

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023 – 028928

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

1 August 2025

DATE

SIGNATURE

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

**LESETJA DAVID MOGOTLANE
THOMAS DUMASI MARIMA
PIETER JOHANNES JACOBS
MAMOHUBA HELEN MODIBA
TSHEPO EDWIN MODIKWE
SEJABATI CYNTHIA MODIKWE**

10th Defendant
11th Defendant
34th Defendant
35th Defendant
36th Defendant
12th Respondent

JUDGMENT

J Vorster, AJ.

- [1] On 28 April 2023, the applicant obtained a provisional restraint order in terms of section 26 of the Prevention of Organised Crime Act, 121 of 1998, against 71 defendants and 12 respondents. The provisional order has since been confirmed against most of these defendants and respondents, except those listed in the headnote above.
- [2] On Monday, 28 July 2025, when the matter was called, Mr Hills appeared on behalf of the 34th defendant and informed me that his client was no longer opposing the confirmation of the provisional restraint order. Mr Wilson, who appeared for the applicant, confirmed this arrangement. As such, my order at the end of this judgment will confirm the order against the 34th defendant.
- [3] In addition, the provisional order will also be confirmed against the 11th and 35th defendants, who did not take part in the proceedings, and who do not oppose the confirmation of the provisional order.
- [4] In respect of procedure, I mention that the application was not argued on Monday, 28 July, but stood down for argument on Thursday, 31 July 2025. As a motion court roll is a continuous roll, and as the application merely stood down (it was not postponed), it remained enrolled before me and there was no need to extend the provisional restraint order – it remained operative.
- [5] There is a dispute between the parties as to what exactly serves before me. The applicant contends that it is the extended return date of the provisional restraint order, whilst Mr Sekwakeng, who appeared for the 10th and 36th defendants and the 12th respondent (**the opposing parties**), submitted that his clients' application to compel compliance with a rule 35(12) and (14) notice served before me.
- [6] The opposing parties have never filed answering affidavits in the main restraint application. Instead, on 11 October 2023, they delivered a notice in terms of uniform rule 35(12) and (14) calling on the applicant to make available a large number of documents for their inspection. The applicant failed to respond to

this notice, and on 23 November 2023, the opposing parties launched an application to compel compliance with their rule 35(12) and (14) notice. After doing so, the opposing parties took no further steps to prosecute this application to finality.

- [7] It appears that the applicant initially failed to respond to the application to compel, but that at some stage earlier in 2025 uploaded an opposing affidavit. When the matter came before me, the opposing parties contended that the opposing affidavit was never served on their attorney of record, and that they only recently became aware thereof. The applicant's counsel conceded that the state attorney was unable to produce evidence of service.
- [8] Under these circumstances, counsel for the opposing parties, Mr Sekwakeng, submitted that the application should be removed from my roll so that the opposing parties could file their replying affidavit.
- [9] I was unwilling to accede to this request. My unwillingness is the result of my view that there is, in truth, no proper application to compel capable of being removed from the roll, and that to allow an application that cannot succeed to be removed or postponed will result in a waste of judicial resources.
- [10] I asked Mr Sekwakeng to identify the specific rule on which the application to compel was based. He was, understandably, unable to do so. To understand my findings, it is necessary to briefly reflect on rule 35(12) and the judicial pronouncements dealing with a failure to comply with this rule.
- [11] Rule 35(12) provides as follows:

“(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*
 - (i) *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."*

[12] What is apparent, is that rule 35(12) does not have its own sanction for non-compliance. However, a defaulting party may be compelled to comply by means of a rule 30A application.¹ In **Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited**,² the Supreme Court of Appeal confirmed this approach as follows:

"However, 'a party who gives notice under rule 35(12) may not be content with just the negative sanction provided by the rule'. So said Ponnann JA in Centre for Child Law v The Governing Body of Hoërskool Fochville and Another, who went on to state that '[i]n that event it is to rule 30A that such a party must turn'."

[13] The opposing parties' application to compel is not an application in terms of rule 30A. It was also not preceded by a rule 30A notice.

