

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D10954/2023**

In the matter between:

NEDBANK LIMITED

APPLICANT

and

**LOCOCO 3 (PROPRIETARY) LIMITED
(Reg. No. 1999/006598/07)**

RESPONDENT

Coram: Mossop J

Heard: 13 May 2024

Delivered: 22 May 2024

ORDER

The following order is granted:

The respondent's discovery application

1. The application is dismissed with costs, such to include the costs of two counsel on scale C.

2. An identical order is granted in the matters with the following case numbers:

- (a) D10914/2023;
- (b) D10955/2023;
- (c) D10956/2023;
- (d) D10957/2023;
- (e) D10958/2023;
- (f) D10959/2023;
- (g) D10960/2023;
- (h) D11378/2023; and
- (i) D11379/2023.

The applicant's condonation application for the late delivery of its concise heads of argument

1. It is recorded that the respondent no longer opposes the condonation application, which is granted.
2. There shall be no order as to costs.

JUDGMENT

MOSSOP J:

Introduction

[1] Nedbank Limited, a major commercial bank in this country, has brought ten separate applications in which it seeks the liquidation of ten different companies that form part of a conglomeration of companies known as the 'Leo Chetty Group of Companies' (the Group). While Nedbank Limited is a constant presence in each application as the applicant, each liquidation application has a different respondent company forming part of the Group. The respondent in this matter is one of the ten companies that the applicant seeks to liquidate. Those ten liquidation applications are not presently before me but are scheduled to be heard by me later this term.

[2] In each of the ten liquidation applications, the respondent company whose liquidation is sought has brought three interlocutory applications against Nedbank Limited. In turn, in each of those liquidation applications, Nedbank Limited has brought a single interlocutory application against the respective respondents. The nature of those interlocutory applications will be mentioned below. Thus, in each of the ten liquidation applications there are four interlocutory applications in total.

[3] I believed that all these interlocutory applications were before me to be argued and I prepared accordingly. It appears that I was mistaken in that belief. Instead, when the matters were called, I was advised by counsel for the respondent that all that I had to determine was a single interlocutory application brought by the respondent. The other interlocutory applications were either no longer opposed or were to be dealt with when the ten liquidation applications are finally determined later.

[4] I regard the failure to notify this court of this fact to be both unfortunate and discourteous. The court had invested time and effort in preparing for all the interlocutory applications. When a party is aware that the scope of an upcoming hearing has changed, or the focus of that hearing has shifted, it should inform the court immediately. This was not done. It is a monumental waste of scarce judicial resources to prepare for matters that are not going to be argued.

The arrangement

[5] In each liquidation application, the four interlocutory applications raised are identical. Thus the four interlocutory applications in this matter are identical to those

in the other nine liquidation matters. Counsel, sensibly in my view, therefore agreed that only a single interlocutory application would be considered in one of the liquidation applications and the decision reached in that matter would then determine the identical interlocutory application in each of the other nine liquidation matters. The application chosen by default was this application. I am grateful to counsel for this agreement.

Reference to the parties

[6] I shall refer to Nedbank Limited as 'the applicant', for it is the applicant in the ten liquidation applications and I shall refer to Lococo 3 (Pty) Ltd as 'the respondent', notwithstanding the fact that it is, in fact, the applicant in the interlocutory application to be determined.

Counsel

[7] The applicant was represented by Mr Rood SC and Ms Mtati and the respondent was represented by Mr Harpur SC. All the counsel are thanked for their most valuable assistance.

The interlocutory applications

[8] Despite only one of the four interlocutory applications being argued, it is desirable to mention all the interlocutory applications. They were the following:

- (a) An application by the respondent seeking an order that the applicant make discovery;
- (b) An application by the respondent to strike out the applicant's claim because of the applicant's failure to timeously deliver its concise heads of argument and a compliant practice note; alternatively, an application by the respondent to set aside the applicant's concise heads of argument and practice note because they allegedly constituted irregular steps, or evidenced non-compliance with Uniform rules 30 and 30A respectively;
- (c) An application by the respondent to strike out certain paragraphs in the applicant's replying affidavit in the liquidation application on the grounds that they

either constitute vexatious and scandalous allegations or that the applicant has impermissibly introduced new facts in its replying affidavit; and

(d) An application by the applicant for condonation of the late delivery of its concise heads of argument and a compliant practice note.

