



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

CASE NO.: 1013/2023

Matter heard on: 10 August 2023

Judgment delivered on: 22 August 2023

In the matter between:

INTERCAPE FERREIRA MAINLINER (PTY) LTD

APPLICANT

And

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT**

1ST

**HEAD OF THE INVESTIGATING DIRECTORATE
RESPONDENT**

2ND

In re:

**INTERCAPE
APPLICANT**

FERREIRA

MAINLINER

(PTY)

LTD

And

MINISTER OF POLICE

1ST RESPONDENT

NATIONAL COMMISSIONER, SOUTH AFRICAN

POLICE SERVICES

2ND

RESPONDENT

PROVINCIAL COMMISSIONER, EASTERN CAPE

3RD RESPONDENT

SOUTH AFRICAN POLICE SERVICE,

PROVINCIAL COMMISSIONER, WESTERN CAPE

4TH RESPONDENT

SOUTH AFRICAN POLICE SERVICE

PROVINCIAL COMMISSIONER, KWA-ZULU NATAL

5TH RESPONDENT

SOUTH AFRICAN POLICE SERVICE

PROVINCIAL COMMISSIONER, GAUTENG

6TH RESPONDENT

SOUTH AFRICAN POLICE SERVICE

PROVINCIAL COMMISSIONER, NORTH WEST

7TH RESPONDENT

SOUTH AFRICAN POLICE SERVICE

NATIONAL HEAD OF THE DIRECTORATE FOR

PRIORITY CRIME INVESTIGATION

8TH RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

9TH

RESPONDENT

HEAD OF THE INVESTIGATING DIRECTORATE

10TH

RESPONDENT

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

.....

.....

Signature

Date

JUDGMENT

MTSHABE AJ:

INTRODUCTION

- [1] This is an application brought by the Applicant in terms of Rule 30A of the Uniform Rules of this Court, read with Rule 35(12).
- [2] The Applicant seeks an order against the First Respondent to produce documents referred to the answering affidavit deposed by Adv Rodney De Kock dated 5 June 2023. In essence, this is an application to compel.
- [3] The Applicants seeks an order of costs against the First Respondent.
- [4] The Respondent in his heads of arguments states that the Applicant's application does not meet the requirements of Rule 35(12), with that reason the Applicant's Rule 35(12) notice and Rule 30A application is fatally flawed.
- [5] The paragraphs which triggered Rule 35(12) notice in the answering affidavit of Adv De Kock are the following:
- [6] Paragraph 2 of the Notice of Motion reads as follows:

2. That the ninth and tenth respondents are ordered to comply with the applicant's notice in terms of rule 35(12) dated 19 June 2023 by producing, within three days of this order, the following documents referred to in the ninth and tenth respondent's answering affidavit deposed to by Adv Rodney de Kock dated 5 June 2023:

2.1. the "enquiries into the status of the Applicant's complaints" made by Adv de Kock, as referred to in paragraph 66; and

2.2. the "feedback.....received" by Adv de Kock in response to the enquiries he made into the status of the applicant's complaints, as referred to in paragraphs 67 and 69."

[7] Paragraphs 66, 67 and 69 appear on pages 56 and 57 of the indexed papers as an annexure "**MB3**". They read as follows:

[7.1] **PARAGRAPH 66:**

"I have, however made **enquiries** into the states of the Applicant's complaints."

[7.2] **PARAGRAPH 67:**

"From the **feedback** that I have received there are common, problematic factors which fundamental to the NPA's ability to successfully prosecute these matters."

[7.3] **PARAGRAPH 69:**

*“From the **feedback** that I have received thus far, it appears that it has been impossible to prosecute the Applicant’s complaints due to lack of sufficient evidence.”*

[8] The Applicant’s rule 35(12) notice reads as follows:

“TAKE NOTICE THAT the Applicant requires Ninth and Tenth Respondents to produce for inspection, and to allow the Applicant to make copies of the following documents referred to in the Ninth and Tenth Respondents’ Answering Affidavit deposited to by Adv Rodney de Kock dated 5 June 2023:

1. The *“enquiries into the status of the Applicant’s complaints” made by Adv de Kock, as referenced in paragraph 66; and*
2. the *“feedback received” by Advocate de Kock in response to the enquiries he made into the status of the Applicant’s complaints, as referenced in paragraphs 67 and 69”.*

[9] The Respondents did not comply with rule 35(12) notice. This compelled the Applicant to deliver notice in terms of rule 30A to the 9th and 10th Respondents, requesting them produce or make available for inspection the documents referred to in rule 35(12).

[10] After the respondents were served with rule 30A notice, they delivered reply to the Applicant's rule 35(12) notice and the reply reads as follows:

"1. AD PARAGRAPHS 1 AND 2

The information requested is of a confidential nature and may contained sensitive information.

2. In the circumstances, document requested cannot be made available to the Applicant."

APPLICABLE LEGAL PRESCRIPTS

[11] The applicable rules forming the subject matter of this application are *inter alia* premised on rule 35(12) of the Uniform Rules of Court. The Applicant approached the court in terms of 30A(2) of the Uniform Rules of Court to compel the discovery.