[14] In **Centre for Child Law v Hoërskool Fochville and Another**,³ the following relevant findings in respect of the purpose of court rules, and a failure to bring an application within the ambit of a specific rule, was made:

¹ **Machingawuta and Others v Mogale Alloys (Pty) Ltd and Others** 2012 (4) SA 113 (GSJ) at [2] – [8].

² 2022 JDR 0431 (SCA) at [20].

³ 2016 (2) SA 121 (SCA) at [17].

"In general terms, the rules exist to regulate the practice and procedure of the courts. Their object is to secure the 'inexpensive and expeditious completion of litigation before the courts' and they are not an end in and of themselves. Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules. Here, having given notice in terms of rule 35(12) that has not been complied with, it was for the School to give notice in terms of rule 30A that it intended, after the lapse of 10 days, applying for an order that its rule 35(12) notice be complied with. That the School did not do. Nor did it apply to court in terms of rule 30A to compel production of the documents sought. That, in and of itself, may have been fatal to the application (see Universal City Studios v Movie Time 1983 (4) SA 736 (D)). In Universal City Studios Booyesen J was urged, despite the fact that the procedure laid down in rule 30(5) (the predecessor to rule 30A) had not been followed, to nevertheless order compliance with the rule 35(12) notice. He declined, stating that -

'a party who deliberately chooses not to claim relief of a particular nature, should in general, even if it were competent, not be granted such relief under the general prayer of alternative relief'.⁴

[15] In my judgment, the opposing parties' application to compel is not catered for in the rules. The rules do not provide for a general or generic application to compel. On this basis alone, the application to compel is irregular and should be dismissed. If I were to remove the application from my roll, the result would be that a different court will be seized with an application that is not recognised in the uniform rules. Saddling a different court with such an application will amount to a waste of scarce judicial resources.

[16] The opposing parties had sufficient time to prepare answering affidavits. It is well established that a notice in terms of rule 35(12) does not interrupt the time for the filing of a subsequent affidavit. This principle was confirmed in **Caxton**

⁴ Footnotes omitted from the quoted passage.

and CTP Publishers and Printers Limited v Novus Holdings Limited,⁵
where the following was said:

[84] Finally, it is necessary to deal with Caxton's quest to be afforded sufficient time within which to file its replying affidavit in the main application. It goes without saying that Caxton's replying affidavit is considerably long overdue. Caxton deliberately elected not to file its replying affidavit pending the outcome of its application to compel the production of the documents it sought from Novus.

[85] There is nothing in the language of rules 35(12) and 30A to suggest that once a demand has been made for the production of the documents to which the rule 35(12) notice relates, the party seeking such documents is excused from complying with the timeframes prescribed in terms of Uniform Rule 6(5)(d)(ii) [66] or 6(5)(e), [67] as the case may be. In Potpale Investments (Pty) Ltd v Mkhize, [68] Gorven J rightly observed that the delivery of a notice in terms of rule 35(12) or (14) does not suspend the period referred to in rule 26 or any other rule. Whilst there is much to be said for the view expressed by the learned Judge, sight should however not be lost of the fact that it is open to the court, in the exercise of its discretion, to extend the time periods prescribed in terms of the rules whenever a proper case therefor has been made out by the party seeking such indulgence. Indeed, this is what Uniform Rule 27 itself contemplates.

[86] It is as well to remember that the manifest purpose of discovery is, as was stated in Durbach v Fairway Hotel, Ltd, 'to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated'. Accordingly, discovery assists the parties and the court in discovering the truth, and, in doing so, helps towards a just determination of the case. This also saves costs.

⁵ 2022 JDR 0431 (SCA). Footnotes omitted from the quoted passages.