[9] I only heard argument on the merits of the application mentioned in paragraph 8(a) above and I was asked, en passant, by the applicant to make a costs order in respect of the application mentioned in paragraph 8(d) above because the respondent no longer opposes that application.

[10] I turn now to consider the respondent's application for discovery.

The application for discovery

The relief claimed

[11] The application calling for the applicant to make discovery was brought by the respondent as a counter-application to the applicant's liquidation application. The respondent seeks the following relief in its notice of counter-application:

- '1. The Applicant is ordered to make discovery under uniform rule 35(13).
2. The Respondent is given leave to supplement its papers within a period of 15 days of the Applicant's said discovery under Uniform Rule 35(13).
3. The main application is stayed pending the implementation of the Order in terms of paragraphs 1 and 2 above.
4. The costs of this application shall be costs in the cause, save that the Applicant is ordered to pay the costs occasioned by any opposition to this interlocutory application, including the costs of senior counsel.
5. The respondent is afforded further and/or alternative relief.'

There can therefore be no doubt that the application was predicated upon the provisions of Uniform rule 35(13).

The purpose and importance of discovery

[12] The purpose behind discovery was explained by Tredgold J in *Durbach v Fairway Hotel, Ltd*,¹ as being to inform the parties in a dispute of all the documentary evidence that is available for the resolution of their dispute. The importance of discovery stems from the fact that it may narrow the issues by reducing, or eliminating, issues that are unanswerable because of the existence of a document or documents that incontrovertibly establish, or demolish, the issue in dispute. The elimination of issues that are incontrovertible may help shorten the proceedings and, in turn, may reduce the costs of the matter.

[13] I am also mindful of the views of the Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and another*² where the following was stated:

‘Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one’s case is a time-honoured part of a litigating party’s right to a fair trial.’

[14] The place and value of discovery proceedings in action proceedings is beyond question. Its place and value in application proceedings, notwithstanding what was said in the extract referred to above, is less entrenched.

Uniform Rule 35

¹ *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) at 1083.

² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) para 25.

[15] This rule generally regulates the discovery procedure applicable in civil litigation.³ The Uniform Rules of Court were first published in 1965 and the final sub-rule to Rule 35, when originally published, was Uniform Rule 35(13).⁴ That rule read, and still reads, as follows:

‘The provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications.’

The fact that discovery in application proceedings, unlike in action proceedings, may only be claimed with the approval of a court is indicative of the fact that it is something that is out of the ordinary.⁵

[16] The precise wording of Uniform Rule 35 leaves no doubt that it was conceived with action proceedings in mind: there are ten references to the word ‘action’ in the rule and seven references to the word ‘trial’. But there is only one reference to the word ‘application’ and that reference appears in Uniform rule 35(13). That discovery was not universally intended to apply to application proceedings was acknowledged by Thring J in *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and others*,⁶ when he said, with reference to discovery in application proceedings, that:

‘. . . it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased.’

[17] That there is a distinction between whether discovery applies in action and application proceedings is understandable, for it is trite that the two procedures are very different in their nature:

(a) An action may take several years to reach a stage when it is ready to be placed before a court for determination. Application proceedings should not have

³ *Lewis Group Ltd v Woollam and others (2)* [2017] 1 All SA 231 (WCC) para 4 (‘*Lewis Group*’).

⁴ GN R48, GG 999, 12 January 1965. The rule now has 15 sub-rules.

⁵ *Lewis Group* para 4.

