

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2021-17543**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: _____
1 November 2024	
DATE	SIGNATURE

In the matter between:

ANNE MICHELLE BOTHA

APPLICANT

and

**STANDARD BANK OF SOUTH AFRICA LIMITED
ANNE MICHELLE BOTHA N.O.
SHERIFF OF THE HIGH COURT, PALMRIDGE
MASTER OF THE HIGH COURT, JOHANNESBURG**

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT

In re:

STANDARD BANK OF SOUTH AFRICA LIMITED

APPLICANT

and

ANNE MICHELLE BOTHA

RESPONDENT

Date of Hearing: **28 October 2024**

Date of Judgment: **1 November 2024**

JUDGMENT

ESTERHUIZEN, AJ

Introduction

- [1] The Applicant seeks an order in terms of Rule 30(1) of the Uniform Rules of Court setting aside, as an irregular step, notices filed by the First Respondent in terms of Rule 35(12) and 35(14).
- [2] The First respondent has in turn filed a counter application whereby, in terms of Rule 30A, it is seeking an order whereby the Applicant is compelled to produce documents as requested in term of its Rule 35(12) and 35(14) notices.

Background

- [3] The background to these applications is common cause.
- [4] Following an application against the Applicant for payment of money, a default judgment was granted against her in her capacity as surety
- [5] Pursuant hereto the First Respondent issued a warrant of execution for the recovery of the amounts claimed and on a number of occasions the Sheriffs from various districts issued *nulla bona* returns in respect of the execution of the warrant.
- [6] Having been unsuccessful with the former attempts the First Respondent instructed the Third Respondent to proceed with an attachment of the incorporeal rights, of the Applicant, to the estate of her deceased husband and bequests to her.
- [7] On 28 July 2023 the Third Respondent attached the following rights of the Applicant:

- . her right, title and interest in the deceased estate of her late husband;
- . her right to adiate or repudiate any benefits bequeathed to her;
- . her right, title and interest in and to any and all assets bequeathed to her by the deceased with specific reference to shares and member interests in various identified companies and close corporations; and
- . her right, title and interest in and to any fees she may be entitled to as Executrix of the estate of her late husband.

[8] Following upon this attachment, the Applicant caused an application to be issued against all of the Respondents to set aside the attachment of her incorporeal rights.

[9] On the same day as filing the notice to oppose the Applicant's application, the First Respondent served the Applicant with notices in terms of Rule 35(12) and 35(14), requiring the production for inspection and permission to make copies of documents mentioned in the respective notices. It is these notices which form the subject of both the Rule 30 and Rule 30A applications before me.

The issues to be determined are:

[10] Whether the First Respondent had to first obtain a direction from court, in terms of Rule 35(13), prior to it being able to file a notice for production of documents in terms of Rule 35(12) and 35(14) and whether there has been compliance with the prescripts of Rule 35(12) and 35(14) by the First Respondent. At the hearing the First Respondent abandoned its Rule 35(14) request and elected to only proceed with the Rule 35(12) notice.

[11] Only if I find that the rule 35(12) notice must not be set aside as an irregular step, the counterapplication in which compliance with the rule 35(12) notice is sought, should be considered. The issues to be determined in relation to the counterapplication are:

- . Whether the First Respondent has complied with the requirements of Rule 35(12).
- . Whether the Applicant should be compelled to deliver the documents set out in the First Respondent's notice in terms of Rule 35(12).
- . Whether the First Respondent's notice in terms of Rule 35(12) dated and served on the Applicant on 11 October 2023 should be set aside.

