



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON**

Case no: EL1363/2025

In the matter between:

JOHN RICHARD ROLAND KEW

Applicant

and

KAREN MARGARET KEW

First Respondent

SHERIFF OF THE HIGH COURT EAST LONDON

Second Respondent

JUDGMENT

APPELS AJ:

Introduction

[1] This is an interlocutory application in terms of Rule 30 of the Uniform Rules of Court in which the applicant seeks to set aside as an irregular step, a notice (“the impugned notice”) filed by the first respondent, purportedly in terms of Rule 35(12) and Rule 35(14). The impugned notice required the applicant to produce and make

available for inspection various documents with reference to certain paragraphs in the founding affidavit filed by the applicant in the pending main application.

[2] After service of the impugned notice, the applicant's attorneys caused a notice of an irregular step, in terms of Rule 30(2)(b) to be served on the first respondent's attorneys. The applicant contends that the first respondent has not properly and lawfully crafted the impugned notice in terms of the provisions of Rule 35(12) and Rule 35(14) and that there has been non-compliance with Rules 35(12), 35(13) and 35(14). More particularly, it is contended that any party who wishes to use Rule 35(14) proceedings in application proceedings, must first approach the court in terms of Rule 35(13) for directions and the applicant has not approached the court in order to obtain directions.

[3] Furthermore, it is contended that the first respondent has sought documents in terms of the impugned notice which are not referred to in the founding affidavit and therefore, the first respondent is not entitled thereto in terms of Rule 35(12).

[4] The main application is an application brought by the applicant to stay a warrant of execution. The first respondent has delivered an answering affidavit to the main application subsequent to the filing of Rule 30(2)(b) notice, but did not respond to the Rule 30(2)(b) notice and has not removed the cause of the complaint.

[5] The applicant contends that he is prejudiced by the notice to produce as the documents requested are not referenced in the founding affidavit and because the impugned notice is nothing more than a fishing expedition. It is alleged that the first respondent is simply attempting to gain access to documents which have no bearing on the main application. Furthermore, the applicant has not yet delivered his replying affidavit in the main application due to the existence of the irregular step procedure.

[6] The impugned notice purports to be a combined Rule 35(12) and Rule 35(14) notice. More particularly, the following words appear in between the tramlines of the notice: "NOTICE TO PRODUCE IN TERMS OF RULE 35(12) AND RULE 35(14)".

[7] The relevant contents of the impugned notice are quoted below:

“A. Make available for inspection within 5 (five) days the following documents or recordings which are relevant to a reasonably anticipated issue in the applicant’s court application dated 26th March 2025 and to allow copies thereof to be made as follows:

- 1. The Sale of Shares Agreement as it is referred to in paragraph 8.3.1 of the applicant’s founding affidavit.*
- 2. Trustees’ resolution confirming the sale by the plaintiff’s trust of the Kewco shares referred to in paragraph 8 of the applicant’s founding affidavit.*
- 3. Directors’ resolution authorizing the disposal of the shares held in Dynamic Brands Manufacturing (Pty) Ltd and authorizing the issue of new share certificates consequent upon the sale of the Kewco shares as it is alleged in paragraph 8 of the applicant’s founding affidavit and as it is recorded in the applicant’s auditors’ letter of 31 October 2024 a copy of which is annexed hereto marked annexure “A”.*
- 4. The security transfer tax (STT) form which would have been submitted via the South African Revenue Services (SARS) Efiling system, in order to confirm the value of the STT paid following the sale of the shares per paragraph 8 of the applicant’s founding affidavit.*
- 5. Proof of payment of the securities transfer tax consequent upon the issue the security transfer tax certificate, payable to SARS in the sum of R37 500.00.*
- 6. Declaration or directive issued by SARS in terms of which dividends withholding tax was payable to SARS in accordance with the advices of the applicants auditors correspondence of 31 October 2024 per annexure “A” hereto*
- 7. The Dividend Tax Transaction Information (DTR01) and Dividend Tax Return (DTR02) SARS forms, as well as the SARS Statement of Account to*

support the payment of the Dividend withholding tax in the sum of R2 344 504.32.”

[8] Rule 35(12) may be invoked in both action and application proceedings and provides for the discovery of documents referred to in an opponent’s pleadings or affidavit. While Rule 35(12) applies to application proceedings, Rule 35(14) does not.¹ Should any party wish to extend the application of Rule 35(14) to application proceedings, directions from the court are required.² No directions from the court are required in respect of Rule 35(12).³

Analysis

[9] It is common cause that the first respondent did not seek directions from the court prior to the filing of the impugned notice. Therefore, the question that arises in this matter is whether the impugned notice is a notice in terms of Rule 35(12) or whether it is a notice in terms of Rule 35(14). If it is found that the impugned notice is indeed a Rule 35(12) notice, no directions from the court were required and this interlocutory application ought to be dismissed. If the impugned notice should be regarded as a Rule 35(14) notice, it is an irregular step within the meaning of Rule 30.