⁶ *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and others* 1999 (3) SA 500 (C) at 513H-I.

such longevity. Application proceedings are designed to be launched, and resolved, relatively quickly. Permitting discovery in application proceedings would have the potential to slow down that designed swiftness;

(b) As a general proposition, most applications do not require discovery because the parties themselves know what the essential facts are and have the documents that they rely on and simply do not need to invoke discovery to either prove their case or rebut their opponent's case; and

(c) Discovery normally occurs in action proceedings after the close of pleadings and before the trial commences with the leading of evidence. There is thus a space in which discovery may occur. Theoretically, there should be no such gap in motion proceedings, where the papers are both the pleadings and the evidence.⁷ However, with the present state of court rolls, there is often a considerable gap in time in application proceedings between the filing of the replying affidavit and the final argument and this difference may consequently have lost some of its potency.

[18] Consequent upon the wording of Uniform rule 35(13), the default position when it comes to discovery is that it does not apply to application proceedings, unless a court has ordered that it shall occur. An order for discovery is, however, not merely there for the asking.⁸ Following upon the observations of Botha J in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and another*,⁹ it is now settled that discovery will only be ordered in application proceedings in exceptional cases. Botha J remarked in that matter as follows:

'In application proceedings we know that discovery is a very, very rare and unusual procedure to be used and I have no doubt that that is a sound practice and it is only in exceptional cases, in my view, that discovery should be ordered in application proceedings.'¹⁰

⁷ *Premier Freight (Pty) Ltd v Breathetex* [2003] ZAECHC 10 para 4 ('*Premier Freight*').

⁸ *Ibid* para 7.

⁹ *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and another* 1979 (2) SA 457 (W) at 470D-E.

¹⁰ *Ibid*.

[19] There can consequently 'be no dispute that exceptional circumstances are required as a matter of law' where the provisions of Uniform Rule 35(13) are invoked.¹¹ In determining whether discovery should be ordered, the court exercises a discretion¹² and when exercising this discretion it will take into account considerations of fairness and equity, including the constitutional values of openness and transparency rightly prized in our nascent democracy.¹³

Exceptional case

[20] What, then, is an exceptional case? It seems that a matter will be capable of being regarded as exceptional if there is some special reason present that justifies discovery being ordered.

[21] There is no way that a definition of what an exceptional case is could be crafted and shaped for general application. Each matter will have to be considered on its own facts and on its own merits. But what is reasonably certain is that exceptional circumstances would have to be identified and mentioned in an affidavit, for they cannot be properly introduced simply in a notice of motion.¹⁴

The facts

[22] All of which brings me to a brief summary of the facts in the matter. I do not intend discussing them in great detail given the fact that I am still to hear the liquidation applications where these facts will be poured out, swirled around, sniffed at, and tested: some will be found to be unpalatable and some will be found to fortify a position taken. But that lies ahead. For now, I shall endeavour to simply narrate those facts that are common cause, for this matter cannot be determined without some reference to the facts.

The structure of the Group

[23] First, it is necessary to consider the structure of the Group. It is comprised of two distinct limbs. The one limb is the so-called 'educational limb', also referred to in

¹¹ 4 *Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority and others* 2020 (6) SA 428 (GJ) para 60.

¹² *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd and others* 2013 (5) SA 238 (GSJ) para 18.

¹³ *Premier Freight* paras 7-8.

¹⁴ *Fargo Industries (Pty) Ltd v Niemcor Africa (Pty) Ltd and others* [2019] ZAGPPHC 417 para 20.

argument as ‘the Educor limb’. Within this limb, which comprises eight companies, four companies conduct business as educational colleges, under names such as Damelin, CityVarsity, ICESA and the Central Technical College, and four companies are property owning entities. The second limb is the property owing limb, consisting of eight companies that own buildings. Linking the two limbs is the holding company of both limbs, namely A1 Capital (Pty) Ltd. The respondent is a property owning company that falls within the educational limb. There is a synergy between the educational limb and the property owning limb, which is found in the fact that the buildings owned by those companies in the property owning limb are utilised as residences for students at the colleges conducted by the educational limb.

