IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022 - 055971

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the application by

JOHANNESBURG ROAD AGENCY (PTY) LTD	First Applicant
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Second Applicant
And	
PK RAMASHU JV	First Respondent
28 OTHER RESPONDENTS	Second to Twenty-Eighth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Rule 35(12) of Uniform Rules – discovery of documents referred to in affidavits or pleadings – court will not go behind the response to the notice except under exceptional circumstances – documents sought must identifiable – application dismissed

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*

2. *The first respondent is ordered to pay the costs of the applicants in respect of the notice of motion and the founding affidavit in the interlocutory application to compel;*

3. *The applicants are ordered to pay the costs of the first respondent in respect of all costs incurred by the first respondent in respect of the affidavit opposing the application to compel and subsequently up to and including appearance and argument, such costs to include the cost of two counsel where so employed.*

[2] The reasons for the order follow below.

Introduction

[3] The applicants served a notice in terms of uniform rule 35(12) requiring the first respondent to produce and discover documents with reference to various paragraphs of the answering affidavit[1] in a pending application between the parties. In the pending

[1] I refer to the answering affidavit in the main application as such, and to the first respondent's answering affidavit to the interlocutory application to compel discovery in terms of rule 35 (12) as the opposing affidavit so as to distinguish between the two affidavits.

application the applicants seek an order setting aside its own decision to award a tender to the first respondent and declaring the tender to be unlawful, invalid and unconstitutional.

The pending main application is opposed by the first respondent, a joint venture and the successful bidder for the tender now sought to be set aside on review. The remaining twenty-seven respondents are not described in the founding affidavit in the main application and they seem to be the unsuccessful bidders who were not awarded the tender. They play no role in this application and have not filed papers in the main application.

[4] The first applicant is a private company and a wholly owned subsidiary of the second applicant. The second applicant is a municipality and thus an organ of state.

[5] Rule 35(12) applies to applications and provides for the discovery of documents or recordings referred to in an opponent's pleadings or affidavits. The opponent may produce the document, object to its production on the basis that it is privileged or irrelevant, or state under oath that the document is not in its possession. A document might possibly not be in the possession of a party because it never was, or because it simply does not exist, or because it is no longer in possession of the party.

[6] While rule 35(12) apply to applications, the remaining provisions of the rule do not apply to applications unless the court so directs in terms of rule 35(13). The usual practice would be for a party seeking discovery in application proceedings to deliver its notice requiring discovery in terms of the rule (primarily rule 35(1) and (14) and then when the other party refuses discovery to approach the court for an order in terms of rule 35(13) as well as an order for discovery in terms of rule 35(1), (14), or any other subrule that might be applicable in the circumstances of the case.

[7] Rule 35(1) provides for discovery in general, in other words of all documents and tape recordings relating to any matter in question in the proceedings, while rule 35(14) provides for the discovery of a clearly specified document or tape recording.

A document includes any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act 25 of

2002, A tape recording includes a soundtrack, film, magnetic tape, record or other material on which visual images, sound or other information can be recorded or any other form of recording.[2]

[8] In *Democratic Alliance v Mkhwebane* [3] Navsa JA said with reference to rule 35(12):

> *"[41] … It appears to me to be clear that documents in respect of which there is a direct or indirect reference in an affidavit or its annexures, that are relevant, and which are not privileged, and are in the possession of that party, must be produced. Relevance is assessed in relation to rule 35(12), not on the basis of issues that have crystallised, as they would have had pleadings closed or all the affidavits filed, but rather on the basis of aspects or issues that might arise in relation to what has thus far been stated in the pleadings or affidavits and possible grounds of opposition or defences that might be raised, and on the basis that they will better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences…. The question to be addressed is whether the documents sought might have evidentiary value and might assist the appellants in their defence to the relief claimed in the main case. Supposition or speculation about the existence of documents or tape recordings to compel production will not suffice. In exercising its discretion, the court will approach the matter on the basis set out in the preceding paragraph. The 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…."*

[9] Three questions therefore arise in the context of Rule 35(12):

9.1 Are the documents referred to either directly or indirectly in an affidavit or pleading, either in the body of the document or in an annexure,

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2 Rule 35(15).

3 *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA) para 41. See also *Caxton and CTP Publishers and Printers Ltd v Novus Holdings Ltd* [2022] 2 All SA 299 (SCA), 2022 JDR 0431 (SCA).

9.2 are the documents relevant, and

9.3 are the documents privileged?

[10] A document might be referred to indirectly for instance when reference is made to an agreement without any details being provided. The opposing party should then be permitted to seek a copy of a written agreement if any existed, but a response that the agreement was an oral agreement would usually suffice.

A court will usually refrain from going behind a discovery affidavit and the affidavit is regarded as conclusive except when it appears from the affidavit itself or from documents referred to in the discovery affidavit, from the pleadings, from any admission made by the party, or from the nature of the case or the documents in issue that grounds exist for supposing that the party has other relevant documents or tape recordings, or a party has misconceived the principles upon which the discovery affidavit should be made.[4]

[11] Documents referred to in affidavits and pleadings would often be relevant. A party is required in litigation to rely on relevant evidence and irrelevant evidence is inadmissible. Relevance is a matter of common sense.[5]

[12] The principles relating to the discovery of documents are intended to assist the parties as well as the court to discover the truth and to promote a just determination of the dispute between the parties. Rule 35(12) authorises the production of documents even though they are referred to in general terms and not with great specificity. Reference by mere inference does however not entitle a party to discovery of a document that might possibly exist. The rule does not provide for speculation and supposition. A fishing expedition is unacceptable.