[12] Rule 35(12) provides as follows:

(a) Any party to any proceeding at any time before the hearing thereof deliver a notice in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to –

- (i) *produce such document or tape recording for inspection at to permit the party requesting inductions to make a copy or transcription thereof; or*
- (ii) *state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or*
- (iii) *state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known.*

(b) *Any party failing to comply with notice referred to in paragraph (a) shall not, save with leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording”.*

[13] In *Erasmus v Slomowitz*¹, it was held that rule 35(12) authorizes the production of documents which are referred to general terms in parties' pleadings of affidavits and further that the terms of sub-rule do not require a detailed or descriptive reference to such documents.

[14] In *Protea Assurance Co Ltd v Waverley Agencies CC*² the court held that the entitlement to see a document or tape recording arises as soon as reference is made here to in pleading or affidavit and that a party cannot ordinary be told

¹ 1938 TPD 242 at 44

² 1994 (3) SA 247 (C) AT 249 B

to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribed, document or tape recording referred to in his adversary's pleadings or affidavits.

[15] In *Unilever vs Polagricks (Pty) Ltd*³, it was held that the rights under sub-rule maybe exercised before the respondent or defendant has disclosed his defense or even before knowing what his defense, if any, is going to be. Further that he is entitled to have the documents or recordings produced for the specific purpose of considering his position.

[16] In *Protea Assurance Co Ltd v Waverly Agencies*⁴, the court held that rule 35(12) plainly entitles a party to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely.

[17] In *Gorfinkel v Gross, Hendler & Frank*⁵ the Court held that *prima facie* there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection called upon to do so in terms of rule 35(12).

[18] In *Democratic Alliance v Mkhwebane*⁶ the Supreme Court of Appeal held that documents in respect of which there is a direct or indirect reference in affidavit, or its annexures are relevant, and which are no privileged, and are in position of that party, it must be produced. The Court went on to state that the

³ 2001 (2) SA 329 (C) AT 336 G-J

⁴ 1994 (3) SA 247 at 249 B-D

⁵ 1987 (3) SA 766 (C) at 774 G

⁶ 2021 (3) SA 403 (SCA) and *Caxton and CTP Publishers & Printers Ltd v Novus Holdings Ltd* [2022]ZASCA

wording of rule 35(12) is clear in relation to its application. Where there has been reference to a document within the meaning of that expression in an affidavit, and it is relevant, it must be produced.

[19] The first step in adjudication process is to consider whether in this case reference is made to document or tape recording in paragraphs 66, 67 and 69 of answering affidavit opposed by Adv de Kock. In *Penta Communications Services (Pty) Ltd v King & Another*⁷ the court held that an essential is of course a reference by the opponent in his pleading or affidavit to the documents were of production is required but the terms of the rule do not require a detailed or descriptive reference to such documents, nor is any distinction made to documents upon which the action or other pleadings is actually founded in documents which possess nearly evidentially value.

[20] In *Contango Trading SA v Central Energy Fund SOC Ltd*⁸ the Respondents contended that there was no reference to a specific document in the Respondents answering affidavit which the court held was correct. The court further held that for a request to fall within the ambit of sub-rule there must be reference to a specific document where not a general category of documents which is in effect what the Applicants' request for discovery of legal review is.

[21] I agree with Respondents that the Applicants application has not met the requirements of rule 35(12). There is clearly no reference to specific document in paragraphs 66, 67 and 69 of the answering affidavit of Adv de

⁷ 2007 (3) 471 (C)

⁸ 2020 (3) SA 58 (SCA)

Kock. I am of the view that the words "**enquiries and feedbacks**" are neither synonyms nor can they be construed as meaning documents in terms of rule 35(12).

[22] A good objection to an application to compel discovery in terms of rule 35(12) would be that the documents are:

- (a) Privileged; and/or
- (b) Confidential, and/or
- (c) Irrelevant.

[23] The above objections would be relevant if I find that in paragraphs 66, 67 and 69 of the answering affidavit of Adv de Kock reference was made to specific documents. I repeat there is no reference made to any document in the answering affidavit of Adv de Kock.

[24] The general rule which has been laid down repeatedly is that an Applicant in motion proceedings must stand or fall by his founding affidavit and the facts alleged in it. This simple means that the Applicant must make out his entire case in the founding affidavit cannot rely on new facts or arguments in his replying affidavit. I can only consider the facts or arguments that have been raised in the founding affidavit.

[25] Rule 35 (12) notice refers to **enquiries** into the status of the Applicant's complaints and **feedback..... received** by Adv de Kock. There is no reference to a specific document in rule 35(12) notice filed by the applicant.

[26] The Applicant has not made out a case in compliance with rule 35(12) of the Uniform Rules of the Court. Rule 35 (12) applies when a reference by an opponent in pleadings or affidavit is made to a document. In this case there is no reference that has been made to any document in paragraphs 66, 67 and 69 of the affidavit of Adv de Kock.

[27] I accordingly make the following order:

1. the application is dismissed.
2. the applicant is ordered to pay the costs of the application of party and party scale such costs to include the appointment of two Counsel where same have been appointed.

NR MTSABE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant : Adv. A Molver with Adv. M Somandi
: Adams & Adams Attorneys
: C/o Huxtable Attorneys
26 New Street
MAKHANDA
(Ref. Mr. Huxtable)

Counsel for 9th &10th Respondent: Adv. M. Morgan
: The State Attorneys
: C/o Whitesides Attorneys
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