Covid-19

[24] The respondent contends that because of the Covid-19 pandemic in 2020, its colleges were forbidden from conducting their regular business and students were prohibited from attending lectures or remaining in their residences. Those events constituted a serious blow to the financial stability of the Group. After the pandemic retreated, the consequences thereof extended into the future and had a continued lingering effect on the finances of the Group, and it was accordingly necessary for it to renegotiate its financial agreements with the applicant.

The respondent’s loans from the applicant

[25] Dealing specifically with the respondent, it owns five buildings that do not appear to be utilised as accommodation for students. It had negotiated three separate written loan agreements with the applicant. The first loan agreement was concluded in May 2016 and involved a loan of R11 760 000. The second loan agreement was concluded in April 2017 for an amount of R18 300 000. The third loan agreement was concluded in August 2018. This loan involved an amount of R16 million. Individually and collectively, these are substantial sums of money.

[26] The terms of the three loan agreements were repeatedly amended by the conclusion of written and signed addenda that, essentially, gave the respondent some financial breathing space with regard to its repayment obligations to the applicant. Thus, each of the three loan agreements was amended by written and signed addenda on no less than seven distinct and separate occasions.

[27] None of what is stated above is contentious. The loan agreements and the signed addenda exist and are included in the papers.

The disputed facts

[28] Where the dispute between the parties arises is the insistence of the respondent that there was a further agreement that applied to all three loans that eased the respondent's repayment obligations. In argument, it was referred to as 'the restructuring agreement' and I shall continue to use that nomenclature. The respondent alleges that the restructuring agreement was concluded and agreed to orally by the applicant and respondent and was to be committed to writing by the applicant, but that this had not been done by the time that the liquidation application directed at the respondent was launched.

[29] The thrust of the restructuring agreement would be to further reschedule the respondent's financial obligations to the applicant, which would mean that the respondent was not in breach of its obligations to the applicant and accordingly would not be susceptible to liquidation proceedings.¹⁵

[30] The respondent concedes that the restructuring agreement does not yet exist in written form, despite the applicant allegedly agreeing to its terms. According to the answering affidavit, the restructuring agreement, in summary insofar as it related to the respondent, comprised the following:

'[a] What was envisaged was in relation to the educational component of the group, that the respective debt in each EPH Group company would be restructured into a new loan agreement repayable over a period of 10 years.

[b] For the first two years from the conclusion of that restructuring agreement, interest only would be paid on the debt. This would be paid by the individual companies in the group forming part of the educational component according to the interest that was then outstanding on their debt;

¹⁵ The applicant alleged in its founding affidavit that the respondent was in breach of its loan repayment obligations.

[c] ...

[d] After the two-year interest-only payments, payments would then be made in respect of capital and interest for the remainder of the ten-year period;'

[31] The applicant denies this to be the case. That it agreed to the seven previous addenda in each of the three loans is readily admitted. But it denies the existence of the restructuring agreement, primarily because it alleges that the respondent, despite repeated requests for information, never supplied it with that requested information. It says that such information was essential for it to assess the respondent's, and the Group's, financial standing. It also has put up a transcript of a meeting between the parties on 28 June 2023 at which it is manifestly apparent that the applicant requires information from representatives of the Group. The applicant says that there are simply no documents that can be put up because none exist. Given that this response is found in the replying affidavit, it follows that the applicant has said as much on oath.

[32] Mr Harpur indicated in argument that the respondent simply did not accept this to be the case: the thrust of his submission was that there must be some documentation recording something. The facts at his disposal did not allow him to be any more precise on what those documents could be or what they might contain because the respondent has no actual knowledge of what does, or does not, exist in the records of the applicant. But it was probable, so he submitted, that there must be something in those records that might assist the respondent in proving the conclusion of the restructuring agreement contended for by it. He could put it no higher than that.