The Rule 30 Issue

[12] A preliminary issue raised by the First Respondent is that the Applicant could not resort to the use of Rule 30 as its use is for the setting aside of an irregular step for non-compliance with the rules where it causes prejudice. Because of the conclusion reached this issue can be dispensed with in considering the Applicant's Rule 30 application. The irregularities relating to the notices in terms of the First Respondent's Rule 35(12) and 35(14) are set out in the Applicant's Rule 30 notice as follows:

- "1. The Notice in terms of Rules 35(12) and 35(14) was filed in an interlocutory application for the setting aside of an attachment on 28 July 2023 by the Third Respondent. In terms of High Court Rule 35(13) the provisions of Rule 35 relating to discovery apply to applications only so far as the Court may direct. There is no direction by a Court that the provisions of Rule 35 apply to the interlocutory application of Applicant, and consequently the filing of a Notice in terms of Rules 35(12) and 35(14), forming part of the provisions of Rule 35, is irregular; and*
- 2. The Rule 35(12) notice does not, as is required by High Court Rule 35(12)(a)(ii), in the alternative to the production of the documents required for inspection, require of Applicant to state in writing within 10 (Ten) days whether Applicant objects to the production of the documents or tape recordings and the grounds thereof, neither does the Rule 35(14) notice, as is required in terms of Rule 35(14)(b), require in the alternative of Applicant to state in writing within 10 (Ten) days whether Applicant objects to the production of the documents or tape recordings required, and the grounds therefore; and*

3. *The Rule 35(12) notice does not, as is required by High Court Rule 35(12)(a)(iii), in the further alternative to the production of documents required for inspection require of Applicant to state on oath, within 10 (Ten) days, that the documents or tape recordings required are not in Applicant's possession, and to state their whereabouts, if known, neither does the Rule 35(14) notice, as is required in terms of Rule 35(14)(c), require in the further alternative of Applicant to state on oath, within 10 (Ten) days, that the documents or tape recordings required are not in Applicant's possession, and in such event to state their whereabouts, if known."*

[13] The First Respondent argues that absent any prejudice an irregularity can be ignored and finds support for their argument in *SA Metropolitan Lewensversekering Bpk v Louw NO 1981 (4) SA 329*¹ where the court concluded.

*"Even if this generalization needs qualification, the exercise of the court's discretion has been consistently led by the presence or absence of prejudice in relation to the exercise of a party's procedural right or duty to respond to a communication received, or to the taking of a next step in the sequence of permissible procedures to ripen the matter for proper orderly hearing. Where such prejudice is absent, a decision to set the irregular proceeding aside will not be given. On the contrary, the irregularity may be overlooked. Cf Herbstein and Van Winsen, *The Civil Practice* (3rd edition) at page 386 and in particular the decisions in *Distins Seed Cleaning and Packing Co. Pty. Ltd. 1954 (1) SA 283 (N)*; *Marais vs Munro & Company Ltd. 1957 (4) SA 53 (E)* and *Ittamar S Romm Pty Ltd. vs Century Insurance Co. Ltd. 1960 (3) SA 33 (W)*. In *Theron vs Haylett 1917 WLD 140* the court, whilst emphasising the need for precision in regard to a summons, said:*

"the principle is that unless the person on whom a summons is served can show he has been prejudiced by formal defects the summons should stand."

Such an approach would be in accordance with the view that

¹ At p 334 A-D.

“objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits”.

Rules of Court should not only be interpreted but also applied in such a manner that the parties come to grips on the real dispute without undue delay and expense.”
(Emphases added)

[14] The Applicant raises no argument which support a conclusion that she would be prejudiced if the irregularity raised in the Rule 30 notice is not set aside. In its heads of argument the Applicant makes mention of prejudice but only if the First Respondent's counter application is successful. In so far as prejudice may be a requirement in the counter application it does not assist the Applicant in its Rule 30 application. I agree with counsel for the First Respondent that the prejudice which may be suffered if the Applicant is compelled to comply with the Rule 35(12) notice has nothing to do with the fact that the Rule 35 notice does not contain a reference to Rule 35(12)(a)(ii) and (iii) nor whether or not Rule 35(13) should have been applied or not.

[15] Absent any prejudice the Applicant's Rule 30 application to set the irregular proceeding aside cannot be granted. This is so at the very least with regard to the argument that the First Respondent's notice does not reference Rule 35(12)(a)(ii) and (iii). Even had the latter been a requirement for the Rule 35(12) notice to be regular, which in my view was not required, the irregularity must be overlooked in the absence of prejudice.

