

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2022/21063

Date of Judgment? 13 November 2023
Reportable? No
Of interest to other judges? No

In the matter between:

GOLD LEAF TOBACCO CORPORATION (PTY) LTD Applicant

And

SASFIN BANK LTD Respondent

JUDGMENT

GREEN AJ:

Ian Green AJ

1. This is an application to produce documents in terms of Rule 35(12).
2. To contextualise this application, it is necessary to have regard to the main application.
3. In the main application the Applicant ("**Gold Leaf**") applies in terms of the Promotion of Access to Information Act ("**PAIA**") for an order directing the Respondent ("**Sasfin**") to provide documents which are described in the notice of motion as:

*"The applicant's bank accounts for the USD accounts held under account number 52639 and the ZAR account held under account number 52574" ("**the bank statements**")*

and

*"The full record of the respondents investigations into the possible manipulation and or destruction/corruption of the bank statements held by the respondent concerning the above accounts" ("**the report**")*

4. The main application was prompted by an investigation and action by the South African Revenue Services ("**SARS**") to investigate Gold Leaf's affairs. In the main application Gold Leaf alleges that it requires the bank statements and the report to assist it in meeting the investigation and action by SARS.
5. In its answering affidavit in the main application Sasfin has raised several substantive defences which are available to it under PAIA to resist producing the bank statements and the report.

6. The Rule 35(12) notice, to which I return below, deals only with the bank statements and I therefore confine myself to the bank statements in the rest of this judgment.
7. In its answering affidavit Sasfin explains that it is no longer in possession of the bank statements, and that the information that was contained in the bank statements is only available on an old computer system which Sasfin no longer uses. For this reason, Sasfin must extract the information from the old computer system and reconstruct the bank statements. This is seemingly not a straightforward task.
8. Sasfin says that while extracting the information from the old computer system:

“The Bank Statements, which were generated by the statement table, are unreliable at best. There are serious discrepancies when they are compared to the EB.CONTRACT.BALANCES table and the ACCT.ACTIVITY table ladder. Pending additional reconciliation work, the Respondent is not placing reliance on the accuracy of these Bank Statements.” (own emphasis”)

9. In the rule 35(12) notice Gold Leaf has requested documents which it describes as follows:

- “1. The bank statements referred to at paragraphs 16, 17, 19, 23, 25, 26, 20 seven, 28 and 29 of the answering affidavit.*
- 2. The bank statements produced to the South African Revenue Services pursuant to the SARS request of March 2022, as described in paragraph 23 of the answering affidavit;*

3. *The bank statements tended to Mr van Niekerk at paragraph 29 of the answering affidavit.”*

10. It will be appreciated that Gold Leaf has duplicated its request for documents. The documents requested in paragraphs 2 and 3 of its rule 35(12) notice are also requested in paragraph 1 of its notice.
11. It is convenient at this point to consider the approach that should be adopted to a request in terms of rule 35(12).
12. During the hearing of the matter there was some debate as to whether rule 35(12) needs to be preceded by a request under rule 35(13). Rule 35(13) provides that the rules of discovery apply to motion proceedings only if so ordered by a court. The authorities on rule 35(13) are clear, and discovery is only ordered in motion proceedings in very exceptional circumstances.
13. Neither party was able to identify a case which has expressly dealt with whether rule 35(13) is a necessary precursor to the invocation of rule 35(12).
14. In *Democratic Alliance*¹ the Court distinguished rule 35(12) from the other sub rules in rule 35 and said:

“Rules 35(1), 35(2) and 35(3) read with rule 35(11) apply to discovery in conventional terms, namely after the close of pleadings or the filing of affidavits. Rule 35(12) is different. It is, as the cases demonstrate, more often than not resorted to in order to compel the production of documents or tape recordings before the close of pleadings or the filing of affidavits, although its field of operation is not restricted thereto”²

¹ *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA).

² Para 24.

and

“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. There is thus no need to consider the submission on behalf of the respondents in relation to discovery generally, namely that a court will only order discovery in application proceedings in exceptional circumstances.” (own emphasis)

15. A similar sentiment was expressed in *Caxton*³:

“Unlike the other rules relating to discovery generally, rule 35(12) is designed to cater for a different set of circumstances. Its provisions are generally deployed to require the production of documents or tape recordings before the close of pleadings or the filing of affidavits.”⁴

16. Sasfin referred me to the decision in *Fourie N.O*⁵ a case which involved the enforcement of a rule 35(12) notice. In the judgement, a single judge found that:

“Rule 35(13) clearly states that although the provisions of rule 35 relating to discovery apply to applications mutatis mutandis, such application is subject to the provisor that the court direct it be so. There must accordingly, first be a finding by the court in terms of rule 35(13). An order in terms of rule 35(13) is also not for the mere asking.”⁶

and went on to say:

³ *Caxton and CTP Publishers and Printers Ltd v Novus Holdings 2022* [2022] 2 All SA 299 (SCA)

⁴ Para 26.