[33] The high-water mark of the respondent's allegations in this regard is to be found in the following extract from its answering affidavit:

'[221] The Applicant denies the conclusion of the restructuring agreement. The Applicant, being a bank will no doubt have internal documents recording the results

of the various meetings and communications to its credit approval committee, to which it refers in the papers.

[222] The Respondent accordingly required full discovery in this regard in relation to the internal communications by the various officials in the Respondent (sic), and deficiencies in the Applicant's case (sic), which should, if records are properly kept by the Applicant, support the Respondent's version.

[223] The Applicant should not be permitted to mask these shortcomings in its own case by electing to institute application proceedings instead of action proceedings.'

[34] The first thing to be acknowledged from this extract is the lack of actual knowledge by the respondent of that which it claims must exist. That is indicated by the use of the words 'no doubt'. That is a phrase ordinarily used when the person speaking it, or writing it, thinks that something is probably true.¹⁶ It may not necessarily, however, be true. What is being engaged in is a form of supposition.

[35] The second thing to be appreciated is that it is of no relevance to this matter what transpired at meetings that are thought to have been held by the applicant's internal credit committee or what was said in internal memoranda. Those documents would not prove the existence of a binding agreement. For example, if the applicant's credit committee had proposed terms for a restructuring agreement that were not acceptable to the respondent, the applicant could not argue that an agreement had actually been concluded. What would be relevant is evidence of an agreement unequivocally concluded between the parties. And not just any agreement. A written agreement, because each of the loan agreements contains a clause that reads as follows:

'This Agreement constitutes the whole of the agreement between the Parties relating to its subject matter and no amendment, alteration, addition, variation or consensual cancellation will be of any force or effect unless reduced to writing and signed by the

¹⁶ Longman Dictionary of Contemporary English: <https://www.ldoceonline.com/dictionary/no-doubt>.

Parties. The Parties agree that no other terms or conditions, whether oral or written, or whether express or implied apply.'

If such evidence of what transpired at meetings that are thought to have been held by the applicant's internal credit committee is available or if evidence of what was said in internal memoranda is likewise available, it is not likely to contain material that will dispose of any of the issues¹⁷ in the liquidation application because of the existence of the requirement that any variation of the loan agreements had to be reduced to writing and signed by the parties.

[36] Thirdly, the deponent to the applicant's founding and replying affidavits has stated under oath that he is authorised to depose to those affidavits on behalf of the applicant and that what he states therein is the truth. He has stated that no agreement was concluded and that there are no documents contended for by the respondent. Given the rank speculation engaged in by the deponent to the respondent's answering affidavit, why should the veracity of the applicant's deponent's statements be doubted at this stage? Had there been some form of specificity from the respondent on what precisely was being sought, a different light may have been cast on the matter.

[37] The fourth and final point to be considered is the breadth of the respondent's claim for discovery. The respondent states that it wants to see the applicant's internal communications. Which ones? Over what period? By which officials? Addressed to whom? The claim to such documentation is impermissibly wide and will, in my view, simply lead to further disputes.

[38] In his argument, Mr Harpur repeatedly emphasised that the applicant required me to conclusively decide in this application that the restructuring agreement had not been agreed upon. I do not believe that to be the case at all. That is an issue to be determined at the hearing of the ten liquidation applications and I expressly refrain from expressing any views on the issue. The inquiry in this matter is much simpler, in my view. For me to come to the assistance of the respondent in the discovery

¹⁷ *Papadakis v Old Mutual Trust (Pty) Ltd NO and others* [2023] ZAGPJHC 1072 page 6.

application, I must merely decide whether it has established the existence of exceptional circumstances.

Have exceptional circumstances been established?

[39] The inquiry into whether an application for discovery should be granted was described by Binns-Ward J in *Lewis Group*,¹⁸ as requiring:

‘... an examination of the request with reference to its particular content assessed in the context of the peculiar characteristics of the litigation and mindful of the premise that the request should, as a matter of policy, be granted only exceptionally.’
(Footnote omitted.)