[16] In addition to the Rule 35(12)(a)(ii) and (iii) issues raised, the Applicant also argues that because the Rule 35(12) notice was served without any direction by a Court, as is required by Rule 35(13), it is an irregular step. Even though the First Respondent did not persist with its Rule 35(14) notice (which does require a Rule 35(13) process). See *Firstrand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd and others* 2013 (5) SA 238 (GSJ) at para 22), the Applicant

argues that because the two notices were combined into one it meant that this was not a 'pure' Rule 35(12) notice and as such the Rule 35(13) issue remained alive. The Applicant did concede during argument that Rule 35(13) is not required where the court deals with a Rule 35(12) notice on its own.

[17] The Applicant contended that because the Rule 35(14) notice must have been preceded by a Rule 35(13) application it has the consequence that the combined notice must thus also be preceded by such an application. Counsel for the First Respondent in turn argued that when considering a joint notice, each must be considered separately to establish compliance with the requirements of each. I agree with counsel for the First Respondent that the mere fact that it is a combined notice does not result in it taking on a new character allowing access to something different than what is actually allowed for by each sub-rule. It still remains separate requests with each having to meet its prescribed requirements to be enforced.

[18] In considering whether Rule 35(13) applies to Rule 35(12) this Court in the matter of *Gold Leaf Tobacco Corporation (Pty) Ltd v Sasfin Bank Ltd* (2022/21063) [2023] ZAGPJHC 1299 (13 November 2023) concluded that:

“[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 [Democratic Alliance and Others v Mkhwebane and Another 2021 (3) SA 403 (SCA) para 24] 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.”

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.”

[15] *A similar sentiment was expressed in Caxton [Caxton and CTP Publishers and Printers Ltd v Novus Holdings 2022 [2022] 2 All SA 299 (SCA)]:*

“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.”

[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] I have no reason to disagree with the court’s analyses and in light thereof I, for the reasons advanced by Green AJ, find that Rule 35(12) can be invoked without first obtaining directions from the court under Rule 35(13) to do so. I may add that further support for this conclusion is to be found in the wording of Rule 35(12) itself. This rule allows “Any party to any proceedings” to utilise this rule. The rule as it stands is thus already available to a party in either action or application proceedings and there can be no reason why Rule 35(13) needs to be invoked to a rule which already allows for its utilization during application proceedings. The mere fact that the Rule 35(12) and (14) notices were combined did not result in the Rule 35(12) losing its identity as such and it was thus not a prerequisite for

the First Respondent to utilise Rule 35(13) before the combined notice could have been served.

[20] The Rule 30(1) application of the Applicant was accordingly not justified and stands to be dismissed.

[21] Because of the finding that Rule 35(12) need not be preceded by a Rule 35(13), I need to consider the First Respondent's counter application in so far as it relates to Rule 35(12) only.

Rule 30A Issue

[22] The First Respondent filed a counter application to the Applicant's Rule 30 application, requesting that the Applicant be ordered to produce the documents listed in its Rule 35(12) Notice.

[23] Rule 35(12) provides:

“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) ...

(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.” (Own emphases)

[24] In analysing the provisions of Rule 35(12) the Supreme Court of Appeal in *Democratic Alliance and others v Mkhwebane and another* [2021] 2 All SA 337 (SCA) provided the following helpful summary:

“[41] 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 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..." (Emphases added)

[25] Evident from this judgment is that the main considerations in determining whether the party relying on its Rule 35(12) notice is entitled to the information being sought are that there must be direct or indirect reference to the document; secondly, the documents must be relevant and free from any privilege. (See also *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (Case no 219/2021) [2022] ZASCA 24 (09 March 2022) at para 15).

