

REPUBLIC OF SOUTH AFRICA



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

Case Numbers: **2024-076060**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
...19/09/2024...	...ML SENYATSI...
DATE	SIGNATURE

In the matter between:

GRIDLINE CONSTRUCTION (PTY) LTD
(REGISTRATION NUMBER: 1998/020669/07)

Applicant

and

THE CITY OF JOHANNESBURG

First Respondent

BRINK N.O., FLOYD

Second Respondent

JUDGMENT

SENYATSI, J*Introduction*

- [1] This is an opposed interlocutory application for an order that, *inter alia*, the provisions of Rule 35(13) read with Rule 35(11) of the Uniform Rules of this Court (“the rules”) relating to discovery, apply to the main application brought under the main case. The applicant also seeks that the respondents be ordered to produce, under oath, the documents referred to in annexure “A” to the notice of motion, or to confirm that such documents do not exist and the reasons therefor, within five days of the order of this Court. The applicant further prays that should the respondents fail to comply with the order of this Court, that the applicant be granted leave to approach this Court on the same papers, duly amended, for an order striking out certain paragraphs of the respondents’ answering affidavit.
- [2] The first respondent opposes the interlocutory application. The second and third respondents did not file opposing papers. The first respondent contends that despite its answering affidavit having been filed in the main application, the applicant through its attorneys, addressed several correspondence requesting certain information, which so contends the first respondent amounts to a fishing expedition, instead of providing a replying affidavit to the first respondent’s answering affidavit already in its possession. The first respondent contends furthermore that the

interlocutory application amounts to abuse of processes which should be visited upon by a punitive costs order.

Background

[3] The main application relates to disputed municipal charges, water and electricity consumption. The applicant contends in the main application that the charges are incorrect. The basis for this contention is that:

- (a) there has been no consumption at the property since August 2010;
- (b) on four occasions between 2013 and January 2016 the respondent's representatives have recorded meter readings of 48,066.00 kWh and 3,633 kWh of its property; and
- (c) during August 2021 the building on the property was demolished and the meters at the property were removed due to vandalism and still bear the readings referred to above.

[4] The respondent's defence in the main application is as follows:-

- (a) the respondent's claim has prescribed,
- (b) the applicant is not the consumer as per its records, and
- (c) the application is rendered moot by the November 2023 tax statement.

The applicant disputes the consumption recorded in respect of the meters referred to above.

[5] As part of its support for the relief sought in respect of the interlocutory application, the applicant seeks that the documents listed in Annexure "A" of its application be discovered in terms of the rules of this court.

- [6] The applicant seeks the discovery of documents used by the respondent's employees when they recorded consumption at the property. These documents are, so contends the applicant, the best evidence of the consumption at the property at various stages. The documents sought include job cards used in recording and quantifying the consumption. A copy of the job card for 29 July 2014 was attached as FA-6 to the founding affidavit. The applicant contends that the records ought to exist and should be discovered. It contends that if the documents required are made available, clearance certificates will be issued in respect of the property. This is so, given the genesis of the disputes that go back many years relating to the incorrect billing by the first respondent in respect of the applicant's property.
- [7] To give context to this judgment, the applicant seeks, in the main application the following declaratory reliefs: -
- (a) to recalculate and amend the applicant's account;
 - (b) to provide the applicant with a reconciled statement or invoice in relation to the account, within 14 days of the service of the court order;
 - (c) to issue clearance figures; and
 - (d) various interdicts restraining the first respondent from terminating the electricity supply pending the finalisation of the matter and directing the City Manager to issue certain instruction to his staff to ensure compliance with the court order.
- [8] The reason for the main application, so contends the applicant, is to ensure that once the recalculation of the services consumed is done from 2010 to date, then payment can be made by the applicant so a clearance certificate can be issued to give effect to the transfer of the property.

- [9] The issue for determination is whether the applicant is entitled to the production of the job card documents set out in Annexure “A” of the answering affidavit from the first respondent, required in terms of Rule 35 of the uniform rules of court.

