



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: 84/2022

In the matter between

**MINISTER OF PUBLIC WORKS AND
INFRASTRUCTURE AND TWO OTHERS**

Applicants

VS

**NMPS CONSTRUCTION CC AND THIRTY
THREE OTHERS**

Respondents

JUDGMENT: APPLICATION TO SET ASIDE

LOWE J:

INTRODUCTION

1. It is unnecessary to deal in any detail with the origin of the principal dispute between the parties in this matter which is being litigated by way of an application to which this is interlocutory.

2. Put shortly the founding papers in the main application seek orders directing the respondents (applicants herein) to implement phase three of the Eastern Cape School Building Expanded Public Works Programme (allegedly initiated in favour of the applicants) to commence within thirty days of the order with monthly progress reports submitted to the court. I will for convenience then refer to the parties as they are in the interlocutory application.

3. During June 2022 second and third respondents (applicants herein) delivered and filed answering papers.

4. On 30 June 2022 the applicants in the main application (respondents herein) delivered a notice to produce documents referred to in the answering affidavit, this being a composite notice in terms of Rule 35(12) and 35(14) of the Uniform Rules, identifying specific documents referred to in the answering affidavit to be produced within five days for their inspection.

5. In due course, applicants brought this interlocutory application to set aside the composite Rule 35(12) and 35(14) notice dated 27 June 2022 directing the respondents to pay the costs thereof.

6. The crux of the argument relevant to such setting aside turns upon the proper meaning to be given to Rule 35(12), Rule 35(13), and Rule 35(14), properly interpreted in the usual manner.

7. In short, applicants contend that:

7.1 the notice, and the Sub-Rules of Rule 35 referred to do not permit of the application of any part of Rule 35, save with the prior direction of the Court as set out in Rule 35(13);

7.2 in summary the entire Rule 35 (including Rule 35(27)) applies to applications only insofar as the Court may direct;

7.3 That, as is common cause, the court has not so directed.

8. Respondents contend the contrary insofar as Rule 35(12) is concerned arguing that this is a self-standing Rule and does not require, as a trigger event, the court's directive in terms of Rule 35(13). It must be said, however, that respondents conceded that Rule 35(14) applies only to action proceedings having regard to the wording of the Rule contending however, that if Rule 35(12) was appropriately used, the additional reference to Rule 35(14) is by the way.

RULE 35

9. Rule 35 as to Discovery, Inspection and Production of Documents provides as follows:

“35(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

(2) The party required to make discovery shall within 20 days or within the time stated in any order of a judge make discovery of such documents on affidavit in accordance with Form 11 of the First Schedule, specifying separately—

(a) such documents and tape recordings in the possession of a party or such party's agent other than the documents and tape recordings mentioned in paragraph (b);

(b) such documents and tape recordings in respect of which such party has a valid objection to produce;

(c) such documents and tape recordings which a party or such party's agent had, but no longer has possession of at the date of the affidavit.

A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

(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 such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.

(4) A document or tape recording not disclosed as aforesaid may not, save with the leave of the court granted on such terms as it may deem appropriate, be used for any purpose at the trial by the party who was obliged but failed to disclose it, provided that any other party may use such document or tape recording.

(5) (a) Where the Fund, as defined in the Road Accident Fund Act, 1996 (Act No. 56 of 1996), as amended, is a party to any action by virtue of the provisions of the said Act, any party to the action may obtain discovery in the manner provided in paragraph (d) of this subrule against the driver or owner or short term insurer of the vehicle or employer of the driver of the vehicle, referred to in the said Act.

(b) The provisions of paragraph (a) shall apply *mutatis mutandis* to the driver or owner or short term insurer of the vehicle or employer of the driver of a vehicle referred to in section 21 of the said Act.

(c) Where the plaintiff sues as a cessionary, the defendant shall *mutatis mutandis* have the same rights under this rule against the cedent.

(d) The party requiring discovery in terms of paragraph (a), (b) or (c) shall do so by notice in accordance with Form 12 of the First Schedule.

(6) Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for

inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver within five days, to the party requesting discovery, a notice in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of such party's attorney or, if such party is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise.

(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.

(8) Any party to an action may after the close of pleadings give notice to any other party to specify in writing particulars of dates and parties of or to any document or tape recording intended to be used at the trial of the action on behalf of the party to whom notice is given. The party receiving such notice shall not less than 15 days before the date of trial deliver a notice—

(a) specifying the dates of and parties to and the general nature of any such document or tape recording which is in such party's possession; or

(b) specifying such particulars as the party may have to identify any such document or tape recording not in such party's possession, at the same time furnishing the name and address of the person in whose possession such document or tape recording is.