[40] On the issue of exceptional circumstances, Mr Harpur submitted that these, indeed, were present. He submitted that the applicant impermissibly resorted to liquidation proceedings when it ought to have proceeded by way of action to recover a disputed debt. By so doing, so the argument went, the respondent was placed at a disadvantage. Had action proceedings been favoured by the applicant, the respondent would have received the benefit of discovery in due course, but as things now stand, it is kept from that benefit because the applicant chose to proceed by way of application. Mr Harpur, however, conceded that the applicant was entitled to proceed by way of a liquidation application but submitted that it was then at risk of falling foul of the *Badenhorst* principle.¹⁹ That may well be so and it might be a risk that the applicant was willing to take, but, again, that is an issue for another day. For the moment, it is apparent that if the applicant wished to attempt to liquidate the respondent, it was entitled to do so and to do so by the prescribed method of application proceedings.²⁰ If what was done by the applicant was at this stage entirely permissible, as Mr Harpur seemed prepared to concede, then I can see no value in the respondent’s argument that exceptional circumstances arise simply because of the applicant’s choice to proceed by way of a liquidation application.

¹⁸ *Lewis Group* para 5.

¹⁹ This principle provides that a liquidation order will not be granted when the obligation sued upon is genuinely disputed: see *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

²⁰ Section 346(1) of the Companies Act 61 of 1973.

[41] It was also submitted by Mr Harpur that because liquidation proceedings had actually been commenced, this in itself established the existence of exceptional circumstances. Because of the consequences that might flow from a provisional, and then conceivably a final, order of liquidation, discovery ought to be allowed to enable the respondent to deal with the applicant's allegedly flawed attempt to liquidate it. That there might be calamitous consequences for the respondent if a provisional liquidation order is granted against it seems logical and probable. But that is true of all liquidation applications – the juristic entity subject to the application faces a threat to its continued existence. The argument advanced is not a novel one. It was raised in *Investec Bank Ltd v Blumenthal NO*,²¹ where Sutherland J stated the following when dealing with a similar point:

'However meritorious these criticisms are, in my view, they are not such that they meet the threshold of exceptionality required by Rule 35(13). Very many applications for sequestration must exhibit these very features. If the rule-makers or the drafters of the insolvency legislation, cognisant as we must deem them to be about the procedures for insolvency procedures, had contemplated a need for discovery on account of these considerations *per se*, it would be expected to see that expressly provided for. There is no sign that they did.'

I agree with these words. In my view, the fact that the applicant has brought liquidation proceedings does not in itself amount to exceptional circumstances. As Sutherland J went on to state in *Investec*:

'On such an approach, the peculiarities of sequestration proceedings do not and ought not to weigh heavily.'²²

[42] Mr Harpur then advanced an alternative argument. He submitted that the application was not entirely based upon the provisions of Uniform Rule 35(13), despite the unquestionable wording of the counter-application, but was also based upon a common law right of access to documents. This allegedly arose from the relationship between the respondent and the applicant, being one of principal and

²¹ *Investec Bank Ltd v Blumenthal NO* [2012] ZAGPJHC 21; 2012 JDR 0362 (GSJ) para 14.

²² *Ibid* para 23.

agent arising out of their financial transactions. It was submitted that the respondent, as principal, was entitled as of right to inspect the books of its agent, the applicant. It was therefore not necessary for it to establish the existence of exceptional circumstances. In this regard, Mr Harpur referred me to *Jacobsohn v Simon and Pienaar*.²³ *Jacobsohn* is indeed authority for the proposition that an agent is obliged to permit inspection by its principal of vouchers and entries in its books and that the entitlement of the principal to such access is not affected by an entitlement to claim discovery through a rule of court.