Legal Framework

- [10] Rule 35 (11) of the Uniform Rules of Court states as follows: -

“ 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.”

- [11] Furthermore, Rule 35(13) of the Uniform rules states that: -

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

There is no doubt that the discovery process can be used at any time during the exchange of pleadings and that the process applies to both action and motion proceedings.

- [12] The first respondent resists discovery of the documents listed in Annexure “A” of the founding affidavit by the applicant on the basis that the first respondent never mentioned those documents in its replying affidavit as required by Rule 35(12). It contends, by inference that Rule 35(11), is only applicable to the extent that the first respondent lists the documents in terms of the discovery process and that absent such listing, there is no basis that the respondent can simply call for the list of documents it chooses to use in its case without leave of the court in terms of Rule 35(13).

[13] In dealing with whether or not discovery in terms of Rule 35(13) can be considered without the leave of court, Mabuse J in *Fourie N.O and Others v Bosch and Others*¹ held as follows:

“[7] 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 proviso that the Court direct it be so. There must accordingly, first be a finding by a Court in terms of Rule 35(13). An order in terms of Rule 35(13) is also not for the mere asking. Discovery in application proceedings is rare and unusual and only ordered when exceptional circumstances are demonstrated to exist.”

The court has a discretion to exercise.

[14] The Court’s direction in terms of Rule 35(13) is a pre-requisite for a notice in terms of sub-rule (1) as well as a pre-requisite for an application to compel compliance. Accordingly, it follows that a Court cannot compel compliance unless and until the Court makes an order in terms of Rule 35(13) and further unless and until a further notice in terms of Rule 35(1) has been delivered.²

[15] The court can however, in the exercise of its discretion, compel the party in terms of Rule 35(12) who has made reference in his/her answering affidavit to discover the documents referred to therein where the relevance thereof is a critical consideration. This was the case in *Gorfinkel v Gross*,

¹ 56027/2020) [2021] ZAGPPHC 553 (27 August 2021)

² *Fourie N.O. and Others v Bosch* footnote 1 above para [8]

*Hendler & Frank*³ where the court held the legal position to be as follows:

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“With regard to relevance there must also, in my view, be some limitation read into Rule 35(12). To construe the Rule as having no limitation with regard to relevance could lead to absurdity. It would be absurd to suggest that the Rule should be so construed that reference to a document would compel its production despite the fact that the document has no relevance to any of the issues in the case. It is not difficult to conceive of examples of documents which are totally irrelevant. Booyesen J in the *Universal City Studios* case gave one such example. What is more difficult to decide is where the line should be drawn. A document which has no relevance whatsoever to the issues between the parties would obviously, by necessary implication, be excluded from the operation of the Rule. But would the fact that a document is not subject to discovery under Rules 35(1), 35(3) or 35(11) render it immune from production in terms of Rule 35(12)?”

The approach followed in that case was that if the documents were listed in the discovery, they would not be protected from inspection simply by being declared as privileged. The facts of the instant case are distinguishable from that case.

- [16] In order to invoke the provisions of Rule 35(12), the party requiring the discovery must first satisfy the provisions of Rule 35(13) and be authorised by court to compel the other party to discover the documents. In the judgment of *Loretz v McKenzie*⁴ the Court said the following: -

“It is clear that the Uniform Rules of Court do make provision for the provisions of Rule 35 relating to discovery to apply to applications. But this clearly and unequivocally stated to be subject to the proviso that the Court directs that this is so. The Applicant’s first argument requires that a clear wording of the rule “insofar

³ 1987 (3) SA 766 (C) para [14]

⁴ 1999 (2) SA 72 TPD at 74 F-G

as the Court may direct” be ignored. This clearly cannot be done and no authority for so doing was referred to.”