[26] The documents which the Applicant had been called upon to produce are recorded in the First Respondent's Rule 35(12) notice as follows:

"BE PLEASED TO TAKE NOTICE THAT *the first respondent requires the applicant to produce for inspection, and to permit the first respondent to make copies of, the following documents, which have either been referred to in the*

applicant's application dated 16 August 2023 ("the application") or are relevant to the issues raised in the application:

1. *The antenuptial contract concluded between the applicant and the late Eric Phillip Botha (the deceased).*
2. *The will referred to in paragraphs 4.15 and 5.2.5 of the applicant's founding affidavit.*
3. *The written application to the fourth respondent, in accordance with section 14(1) of the Administration of Estates Act 66 of 1965 (the Act), together with supporting documents, for the issuing of the Letter of Executorship annexed to the applicant's application as annexure "I".*
4. *Any and all documents lodged with the fourth respondent relating to the administration of the deceased estate.*
5. *The deceased estate's asset inventory, as required in terms of Section 9(1)(a) of the Act and referred to in the Power of Attorney annexed to the applicant's application as annexure "J".*
6. *The banking account details of the estate account opened by the second respondent and/or her attorney in accordance with section 28(1) of the Act and referred to in the Power of Attorney annexed to the applicant's application as annexure "J".*

[27] The arguments pertaining to each of these requests by the Applicant and First Respondent can be summarised as follows:

The Applicant argued that:

- . Item 1 - the First Respondent has requested this document by way of inference and as such it falls fowl of Rule 35(12);

- . Item 2 – it is correct that there is reference to the will as contemplated in Rule 35(12) but relevance is at issue;
- . Item 3 - annexure “I” is the letter of executorship and there is no reference to any documents in it therefore the request cannot be made in terms of Rule 35(12);
- . Item 4 – the First Respondent has requested this document by way of inference and as such it falls fowl of Rule 35(12);
- . Items 5 & 6 annexure “J” is a power of attorney providing the attorney with a mandate. There is no reference to any documents. No documents have in any event been prepared. The reference to a bank account is not a reference to an existing document as the account still needs to be opened in future.

[28] The First Respondent argued that the documents fall within the ambit of Rule 35(12) because:

- . Item 1 – a reference is made to the antenuptial contract and because the only way in which one can be married out of community of property is pursuant to an antenuptial contract; by stating her marital regime, the Applicant thus made an indirect reference to her antenuptial contract.
- . Item 2 – common cause that there is a direct reference as contemplated in Rule 35(12).
- . Items 3 and 4 - the letter of executorship can only be issued pursuant to a written application in terms of section 14(1) of the Administration of Estates Act 66 of 1965 and therefore the First Respondent is entitled to be provided with supporting documents used for the issuing of the letter.
- . Item 5 and 6 - The Applicant makes no mention of the reasons for access to the asset inventory. With regard the bank statement the First

Respondent argues because the power of attorney references a banking account they are entitled to it.

[29] In considering the respective arguments I will do so having regard to the requirements that there must be a direct or indirect reference to the document and if that requirement is met then it must be determined whether the document is relevant, and not privileged.

Direct or indirect reference

[30] The First Respondent argued that by its very nature an 'indirect' reference requires some inferences to be drawn. In dealing with inferences to be drawn the Supreme Court Appeal in *Caxton and CTP Publishers supra* said :

“[16] It must, however, be pointed out that what is meant by the word 'reference' requires some elucidation in at least two fundamental respects. The document or tape recording must have been referred to in a party's pleadings or affidavits in general terms, a detailed or descriptive reference is not required. However, a mere reference by deduction or inference does not suffice for purposes of rule 35(12). On this score, what this court said most recently in *Democratic Alliance and Others v Mkwabane and Another* is instructive. The court said the following:

' . . . What will not pass muster is where there is no direct, indirect or descriptive reference but where it is sought through a process of extended reasoning or inference to deduce that the document may or does exist. Supposition is not enough.'” (Own Emphases)