⁵ *Fourie N/O. and others v Bosch and others*, unreported, case number 56027/2020, Gauteng Division, Pretoria, 27 August 2021.

⁶ Para 7.

“Accordingly, a party may not invoke the provisions of rule 35(12) unless it has sought and obtained the direction of the court in terms of rule 35(13).”

17. *Fourie N.O* is the only case I was referred to, and which I have found, that requires an application in terms of 35(13) to precede the use of rule 35(12).
18. Given the distinction that has been drawn between rule 35(12) and the other sub rules in rule 35, I find that 35(12) can be invoked without first obtaining the leave of the court under rule 35(13).
19. The decision in *Fourie N.O* is at odds with the Court in *Democratic Alliance and Caxton*, and I find that *Fourie N.O* was wrongly decided in so far as it requires an application in terms of rule 35(13) to precede the use of rule 35(12). I therefore proceed on that basis.
20. The approach to assessing an application for positive relief⁷ following on a refusal by a party to produce a document that has been called for under rule 35(12) is well established. In *Caxton* the Court explained the approach:

“Accordingly, in the event that a court seized with an application to produce documents subject to the rule 35(12) notice concludes that the documents sought to be produced: (a) have been referenced in the adversary’s pleadings or affidavits; (b) are relevant; and (c) are not privileged, the application for their production must, in the ordinary course, necessarily succeed.”⁸

⁷ A party may use rule 35(12) and rule 30A to obtain positive relief in the form of the production of documents and need not be satisfied with the negative sanction contained in rule 35(12).

⁸ Para 38.

21. What must not be overlooked is the purpose of the production of documents that are called for under rule 35(12). In *Democratic Alliance*⁹ the purpose of a request under rule 35(12) was explained:

“In Erasmus v Slomowitz (2) 1938 TPD 242 at 244 the purpose of rule 35(12) was said to be that a party is entitled to the production of documents referred to in an opponent's pleadings or affidavits to enable him to consider his position. See also Gehle v McLoughlin 1986 (4) SA 543 (W) at 546D. In Unilever above [20] at 336H – I the following, with reference to Slomowitz, appears:

‘(A) defendant or respondent does not have to wait until the pleadings have been closed or his opposing affidavits have been delivered before exercising his rights under Rule 35(12): he may do so at any time before the hearing of the matter. It follows that he may do so before disclosing what his defence is, or even before he knows what his defence, if any, is going to be. He is entitled to have the documents produced for the specific purpose of considering his position. . . .’

See also Protea Assurance Co Ltd and Another v Waverley Agencies CC and Others above [21] at 249B – D.

22. The purpose of rule 35(12) is to allow a party to consider its position in the main proceedings. The purpose of rule 35(12) is not to resolve the relief claimed or defended in the main application, nor is its purpose to circumvent the claims or the defences that have been raised in the main application. Further, the purpose of rule 35(12) is not to allow a party to obtain documents which are useful to it in some other dispute.

⁹ Para 25.

23. I turn now to consider whether Sasfin has referred to the documents sought in its answering affidavit and whether those documents are relevant.
24. Sasfin's answering affidavit is an affidavit which deals with Gold Leaf's request for the bank statements. That being so, it is in my view not possible to prepare an answering affidavit without referring to the bank statements. After all that is the subject of Gold Leaf's claim, and that claim cannot be defended without referring to that which is claimed.
25. In its answering affidavit Sasfin recounts the claim made by Gold Leaf in the main application and says:

*The Applicant's request for access to historical bank accounts, defined as a USD account held under number 52639, a ZAR account held under 52574, and any other accounts which may have been held in the name of the Applicant with SASFIN, are denied for the reasons set out below. These will collectively be referred to as ("**the Bank Statements**")*¹⁰

26. It is important to recognise that Sasfin has, for the purpose of its answering affidavit defined the bank statements claimed by Gold Leaf. Therefore, references to "Bank Statements" in the answering affidavit are references to that which is claimed by Gold Leaf.
27. In the rule 35(12) Gold Leaf asks for the production of the "bank statements" in specified paragraphs of the answering affidavit. Gold Leaf has not used the capitalised version of the phrase "Bank Statements". Gold Leaf appears to have overlooked the significance of the capitalisation of the phrase "Bank

¹⁰ Para 16.

Statements” in the answering affidavit, and that it operates to define the very thing that Gold Leaf has claimed in the main application.

28. I now deal with each of the paragraphs in the answering affidavit in which Gold Leaf calls for the production of documents.
29. Paragraph 16 of the answering affidavit is a recounting of what Gold Leaf has asked for in the main application. It is not a reference to a document for the purpose of rule 35(12).
30. Paragraph 17 of the answering affidavit is a description of what SARS asked Sasfin to produce, and one of the classes of documents that SARS asked Sasfin to produce is the Bank Statements. It is not a reference to a document for the purpose of rule 35(12)
31. Paragraphs 19 and 23 of the answering affidavit do not refer to bank statements, whether capitalised or not.
32.
 - 32.1. Paragraphs 25, 26 and 27 must be dealt with together.
 - 32.2. The starting point is that each of these paragraphs uses the capitalised version of the phrase “Bank Statements”. Literally this is a reference to the documents claimed by Gold Leaf in the main application.