- [17] The reason for Rule 35(12) requiring a party to first obtain the directive of the Court before invoking the provisions of Rule 35(12) is, according to Botha J, that:

“In application proceedings we know that discovery is a 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.”⁵

- [18] In order to succeed with the relief sought, the applicant must firstly prove that the first respondent referred to the documents in its replying affidavit. Secondly, the applicant must show that exceptional circumstances exist justifying the court directive that discovery should be made.

- [19] In *Unilever plc and Another v Polagric (Pty) Ltd*⁶ the court held that:-

“[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 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 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.”

⁵ *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 459F-460A

⁶ 2001 (2) SA 329 (C) at 336G-J.

[20] In *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited*⁷ the court said the following in regard to reference to the documents in the answering affidavit:-

“In order for the production of a document to be compellable under rule 35(12) it is necessary that reference to such document must have been made in the adversary's pleadings or affidavits. In *Magnum Aviation Operations v Chairman, National Transport Commission, and Another*⁸, the court, in ordering the applicant to produce documents to which reference had been made in the founding affidavits, said the following relative to rule 35(12):

'In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document, you must produce it. Even more is it so in this case where the implication in paras 19.4 and 19.6 is that, if the NTC had called for and looked at the financial statements of Operations, it might well have come to a different conclusion.' ”⁹

[21] The legal position on the application to compel production of documents in terms of Rule 35 (12) was summarised by Navsa ADP in *Democratic Alliance and Others v Mkwebane and Another*¹⁰ to be the following:

“To sum up: 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 been 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

⁷ (219/2021) [2022] ZASCA 24; [2022] 2 All SA 299 (SCA) (9 March 2022)

⁸ 1984 (2) SA 398 (W).

⁹ At 400B-D. See also *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) para 14.

¹⁰ [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) para 41

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. In the present case we are dealing with defamatory statements and defences such as truth and public interest or fair comment that might be raised. 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. 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.' ”

- [22] As already mentioned, it is necessary to emphasise that a court considering an application to compel production of the documents or tape recordings which are the subject of a Rule 35(12) notice exercises a discretion in a broad sense.¹¹ A court exercising a discretion in the true sense may properly come to different decisions having regard to a wide range of equally permissible options available to it. A discretion in the true sense was described by E M Grosskopf JA in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')*¹² in these terms:

“The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his

¹¹ *Naylor and Another v Jansen* [2006] ZASCA 94; [2006] SCA 92 (RSA); 2007 (1) SA 16 (SCA) para 14; *Gaffoor NO and Another v Vangates Investments (Pty) Ltd and Others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA); [2012] 2 All SA 499 (SCA) para 41.

¹² [1992] ZASCA 149; 1992 (4) SA 791 (A) at 800E-H.

exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.”

[23] In exercising its discretion the courts have considered multiple factors. The factors and their application to the present circumstances are as follows:

23.1. The finality of the order sought¹³. The relief sought by the applicant in the main application is final and will lead to a clearance certificate being granted and the applicant being allowed to sell its property.

23.2. Fairness, equity, openness, and transparency.¹⁴

I agree with the applicant’s contention that the respondent is the sole entity mandated to supply and charge for the services. In an open democratic society, it cannot be allowed to rely on an invoice to prove consumption when (a) the veracity of the invoice is disputed and (b) it has access to primary evidence of the consumption (i.e. the job cards).

Analysis and Reasons

[24] At the heart of the main application, is the quibble about the disputed electricity consumption. The respondent’s defence is that the readings are correct because the tax invoices attached to the answering affidavit and the readings are either based on the actual consumption or estimated

¹³ *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* – 1985 (1) SA 146 (T)

¹⁴ *Premier Freight (Pty) Ltd v Brethetex Corporation (Pty) Ltd* – 2003 (6) SA 190 (SE) at 196A-B; *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd and Others* – 2013 (5) SA 238 at [17] – [18]

consumption. This is highly disputed by the applicant who states that no business activity has been taking place at the property since 2010.