[31] What is evident from this judgement is that an inference does not suffice for purposes of Rule 35(12). By reaching this conclusion it is evident that the court recognised the distinction between indirect reference and inference being made. An indirect reference requires at least a description of a document albeit not

expressly referred to. The word “indirect” is defined in the Collins dictionary² to mean “*information suggests something or refer to it, without actually mentioning it or stating it clearly*”. The word ‘indirect’ does not stand on its own but qualified in that the requirement of Rule 35(12) is that there must have been an ‘*indirect reference*’ to the document. It is because the document at the very least had to be referred to, albeit indirectly, that an inference of a document cannot suffice for purposes of rule 35(12). In *Penta Communication Services (Pty) Ltd v King And Another 2007 (3) SA 471 (C)* the court, in dealing with the term ‘reference’ remarked as follows:

[15] *...The question that arises in the present instance is whether Rule 35(12) can be invoked when not only has no detailed or descriptive reference been made to the document/s, but neither has there been any indirect reference to such document/s, and it is only through a process of reasoning and inference drawing that it can be deduced that the document does or may exist.*

[17] *This was in effect the argument adopted by the second respondent in the compelling application. The approach was developed by Mr Vetten in argument, his submission being that where, upon analysis of a statement made by a deponent, it can reasonably be inferred that a document/s must exist relating to that fact or allegation, then the opposing party is entitled to call for the production of such documents. In my view this extends the provisions of Rule 35(12) too far in that it gives the concept of a 'reference' to a document so broad a meaning as to make it almost superfluous. In my view this does not fit within the purpose or scope of Rule 35(12). The Rule provides a mechanism for a party to obtain production and inspection of documents prior to making out his case where these documents have been referred to by another litigant but not annexed. To give the Rule the wide*

² Accessed online at <https://www.collinsdictionary.com/dictionary/english/indirect>

meaning contended for by Mr Vetten would be to sanction immediate and full discovery as provided for by Rule 35(1). This is not the purpose of Rule 35(12).” (Emphases added)

- [32] For a document to fall within the ambit of having been indirectly referred to will require the presence of some description by which the document can be identified.
- [33] In the current matter it is common cause that direct mention is made only to the will of the deceased (item 2).
- [34] Because the anti-nuptial contract (item 1), the documents lodged in relation to the administration of the deceased estate (item 4), and the deceased estate’s asset inventory (item 5) have been inferred they fall outside of the scope an ambit of Rule 35(12) and for this reason alone need not be provided.
- [35] Notwithstanding the former a further obstacle the First Respondent’s request is facing is that some of what is being requested do not even pass the first hurdle of being a ‘document’. The Rule 35(12) notice is utilised to produce ‘documents’ to which reference has been made. In *Le Roux v Hon Magistrate Mr Viana [2007] SCA 173 (RSA)* the Supreme Court of Appeal in considering the meaning of the word document remarked: “[10].... *The Concise Oxford English Dictionary (10th edition revised) defines....a document as ‘a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record’*”
- [36] Annexure “I” (item 3) is a letter of executorship with no reference to a single document. For this reason the request for the supporting documents cannot be sustained.
- [37] The First respondent’s request for items 5 (asset inventory) and 6 (the banking account details) is made with reference to annexure “J” to the pleadings which is a power of attorney. The relevant provisions of the power of attorney provides:

“To make and sign any and every inventory in regards to the assets in the said estate, to sign the requisite Declarations and Power of Attorney to transfer property in the said estate, to demand, collect, sue for and recover any monies due to the said estate, to act and represent the me in my aforesaid capacity, in regard to all claims of every description, whether due by or to the said estate, to open a banking account in the name of the estate and to sign and endorse all cheques drawn thereon, to apply for endorsement to any Title Deed or Bond, to frame, sign and lodge all liquidation accounts, to sign and execute any receipts and discharges in connection with the said estate.

And generally, for effecting the purposes aforesaid to do or cause to be done whatsoever shall be requisite as fully and effectually for all intents and purposes as I could do if personally present and acting herein. And all whatsoever my said agent shall lawfully do or cause to be done by virtue of these presents, I hereby agree to ratify, allow and confirm.”