- 32.3. Paragraphs 25 and 26 refer to “*the reconstructed Bank Statements*” which is a reference that which Sasfin is in the process of reconstructing.
- 32.4. Safin has explained that the Bank Statements are “*still in the process of being reconstructed and reconciled, in the sense that SASFIN is using alternative mechanisms and ways to extract the information as SASFIN has limited functionality access to the system as already explained.*”
- 32.5. In paragraph 27 Sasfin has explained that the Bank Statements that it has “*generated*” using the data from the old computer system are “*unreliable*” and that it does place any “*reliance on the accuracy of these Bank Statements.*”
- 32.6. Whilst paragraphs 25, 26 and 27 refer to a document that is a reference to a document that is still being reconstructed. The documents referred to are in substance draft documents, they are a work in progress, which are unreliable and Sasfin places no reliance on the accuracy of them.
- 32.7. I cannot see how a draft document that is still being reconstructed and reconciled, which is unreliable and where the opposite party expressly disavows reliance on it, can be relevant to Gold Leaf for the purpose of assessing its position in the main application. I accordingly find that these documents are not relevant for the purpose of rule 35(12).

- 32.8. During the argument of the matter there was a suggestion that the work in progress versions of the Bank Statements may be relevant to Gold Leaf in its engagements with SARS. That may be so, but that is not the question to be answered in a rule 35(12) application when assessing relevance.
33. Paragraph 28 of the answering affidavit refers to “the Bank Statements”. Literally this is a reference to the defined term in paragraph 16 of the answering affidavit. In context it seems that reference to “the Bank Statements” in paragraph 28 may be a reference to the draft bank statements dealt with in paragraphs 25 to 27. On either basis, and for the reasons which I have already set out the “Bank Statements” referred to in paragraph 28 are either a reference to that which is claimed by Gold Leaf in the main application, or are a reference to the draft documents which are being reconstructed and reconciled and which are not relevant to Gold Leaf's assessment of its position in the main application.
- 34.
- 34.1. In paragraph 29 of its answering affidavit Sasfin said: *“The Respondent does, however, tender to make those reconstructed Bank Statements that have been extracted available to Mr van Niekerk, should he request them. Mr van Niekerk, being the curator bonis, appointed in terms of HB3, is regarded by the Respondent as being impartial.”*
- 34.2. The reference to Mr van Niekerk being appointed as the curator bonis arises from a preservation order which SARS obtained against

Gold Leaf. By the time that this application was heard the preservation order and Mr van Niekerk's appointment had been discharged.

- 34.3. Sasfin's tender to provide "*those reconstructed bank statements that have been extracted*" is a reference to the draft bank statements which are still being reconstructed and reconciled, which are unreliable, and on which Sasfin says it places no reliance as to their accuracy. For the reasons I have already explained in my view those draft bank statements are not relevant to Gold Leaf for the purpose of assessing its position in the main application.
35. In addition to what I have found in respect of the reference to documents and the relevance of documents for the purpose of rule 35(12) there is a further reason why the application must fail.
36. In the main application Gold Leaf claims production of the Bank Statements and Sasfin has opposed that application and raised substantive defences available to it under PAIA. The main application is not before me, and I am not called on to decide the correctness of the substantive defences raised by Sasfin.
37. The rule 35(12) application which Gold Leaf has brought, would if it were granted have the effect that Gold Leaf would be able to obtain production of the same documents that it claims in the main application without having to meet Sasfin's substantive defences.

38. During the argument, Mr Mastebroek who appeared for Gold Leaf, said that if Gold Leaf obtains the bank statements under this 35(12) application, then all that remains in the main application is the issue of production of the report.¹¹ This demonstrates the difficulty with this application. A party should not be able to secure the substantive relief that it claims in the main application through the “back door” of a rule 35(12) application. If that were permitted it would deprive the opposing party of its right to a hearing, and a proper adjudication of its defences in the main application.
39. Rule 35(12) involves the exercise of a discretion,¹² albeit that the discretion is narrowly circumscribed. In my view, and in the exercise of my discretion I refuse the rule 35(12) application because to allow the application would create a situation where Sasfin is denied its entitlement to have its substantive defences to the production of the bank statements adjudicated. This applies equally to the draft bank statements that currently exist and the final reconciled version of the bank statements. Gold Leaf’s entitlement to the bank statements is a matter that the court in the main application must decide once it has assessed Sasfin’s substantive defences.
40. There is no reason that the costs should not follow the result.
41. For the reasons set out above I make the following order:

“The application in terms of Rule 35(12) is dismissed with costs.”

¹¹ Whilst this was the argument it seems to overlook that Sasfin is still to produce the bank statements in a reconciled, reliable and accurate form.

¹² Caxton para 38.

Ian Green
Acting Judge of the High Court
13 November 2023

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