(9) Any party proposing to prove documents or tape recordings at a trial may give notice to any other party requiring him within ten days after the receipt of such notice to admit that those documents or tape recordings were properly executed and are what they purported to be. If the party receiving the said notice does not within the said period so admit, then as against such party the party giving the notice shall be entitled to produce the documents or tape recordings specified at the trial without proof other than proof (if it is disputed) that the documents or tape recordings are the documents or tape recordings referred to in the notice and that the notice was duly given. If the party receiving the notice states that the documents or tape recordings are not admitted as aforesaid, they shall be proved by the party giving the notice before being entitled to use them at the trial, but the party not admitting them may be ordered to pay the costs of their proof.

(10) Any party may give to any other party who has made discovery of a document or tape recording notice to produce at the hearing the original of such document or tape recording, not being a privileged document or tape recording, in such party's possession. Such notice shall be given not less than five days before the hearing but may, if the court so allows, be given during the course of the hearing. If any such notice is so given, the party giving the same may require the party to whom notice is given to produce the said document or tape recording in court and shall be entitled, without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given.

(11) The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in such party's power or control relating to any matter in question in such proceeding as the court may deem appropriate, and the court may deal

with such documents or tape recordings, when produced, as it deems appropriate.

(12) (a) Any party to any proceeding may 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 and to permit the party requesting production 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 the notice referred to in paragraph (a) shall not, save with the 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) The provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications.

(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to —

(a) make available for inspection within five days a clearly specified document or tape recording in such party's possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof; or

(b) 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

(c) 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.

(15) For purposes of rules 35 and 38 —

(a) a document includes any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002); and

(b) a tape recording includes a sound track, film, magnetic tape, record or other material on which visual images, sound or other information can be recorded or any other form of recording.

10. It is also relevant to set out the relevant definitions in Rule 1 as follows:

“10.1 Proceedings” is not defined.

10.2 The word “action” is defined to mean “...a proceeding commenced by summons”.

10.3 The word “application” is defined to mean “... a proceeding commenced by notice of motion or other forms of applications provided for by Rule 6.”

11. Turning firstly to Rule 35 itself, it should be noted that the original Rule 30(5) was later repealed and substituted with the current Rule 30A dealing with the procedure to be adopted where a party fails to comply with the Rules or with a request made or notice given pursuant thereto.

12. It has been emphasized in **Caxton and CTP Publishers and Printers Ltd and Novus Holdings Ltd**¹ that the underlying purpose for production of documents for inspection and copying or transcribing, as part of the broader discovery mechanism, is to assist the parties and the court in discovering the truth and to promote a just and expeditious determination of the case.²

13. As was pointed out in **Gorfinkel v Gross, Hendler and Frank**³ there are undoubtedly differences between the wording of Rule 35(12) and the other sub-rules relating to discovery, for example sub-rule (1), (3) and (11) of Rule 35. It is, so it was pointed out, clear that Rule 35 in the sub-rules referred to, specifically refer to “*relevance*” but sub-rule (12) contains no such limitation and is *prima facie* cast in terms wider than sub-rule 35(1), (3) and (11).

14. In **Caxton** (*supra*), **Gorfinkel** (*supra*) was referred to with approval⁴. The Court said that in order for the production of a document to be compellable under Rule 35(12) it was necessary that reference to such document must be made in the adversaries, pleadings or affidavits.

15. In **Magnum Aviation Operations v Chairman National Transport Commission and Another**⁵ the court, in ordering the applicant to produce documents, to which reference had been made in the founding affidavits, pointed out that the ordinary grammatical meaning of the words in Rule 35(12) was clear and that is that once reference is made to a document they must be produced.

16. Herein lies an important issue arising from the provisions of Rule 35 generally. Section 35(1) refers to an action, the further subsections up to (7) flowing therefrom. Rule 35(8) similarly applies to an action and 35(9) to a “*trial*”. Rule 35(11) refers to “*any proceeding*” not specifying an action or application. Similarly Rule 35(14) clearly

¹ [2022] 2 All SA 299 (SCA) (9 March 2022) I was not referred to this case during argument.

² **Santam Ltd and Others v Segal** 2010 (2) SA 160 (N) at 162E – F; **MV Alina II, Transnet Ltd v MV Alina II** 2013 (6) SA 556 (WWC) at 563 F – G.

³ 1987 (3) SA 766 (C) at 773G – J.

⁴ [27].

⁵ 1984 (2) SA 398 (W).

applies to an action, that word being used and refers to “*for the purposes of pleading*”. Rule 35(13) refers to the provisions of the Rule “*relating to discovery*”. This seemingly pointing to Rule 35(1).