[43] There are, however, several reasons why this alternative argument cannot succeed. Schreiner J stated in *Jacobsohn* that:

‘... in my opinion the nature of the application must be found in the terms of the petition and the prayers thereof, and on this view of the matter I am unable to agree with the conclusion of the learned Judge that the application was in reality one for discovery under the rules of Court.’²⁴

What was said by Schreiner J therefore was that what was being asked for must be considered. There is no doubt that the application before me is an application for discovery in terms of Uniform rule 35(13) and not an application for access to records based upon the existence of a principal-agent relationship. The counter-application, already mentioned in full in this judgment, makes that plain. But for fear that there be any doubt about that, the deponent to the answering affidavit states the following:

‘This is a matter which is eminently suitable for this Honourable Court to make an order under Uniform Rule 35(13), which reads as follows: ...’.

[44] The application is not predicated on the relationship contended for by Mr Harpur. Indeed, there is no mention whatsoever of the relationship summoned up in argument in the answering affidavit, which also serves as the founding affidavit for the respondent’s counter-application for discovery. I am by no means certain that the

²³ *Jacobsohn v Simon and Pienaar* 1938 TPD 116 (‘*Jacobsohn*’).

²⁴ *Ibid* at 119.

relationship is one that can be characterised as contended for by Mr Harpur. I think that evidence should have been presented had such an application been intended. It seems unfair to me to fashion an application in which defined relief is claimed and then attempt to claim other relief based on an unpleaded alternative hypothesis. I am not persuaded that, on the facts of the counter-application, it is open to Mr Harpur to argue for something that his client has not asked for in its application.

[45] Mr Rood, in a measured argument that seamlessly made full use of the considerable volume of documents in this application, argued convincingly that what the respondent was doing was either one of two things, or, perhaps, was both: it was either engaging in a classic fishing exercise or it was a dilatory tactic being employed in an attempt to delay the hearing of the ten liquidation applications. It appears to me that there is some merit in these arguments.

[46] Mr Rood went on and stated that even if there were internal documents that related to the applicant's deliberations on whether to conclude the restructuring agreement, which was denied by the applicant, those documents could not come to the rescue of the respondent. This was because the loan agreements all contained *Shifren*-type clauses²⁵ that required any variation of the loan agreement to be recorded in writing and signed by the parties. Absent such a signed agreement, which the respondent was obliged to admit did not exist, there could be no variation of the loan agreement as contended for by the respondent.

[47] To this, Mr Harpur argued in reply that it would be unfair to permit the applicant to shelter behind the *Shifren* clause. Unfairness, in my view, does not enter the picture. It is so, as was said in *Brisley v Drotsky*,²⁶ that:

‘. . . in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy.’²⁷

²⁵ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere* 1964 (4) SA 760 (A); [1964] 4 All SA 520 (A) at 765C; *Ba-Gat Motors CC t/a Gys Pitzer Motoring and another v Kempster Sedgwick (Pty) Ltd* [2023] ZASCA 137.

²⁶ *Brisley v Drotsky* 2002 (12) BCLR 1229 (SCA); 2002 (4) SA 1 (SCA).

There cannot be, nor was there, any argument that the non-variation clause in this instance is contrary to public policy. Unfairness, if it exists, does not equate to something that is in violation of public policy.

[48] If I understood Mr Harpur correctly, he argued, finally, that because the provisions of the seventh and last addendum to the loan agreements had expired through the effluxion of time, there was no loan agreement, and thus the proposed restructuring agreement would not constitute a variation of an existing agreement but would be a new, independent agreement that need not necessarily be reduced to writing. That is not an argument of any merit. The provisions of the seventh addendum may well have come to an end, but underlying all the addenda were the three loan agreements, which remained in full force and effect and which contained the *Shifren*-type clause.

Finding

[49] In the circumstances, I am unpersuaded that the respondent has demonstrated that any exceptional circumstances exist that would entitle me to grant the counter-application. If discovery were to be allowed on the speculative grounds advanced by the respondent, there is a possibility that an undesirable widening of the ambit of these proceedings will take root. I am fortified in the conclusion to which I have come by the limited relevance of the general documentation that is sought, the wide reference to what is sought, and to the pervasive perception that what is being engaged in is no more than a fishing expedition.