[13] The first respondent denies that the paragraphs in the answering affidavit referred to by the applicants referred to written documents, and argues that what the applicants are seeking to do is to obtain access to different documents not referred to in the affidavit, to require the documents to be provided in a particular format and to use the

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4 *Federal Wine & Brandy Company Ltd v Kantor* 1958 (4) SA 735 (E) 749H and the various cases referred to by Van Loggerenberg *Erasmus: Superior Court Practice* RS 21, 2023, D1-472, footnote 146.

5 *R v Matthews* 1960 (1) SA 752 (A) 758.

application under rule 35(12) as a foundation for interrogatories.

[14] When the first respondent failed to provide the documents sought in the rule 35(12) notice the applicants launched an application in terms of rule 30A requiring the first respondent to comply with the notice and stating that should the first respondent fail to comply in 10 days the applicants would make application to the court for an order that the notice be complied with alternatively that the first respondent's defence be struck. There then follows a list of requests for particulars and documents with reference to various paragraphs of the answering affidavit.

[15] In response to the rule 35(12) notice the first respondent discovered a rental agreement, an invoice, and appointment letters. This was done in April 2023. The applicants were not satisfied and launched an application for the discovery of various documents listed in a notice of motion. The first respondent filed an opposing affidavit. The deponent to the opposing affidavit stated that the first respondent had delivered its answering affidavit in the main application on 5 April 2023 and that the replying affidavit by the applicants in the main application was now late. The mere delivery of a notice in terms of rule 35(12) does not suspend the *dies* for the delivery of a replying affidavit.

[16] The deponent to the opposing affidavit submits that a party may not rely on rule 35(12) to request documents not referred to in a pleading or affidavit and may not utilise the sub-rule to obtain further and better discovery. He submitted that the applicants request went beyond the parameters of the sub-rule and constituted interrogatories directed at the first respondent.

[17] The deponent dealt in detail with the request for documents in the opposing affidavit.

17.1 Paragraphs 26 and 27 of the answering affidavit do not refer to written documents and the deponent confirmed that no written contracts had been entered into. The contracts for the supply of bitumen had been concluded orally and proof of payments made were annexed to the answering affidavit and copies of invoices issued by suppliers were annexed to the opposing affidavit.

17.2 Rule 35(12) cannot be employed to obtain the names of contracting parties as sought by the applicants. This amounts to a request for further and better particulars rather than discovery of documents.

17.3 In respect of paragraph 32 of the answering affidavit the deponent confirmed that the documents referred to were annexed to the answering affidavit as annexures. These documents relate to the cost of bitumen. Rule 35(12) cannot be utilised to obtain access to other documents.

17.4 The applicants' objection seems to be that the documents provided did not reflect date stamps rather than that the documents were not provided that all.

17.5 With reference to paragraph 33.1 of the answering affidavit the applicants seek the discovery of proof of payment and proof of cost in the regards to labour, copies of employment agreements, and the production of monthly payslips. None of these documents are referred to in paragraph 33 of the answering affidavit. The first respondent without admitting any obligation to do so nevertheless made copies of payslips available and attached same to its opposing affidavit.

17.6 With reference to paragraph 33.2 of the answering affidavit the applicant also seeks copies of proof of costs of securing storage facilities and lease agreements. No such documents are referred to in the answering affidavit. The first respondent explains that there are no written lease agreements and that the bitumen was stored at premises leased to the joint venture in terms of an oral agreement.

17.7 The first respondent explains that there is no written lease agreement and there is no reference to a lease agreement in the answering affidavit.

17.8 The applicants then seek documents evidencing proof of costs of vehicles and copies of lease agreements. No such documents are referred to in paragraph 33.3 of the answering affidavit or anywhere else. The first respondent confirms that there are no such written documents.

17.9 In the respect of the reference to insurance the applicant in paragraph 33.4 of the answering affidavit the applicant seeks proof of insurance costs and a copy of the insurance agreement. No such documents are referred to in the answering affidavit.

17.10 The applicant also seeks access to miscellaneous documents with reference to paragraph 33.5 of the answering affidavit. No documents are referred to and documentation relating to a laptop computer had in any event been provided in the initial response to the rule 35(12) notice.

17.11 In respect of evidence to establish the losses suffered by the first respondent reflected in the schedule “PKR4” mentioned in paragraph 34 of the answering affidavit to the answering affidavit the documents have been provided.

[18] The first respondent failed to provide a formal response to the applicants’ rule 35(12) notice for reasons explained in the opposing affidavit The first respondent quite correctly tendered the costs consequent upon the formal launching of the present application to compel but advised that should the applicants persist with the application they would seek a dismissal of the application with a punitive cost order.

[19] No case is made out for discovery under rule 35(12) of the founding affidavit and the request consists of interrogatories.

There is some merit in the first respondent’s arguments in support of a punitive cost order but having considered the whole application and the history as set out in the affidavits I am satisfied that the ordinary order of costs including the cost of two counsel would suffice.

[20] For all the reasons as set out above I make the order in paragraph 1.

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J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **1 MARCH 2024**

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INSTRUCTED BY:	MALEBYE MOTAUNG MTEMBU INC
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INSTRUCTED BY:	MENZI VILAKAZI ATTORNEYS
DATE OF ARGUMENT:	21 FEBRUARY 2024
DATE OF JUDGMENT:	1 MARCH 2024