17. Rule 35(12)(a) in referring to “*any proceedings*” makes it clear in the remaining words to the introduction of the subsection that this relates to “*pleadings or affidavits*” in which reference is made to any document or tape recording obliging the person receiving the notice to produce same or proceed in terms of one or other of the remaining options in this regard.

18. While Rule 35(12)(b) preventing the use of a document not supplied accordingly (failing to comply with the notice) can also be dealt with by an application to enforce compliance with the Rule in terms of Rule 30A.

19. It follows from the above, and analysis of the Rule, that the earlier parts of Rule 35 apply to discovery proceedings, the notice to be given only after “*the close of pleadings*”, save with the leave of a Judge. It is trite, and was common cause between the parties, that the discovery process consequent upon Rule 35(1) is only applicable in terms of Rule 35(13) “*insofar as the court may direct, to applications.*”

20. The contention by applicants was simply that this covers and similarly applies to Rule 35(12).

21. That Rule 35(12) stands out as quite different from the remaining parts of Rule 35 lies in the words thereof. This is applicable to any time before the “*hearing thereof*” relating to “*any proceeding*” and comes into operation at any time that a pleading or affidavit is filed referring to a document or tape recording.

22. This clearly is such as to come before the possibility of any discovery proceedings referred to in Rule 35(1), being brought into operation in the normal course.

23. Indeed, in **Gorfinkel** (*supra*)⁶ the following was stated:

“As Rule 35(12) can be applied at any time, ie before the close of pleadings or before affidavits in a motion have been finalized, it is not difficult to conceive of instances where the test for determining relevance for the purposes of Rule 35(1) cannot be applied to documents which a party is called upon to produce under Rule 35(12), as for example where the issues have not yet become crystallized. Having regard to the wide terms in which Rule 35(12) is framed, the manifest difference in wording between this subrule and the other subrules, ie subrules (1), (3) and (11) and the fact that a notice under Rule 35(12) may be served at any time, ie not necessarily only after the close of pleadings or the filing of affidavits by both sides, the Rule should to my mind be interpreted as follows: prima facie there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12).”

24. The proper approach to interpretation of the Rules is no different from that in any other interpretative exercise.

25. It must be emphasised, and always remembered, that in the current day, interpretation of a document, including a statute, requires careful regard to context (and the Rules). When a court determines the nature of the party’s rights and obligations in a contract it is involved in an exercise of contractual interpretation. There is now a settled approach to the interpretation of contracts, documents and indeed statutes.⁷ In that matter the following was said:

“[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of

⁶ At 774E – H.

⁷ **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA).

documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’,¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

26. As was emphasised this approach to interpretation requires that from the outset one considers the context and language together, with neither predominating over the other.

27. In **Chisuse v Director - General Director of Home Affairs**⁸ (at paragraph 52) the Constitutional Court speaking in the context of statutory interpretation held that this “*now settled*” approach to interpretation, is a “*unitary*” exercise. This means said the

⁸ 2020 (6) SA 14 (CC).

court in **University of Johannesburg v Auckland Park Theological Seminary and another**⁹, that interpretation is to be approached holistically: simultaneously considering the text, context and purpose. To make it clear, it has been explicitly pointed out in cases subsequent to **Endumeni** that context and purpose must be taken into account as a matter of course whether or not the words used in the contract (or statute) are ambiguous.¹⁰

28. In **Cool Ideas 1186 CC v Hubbard**¹¹ the court in dealing with the interpretation of statutes said the following:

“[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”

29. **Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re: Masetlha v President of the Republic of South Africa and Another**¹² the Constitutional Court underscored the importance of disclosure in court proceedings pointing out that 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

⁹ 2021 ZACC 13 at [65].

¹⁰ **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA).

¹¹ 2014 (4) SA 474 (CC).

¹² 2008 (5) SA 31 (CC) at para [25].

threatened right or advance cause of action. This is so, it was said, because Courts take seriously the valid interests of a litigant to be placed in a position to present his, her or its case fully during course of litigation but also weighing the interests of justice. This indicates the kind of background to which such an interpretive exercise in this matter should be approached.

30. In **Caxton** (*supra*)¹³ the court pointed out that the juridical framework within which the court considering an application to compel production documents or tape recordings sought pursuant to Rule 35(12) was captured in **Democratic Alliance v Mkwabane and Another**¹⁴, the court pointing out that it appeared to be clear the 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 possession of that party, must be produced.