[50] There was a large volume of evidence, being probably in excess of five thousand pages, that had to be mastered in preparing for what initially appeared to be four separate interlocutory applications in each of ten liquidation applications. It was prudent in those circumstances for the applicant to brief two counsel for that task. The applicant must be awarded the costs of those two counsel and in the exercise of my discretion, I direct that those costs should be paid on scale C.

²⁷ Ibid para 91 per Cameron JA, cited with approval in amongst others, *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) and *Ba-Gat Motors CC t/a Gys Pitzer Motoring and another v Kempster Sedgwick (Pty) Ltd* [2023] ZASCA 137.

The applicant's costs in its condonation application

[51] I turn now to consider the limited issue of the applicant's costs in its condonation application.

[52] The applicant's concise heads of argument were due by 14 February 2023. Its long heads of argument were delivered by that date but its concise heads of argument are dated 27 February 2023. The applicant sought condonation for this lateness, which was initially opposed by the respondent. On the evening before this matter served before me, so I was advised from the bar, the respondent notified the applicant that it was no longer opposing its condonation application. The applicant accordingly requested a costs order in its favour. The respondent resists this and claims a cost order in its favour.

[53] That the concise heads of argument were delivered out of time, although not outrageously so, is not to be doubted. The reason advanced for the late delivery was that the applicant believed that the order granted by Harrison AJ on 1 November 2023, which set out the dates for the filing of further affidavits and for the delivery of heads of argument, only related to the delivery of long heads of argument.

[54] It appears to me that such a view is not based upon a correct understanding of the practice directives then applicable to the delivery of heads of argument in this division (the practice directives relating to heads of arguments have subsequently been varied). A reference to heads of argument in the order of Harrison AJ can only mean heads of argument as contemplated in the practice directives for this division.

[55] In *M-B.F.M v H.P.N.P*, Pitman AJ stated the following about heads of argument in this division:²⁸

'Practice Directives constitute procedures carefully weighed and prepared by each Division to ensure its effective and smooth running. It would surprise me to hear any

²⁸ *M-B.F.M v H.P.N.P* [2024] ZAKZPHC 8 para 21.

Advocate say that they are not aware of this, or that they do not know that different Divisions have different practice Directives.'

I agree with that statement. Practitioners who ordinarily do not practise in this division should familiarise themselves with the applicable practice directives here. Practice directive 9.4.1, at the time when the heads of argument were required to be filed, read as follows:

'The applicant, excipient or plaintiff in opposed motions, exceptions and provisional sentence proceedings shall not less than ten clear court days before the day of the hearing deliver concise heads of argument (which shall be no longer than five pages ("the short heads") and not less than seven clear court days before the hearing the respondent or defendant shall do likewise. The heads should indicate the issues, the essence of the party's contention on each point and the authorities sought to be relied upon. The parties may deliver fuller, more comprehensive heads of argument provided these are delivered simultaneously with the short heads. Except in exceptional circumstances, and on good cause shown, the parties will not be permitted to deliver additional heads of argument.'

Given that only long heads of argument were timeously delivered by the applicant, the non-compliance with the practice directive is manifest.

[56] It appears to me that the applicant was initially at fault. But so, too, was the respondent in maintaining its opposition for a number of months only to withdraw it at the last moment. It seems to me that there is inexcusable conduct on the part of both parties and that a just order should be that there shall be no order as to costs in the applicant's condonation application.

The order

[57] I accordingly grant the following order:

The respondent's discovery application

1. The application is dismissed with costs, such to include the costs of two counsel on scale C.

2. An identical order is granted in the matters with the following case numbers:

(a) D10914/2023;

(b) D10955/2023;

(c) D10956/2023;

(d) D10957/2023;

(e) D10958/2023;

(f) D10959/2023;

(g) D10960/2023;

(h) D11378/2023; and

(i) D11379/2023.

The applicant's condonation application for the late delivery of its concise heads of argument

1. It is recorded that the respondent no longer opposes the condonation application, which is accordingly granted.

2. There shall be no order as to costs.

MOSSOP J

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