[87] *As the time for the delivery of Caxton's replying affidavit has long come and gone, it made perfect sense therefore for Caxton to ask for leave to deliver its replying affidavit only once it has had the opportunity to inspect and copy the documents that Novus is required to produce in terms of this judgment. And given the voluminous nature of the documents involved, it is eminently reasonable and fair that it be afforded a reasonable period within which to do so. This will be reflected in the order made below. Similarly, it is only fair that Novus should be afforded a reasonable period of time within which to produce the documents sought. This, too, is catered for in the order below."*

[17] The application to compel, even if it was regarded as a proper application, does not include an order to condone the late filing of answering affidavits. The time for filing answering affidavits lapsed in 2023 already.

[18] During argument, the opposing parties' counsel submitted that my views in respect of the application to compel, and the possible dismissal of the application for procedural reasons, would amount to judicial overreach. In this regard, he invited my attention to the judgment in **Van Der Nest NO v Minister of Police**,⁶ where the following was said:

"[21] It is trite that courts adjudicate issues outlined by the parties in their pleadings, as was found by this Court in Fischer and Another v Ramahlele and Others. It is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone. In some cases, the parties may expand the issues for determination by the way they conduct the proceedings. In others, the court may, mero motu, raise a question of law that emerges fully from the evidence and is necessary for the decision of the case, subject to the proviso: no prejudice will be caused to any party by its being decided."

⁶ 2025 JDR 1489 (SCA).

[22] *It is, however, also trite that a court can also raise an issue mero motu where: raising it is necessary to dispose of the matter, and it is in the interests of justice to do so, which depends on the circumstances at hand. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal with it.*"

[19] I am also mindful of what was said in **Magistrates Commission and Others v Lawrence**,⁷ concerning the function performed by a Judge when adjudicating matters:

"At the outset it may be important to restate certain basic tenets: (i) in exercising the judicial function, judges are themselves constrained by the law; (ii) judgments should be confined to the issues before the court; (iii) courts should avoid deciding matters that are not relevant; (iv) it is not for a court to create new factual issues; and (v) courts must distinguish between allegation, fact and suspicion."

[20] In my judgment, the difference between the approach that I adopt, and what was referred to in **Van Der Nest** and **Lawrence**, is that the issue that I raised concerns procedure, and not the substance of the application. Put differently: I am enforcing the uniform rules – nothing more.

[21] In my judgment, the application to compel must be dismissed for procedural reasons, and the application to confirm the provisional restraint order against the opposing parties must therefore proceed on an unopposed basis.

[22] In respect of the restraint application, I am satisfied that the requirements in sections 25 and 26 of the Prevention of Organised Crime Act, 1998, have been met. In this regard, there is pending criminal prosecution against the

⁷ 2022 (4) SA 107 (SCA) at [78].

defendants, there are reasonable grounds to believe that a confiscation order may be granted, and the criminal proceedings have not been concluded.

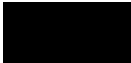
[23] In respect of costs, it must follow the event, and the opposing respondents will be ordered to pay the costs of the application to compel and also the costs incurred by the applicant to have the order against them confirmed. Such costs to be taxed on scale B.

[24] Consequently, the following order is made:

[24.1] The 10th and 36th defendants' and the 12th respondent's, application to compel compliance with the notice in terms of rule 35(12) and (14) dated 11 October 2023 is dismissed with costs, such costs to be taxed and paid on scale B.

[24.2] The provisional restraint order issued in terms of section 25 of the Prevention of Organised Crime Act, 121 of 1998, on 28 April 2023, as extended from time to time, is hereby confirmed and made final against the 10th, 11th, 34th, 35th and 36th defendants, and the 12th respondent.

[24.3] The 10th and 36th defendants, and the 12th respondent, shall jointly and severally pay the applicant's costs occasioned by the proceedings to have the provisional restraint order against them confirmed, such costs to be taxed on scale B.


J VORSTER, AJ.

Acting Judge of the High Court

Date heard: 31 July 2025.

Judgment date: 1 August 2025.

Appearances:

For the applicant (NDPP):

Counsel: J Wilson

Instructed by: State Attorney

For the 34th defendant:

Appearance: J Hills (attorney)
Attorney: Hills Attorneys Inc.

For the 10th and 36th defendants and 12th respondent:

Counsel: MD Sekwakeng
Instructed by: Abram Madira Attorneys Inc.