31. As was pointed out in **Caxton** (*supra*)¹⁵ there are two features that strike one about the provisions of Rule 35(12). Firstly, to invoke these the pleadings or affidavits must make reference to the document or recording, it being that reference which triggers the right of the adversary to require that document or tape recording to be produced for inspection, copying or transcription, that entitlement being triggered immediately. Of course, that document or tape recording must have been referred to in the pleadings or affidavits and the rational for a party's entitlement to see same (referenced in the other party's pleadings or affidavits) is that the party cannot ordinarily be required to answer before they are given the opportunity to inspect and copy or transcribe such document.¹⁶

32. Further, as was pointed out in **Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another**¹⁷ the sanction provided for in Rule 35(12) is quite different in nature and effect from the kind of sanction envisaged

¹³ [32].

¹⁴ 2021 (3) SA 403 (SCA) at [41].

¹⁵ [15], [16] and [17].

¹⁶ Protea Assurance Company Ltd and Another v Waverley Agency CC and Others 1994 (3) SA 247 (C) at 249B.

¹⁷ 1979 (2) SA 457 (W) at 459F – 460A.

in Rule 30(5) now 30A. It is a negative sanction, Rule 30A operating differently, being that if the document is not produced the claim or defence may be struck out.¹⁸

33. In short, unlike the other parts of Rule 35, 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.¹⁹

34. This was further emphasised in **Unilever plc and Another v Polagric (Pty) Ltd**²⁰ in which the objective of Rule 35(12) was explained as follows:

“[A] defendant or respondent does not have to wait until the pleadings have been closed or opposing affidavits have been delivered before exercising his right 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 discovery 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”.”

35. It bears repetition that as pointed out in **Caxton**²¹ the ambit of Rule 35(12) is very wide and admits of no serious doubt that this has extensive reach as pointed out in **Gorfinkel** (*supra*)²².

36. In my view the provisions of Rule 35(13) are clear and unambiguous relevant to the provisions of discovery in Rule 35 being subject to the Court’s direction in application proceedings first being had. That is an essential prerequisite for a notice in terms of Rule 35(1) in applications and in an application to compel compliance with the notice in terms thereof.

¹⁸ Of course as pointed out Rule 30(5) has been replaced by Rule 30(A).

¹⁹ **Caxton** (*supra*) (26).

²⁰ 2001 (2) SA 329 (C) at 336 G – J.

²¹ Para [27].

²² ...773 G – J.

37. An analysis of Rule 35 and its interpretation in the manner already fully referred to above, admits of no doubt whatsoever, in my view, that Rule 35(12) is a self-standing subrule in Rule 35, unconnected with and not requiring the trigger mechanism of a court order, making discovery relevant to applications first being had.

38. It has an entirely different purpose and in referring to “*proceedings*” and “*pleadings and affidavits*” is entirely clear and self-standing.

39. The consequence is, that any party in an application proceeding may invoke the provisions of Rule 35(12) at any stage of the proceedings, and particularly immediately after the filing of affidavit in which reference is made to a document or tape recording, with the entitlement to seek production of same and to compel its production in terms of Rule 30(A) if necessary, within the terms of the Rules. The purpose being to enable it to assess its position and consider its defence and how that should be set out in answer or reply.

40. Counsel for respondent referred to a number of authorities which he contended are to the contrary, I do not agree at all. In essence the authorities deal mainly with Rule 35(13) in the context of Rule 35(1). Counsel for both sides could refer me to only one matter dealing directly with Rule 35(12) being **Fourie and two others v Bosch and two others**²³.

41. In this matter the court dealt with a Rule 30A application to compel production of documents referred to in a Rule 35(12) notice on the absence of an order in terms of Rule 35(13). The court found shortly that this was not competent referring to **Loretz v McKenzie**²⁴. In my view this case was not authority for the proposition considered and decided.

42. Further my view is that the matter appears not to consider all that interpretational relevant arguments and in context I cannot agree therewith.

²³ 56027/2020: 17 August 2021, Gauteng High Court per Mabuse J.

²⁴ 1999(2) SA 72 TPA at 74F – G.

43. I also agree that in context the Rule 35(14) issue, though clearly not applicable to the notice, not such as to disturb substantial success.

44. In the result, the application to set aside must fail with costs.

ORDER

45. The following order is made:

1. The application to set aside is dismissed.
2. Applicants in the application to set aside are jointly and severally, the one paying the other to be absolved to pay first to thirty fourth respondents' costs of the interlocutory application.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicants:	Adv. Poswa,
Instructed by	State Attorney, East London

Appearing on behalf of the Respondents:	Adv. Mapoma S.C.,
Instructed by	Tyopo Attorneys.

Date heard:	18 May 2023.
Date delivered:	30 May 2023.