[38] As is evident from the wording of the power of attorney there is no reference in this power of attorney to any ‘document’ which can be argued to fall within the ambit of Rule 35(12). The reference to the asset inventory is not a reference to a document but a mandate to sign an inventory. There is thus not even evidence of the existence of such a document. Furthermore, in *Penta Communication Services (Pty) Ltd v King And Another 2007 (3) SA 471 (C)* the court in dealing with a request, for amongst others, a bank account concluded:

“[18] Reverting to the particular documents sought, no doubt where a bank account is utilised there must exist somewhere documents evidencing its existence and its use. It does not follow, however, that a reference to that bank account, without more, constitutes a reference, for the purposes of Rule 35(12), to documentation relating to such bank account. “

[39] The mere reference to a bank account (item 6) is thus equally not sufficient.

Documents must be relevant, and not privileged

[40] The only document which the First Respondent could thus possibly have requested by utilising the provisions of section 35(12) is the will (item 2). Referencing a document in itself is not sufficient, the party requesting it must also show that these documents are relevant.

[41] In considering the requirement of the relevance of a document being sought in terms of a Rule 35(12) notice the SCA in *Caxton supra* stated:

[45] In order to determine whether the documents that are the subject matter of this appeal are relevant, it is necessary first to have regard to the kernel of the dispute between the parties in the main application....

*[46] ... All what Caxton need establish in this appeal is that the documents bear relevance to the issues raised in the main application. This can be demonstrated with reference to the fact that the documents were called in aid and heavily relied upon by Novus in opposing the relief sought by Caxton. In *Democratic Alliance v Mkhwebane*, this Court stated that reliance on a document or tape recording by an adversary “is a primary indicator of relevance”. Whilst acknowledging that such reliance cannot be used as “the sole indicator”, this Court nevertheless recognised that the materiality of the document “in relation to the issues that might arise or to a defence that is available to the party seeking production” is another important consideration...(“own emphases”)*

[42] In *Democratic Alliance*³ *supra* the court, in dealing with the obligation of the party seeking production of the document stated:

“[40] Hoërskool Fochville went on to say the following:

‘For my part I entertain serious reservations as to whether an application such as this should be approached on the basis of an onus. Approaching the matter on the basis of an onus may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the

³ Para 40.

disharmony on the point. That notwithstanding, it is important to point out that the term onus is not to be confused with the burden to adduce evidence (for example, that a document is privileged or irrelevant or does not exist). In my view, the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.'

*I support this approach. The court will have before it the pleading or affidavit in question, the assertions by the party seeking production as to why it is required and why it falls within the ambit of the rule and the countervailing view of the party resisting production. The basis for requiring the document, at the very least, has to be provided. The court will then, based on all the material before it, exercise its discretion in the manner set out in *Hoërskool Fochville*, in the abovementioned paragraph" (own emphases)*

[43] From *Caxton and Democratic Alliance* two important factors arise when dealing with relevance, the first is that the documents being requested must bear relevance to the issues raised and secondly the basis for requiring the document, at the very least, has to be provided by the person requesting it, being the First Respondent in this instance.

[44] The First Respondent has not filed an answering affidavit to the Applicant's recission application thus it cannot be used as an indicator of relevance. The First Respondent further provides no explanation which can be said to be the basis for its request. This is not only in relation to the will but equally applicable to all the documents having been requested.

[45] In having regard to the type of documents being requested, I agree with the Applicant that, if anything, it supports a conclusion that it is an attempt to uncover

assets of the Applicant which can be attached for purposes of execution of the default judgment rather than documents which are relevant for the application to set aside the warrant of execution.

[46] For these reasons, the First Respondent's counter application, in relation to its Rule 35(12) notice cannot succeed and stands to be dismissed.

[47] In this instance both parties were unsuccessful with their respective applications and therefor I am of the view that each should be responsible for their own costs.

[48] I therefore make the following order.

1. The Applicant's Rule 30 application is dismissed.
2. The First Respondent's counter application to compel compliance with Rule 35(12) is dismissed.
3. No order as to costs.



ESTERHUIZEN AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv J.G. Bergenthuin SC

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For the First Respondent:

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