspection in accordance with rule 35(6) the documents referred to in those paragraphs, namely: -

(a) Paragraphs 50 and 51 ('the insurance documents') – Any and all correspondence exchanged between the first and/or the second defendant and representatives of Marsh after 11 September 2019 in relation to the suspected fraud of the third defendant and in relation to these proceedings, including but not limited to all notifications of loss claims, which shall include the correspondence between ENSafrica and/or Marsh, acting on the instructions of or on behalf of the first and/or the second defendant, with their insurers in relation to any claim or prospective claim lodged or to be lodged by the first and/or the second defendant as a result of their suspicion of a fraud having been committed by the third defendant, between 4 December 2019 and the present date;

(b) Paragraph 70 ('the FAIS and related documents') – Any and all policies of the first and/or the second defendant pertaining to client relations, standard disclosures when engaging with clients, written mandate documents, engagement letters, know-your-customer (and similar) policies, documents or training guides to employees or agents, including but not limited to measures to disclose whether or not employees or agents are operating under supervision for the purposes of FAIS; and

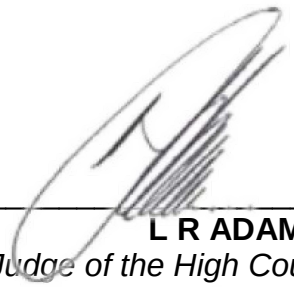
(c) Paragraphs 84, 87 and 94 – Any briefs or instruction letters (or emails) to Hogan Lovells, Norton Rose Fulbright or Cliffe Dekker Hofmeyr in relation to the note programme and/or the Guarantee Policy generally,

alternatively, to state on oath within ten days from the date of this order that any such documents are not in their possession and, in which case, to state the whereabouts of the documents, if known to them.

(2) In the event of the first and second defendants' non-compliance with the order in paragraph (1) above, the plaintiff is hereby granted leave to apply on the papers in this application, duly supplemented, to have struck out the first and second defendants' defence and for judgment against the said defendants.

(3) The first and second defendants, jointly and severally, the one paying the other to be absolved, shall pay the plaintiff's costs of its application in terms of rule 35(7) to compel better discovery, including the costs consequent upon the employment of two Counsel (where so employed).

(4) The first and second defendants' application in terms of rule 35(7) to compel plaintiff to better comply with defendant's rule 35(3) notice is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel, where so employed.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	3rd and 10th February 2023
JUDGMENT DATE:	22nd February 2023
FOR THE PLAINTIFF:	Advocate M De Oliviera
INSTRUCTED BY:	Baker & McKenzie, Sandton
FOR THE FIRST AND SECOND DEFENDANT:	Adv R Ismail
INSTRUCTED BY:	ENS Africa, Sandton
FOR THE THIRD DEFENDANT:	No appearance
INSTRUCTED BY:	No appearance