- [25] Based on the approach to be adopted in this kind of dispute, I am not in agreement with the first respondent. Mainly, that the job cards which are the basis of the tax invoices generated for electricity consumption were not listed in the answering affidavit and that the applicant is not entitled to have them discovered. It is my view that the discovery of the job cards is an important factor to resolve the dispute relating to the consumption because the applicant has not been operating a business on the property since 2010. The job cards of the actual meter readings will enable the court seized with the main application to assess the veracity of the evidence before it and to make a determination.
- [26] The discovery of the job cards is critical because as the applicant contends, for the first respondent's representatives to record the information they collected from the actual meter reading on 12 August 2013, 29 July 2014, 24 June 2015 and 29 January 2016 when there was no business operating on the property does not represent the true situation. The building on the property was demolished by the applicant during August 2021 and the two meters were removed as a result of vandalism. The applicant contends that it is not able to reply to the first respondent's answering affidavit because the first respondent's answering affidavit is based on the sources based on hearsay evidence. This is so because the deponent thereof is a legal advisor as opposed to someone who may have had a direct input in the generation of the tax invoices.
- [27] Based on the authorities referred to in this judgment, I hold the view that the discretion to order the job cards as contained in Annexure "A" of the applicant's founding affidavit to be discovered is appropriate and in the interest of justice.

[28] The view I hold is fortified by the fact that the electricity reading of November 2023 suggests that the electricity has been reconnected. There is however, no suggestion from the answering affidavit of the main application that in fact the services have been reconnected. What has been asserted by the applicant is that the meters were removed in 2021. The job cards, are reliable direct evidence that will put this issue to bed once discovered.

[29] I now deal with the contention by the first respondent that the interlocutory application constitutes an abuse of the court process. I do not agree with this contention because as already demonstrated, the rules do permit in the appropriate circumstances for the court to order the discovery of documents. If there was a case where discovery needs to be ordered in the motion proceedings, this is it. It will be an injustice not to order the discovery of the job cards when, according to the applicant, there has not been any business activity or consumption on the property. Furthermore, it has not been suggested that the property has been high jacked or illegally occupied, for that reason, the discovery of the job cards would be appropriate to resolve the dispute.

Conclusion

[30] The applicant has, in my view, succeeded in establishing that exceptional circumstances exist allowing for the discovery of the job cards relating to the disputed meter readings. Accordingly, the interlocutory application must succeed.

Costs

- [31] The applicant has argued that the first respondent should be ordered to pay the costs on a punitive scale. Mr Boshomane, on behalf of the applicant, correctly abandoned the submission as the circumstances of this case do not justify such an order. It has not been suggested that the first respondent was dilatory in dealing with this application. The other two respondents did not take part in this litigation and I see no reason why they should be burdened with the costs order.

Order

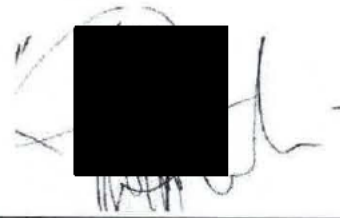
- [32] Having considered the papers before me and the submissions by the parties Counsel, it is ordered that:

(32.1) The provisions of Rule 35 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa relating to discovery shall *mutatis mutandis* apply to the main application brought under the above case number;

(32.2) The respondents are ordered and directed to produce, under oath, the documents referred to in annexure "A" hereto, or to confirm that such documents do not exist and the reasons therefor, within 5 (five) days of this order;

(32.3) Should the Respondents fail to comply with paragraph 2 of this order, the applicant is granted leave to approach this Honourable Court on the same papers, duly amended, where necessary, for an order striking out certain paragraphs of the respondents' answering affidavit;

4. The first respondent is ordered to pay the opposed costs of this application.



ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **19 September 2024**.

Appearances:

For the applicant: Adv KM Boshomane

Instructed by Vermaak Marshall Welbeloved Inc

For the first respondent: Adv E Sithole

Instructed by Phungo Incorporated

Date of Hearing: 29 February 2024

Date of Judgment: 19 September 2024