[10] Rule 35(12) stipulates as follows:

“(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

¹ *Botha v Standard Bank of South Africa Limited and Others* (2021/17543) [2024] ZAGPJHC 1118 (1 November 2024) at para 18.

² Rule 35(13) provides that: *“The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications.”*

³ *Minister of Public Works and Infrastructure and Others v NMPS Construction CC and Others* (Application to Set Aside) 2023 (6) SA 314 (ECB) at para 37.

(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."

[11] In *Democratic Alliance and others v Mkhwebane and another*,⁴ the SCA held as follows regarding Rule 35(12):

"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..." (Emphasis added)

[12] Mr Cole, appearing on behalf of the first respondent, also referred me to the case of *Cullinan Holdings Ltd v Mamelodi Stadsraad*⁵ where the court endorsed the finding in the judgment of *Erasmus v Slomowitz*⁶ that Rule 35(12) also permits discovery of documents which have been referred to in general terms. The SCA has also confirmed in *Caxton and CTP Publishers and Printers Ltd v Novus Holdings*,⁷ that documents referred to in general terms, even when a detailed description is not given, also fall within the ambit of Rule 35(12).

[13] Therefore, considering the authorities referred to above, the court, in determining the issue whether the impugned notice is a notice in terms of rule 35(12), should have regard to whether the documents in respect of which discovery is sought, are referred to directly, indirectly or in general terms in the notice.

⁴ *Democratic Alliance and others v Mkhwebane and another* [2021] 2 All SA 337 (SCA) at para 41.

⁵ *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992(1) SA 645 at p648 A-D,

⁶ *Erasmus v Slomowitz* (2) 1938 TPD 242

⁷ *Caxton and CTP Publishers and Printers Ltd v Novus Holdings* [2022] 2 All SA 299 (SCA) at para 16.

[14] Scrutiny of the impugned notice reveals that discovery in respect of seven documents is required, but none of the documents have been referred to directly, indirectly or in general terms in the applicant's founding affidavit.

[15] More particularly, in paragraph 1 of the impugned notice, the first respondent seeks discovery of a "*sale of shares agreement*" purportedly referred to in paragraph 8.3.1 of the founding affidavit. However, no reference has been made to an agreement in paragraph 8.3.1 of the founding affidavit. It reads as follows:

"The Applicant 'expects to receive payment for the sale of the shares and be able to make payment to' the First Respondent 'by no later than 14 November 2024' "

[16] Nothing contained in paragraph 8.3.1 suggests that there is a written agreement or any other written document relating to the sales of shares. In this regard it should be noted that Rule 35(12) is applicable to "*documents*" to which reference has been made.⁸ The word "*document*" has been defined as "*a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record.*"⁹

[17] Mr Cole argued that the reference to "*sale of shares*" implies that there must have been a written agreement in respect of the sale of shares. It should however be borne in mind that the SCA has held that "*a mere reference by deduction or inference does not suffice for purposes of rule 35(12)*"¹⁰ Therefore, it cannot be simply inferred or deduced that a written agreement in respect of the sale of shares exists which can be produced in terms of Rule 35(12). An inference or a deduction that there is a written sale of shares agreement, will therefore not suffice for purposes of Rule 35(12).¹¹

[18] In paragraph 2 of the impugned notice, the first respondent requires the production of trustee's resolution confirming the sale by the plaintiff's trust of the Kewco shares, purportedly referred to in paragraph 8 of the founding affidavit.

⁸ *Botha v Standard Bank of South Africa Limited and Others*, *supra* at para 35

⁹ *Le Roux and Others v Viana NO and Others* 2008 (2) SA 173 (SCA) at para 10.

¹⁰ *Caxton and CTP Publishers and Printers Ltd v Novus Holdings*, *supra* at para 16

¹¹ *Caxton and CTP Publishers and Printers Ltd v Novus Holdings*, *supra* at para 16

However, it is evident from the contents of paragraph 8 of the founding affidavit that there is no reference directly, indirectly or in general terms to a trustees' resolution of whatever nature in the founding affidavit.

[19] In paragraph 3 of the impugned notice, the first respondent requires the production of a director's resolution authorising the disposal of shares held in Dynamic Brands Manufacturing (Pty) Ltd and authorising the issue of new share certificates consequent upon the sale of the Kewco shares, purportedly referred to in paragraph 8 of the founding affidavit. However, scrutiny of paragraph 8 of the founding affidavit reveals that there is no reference directly, indirectly or in general terms to a director's resolution of whatever nature in the founding affidavit.

[20] In paragraph 4 of the impugned notice, the first respondent requires the production of a security transfer tax form, purportedly referred to in paragraph 8 of the founding affidavit. Once again, it is evident from the contents of paragraph 8 of the founding affidavit that there is no direct or indirect reference or reference in general terms to a security transfer tax form in the founding affidavit.

[21] In paragraphs 5, 6 and 7 of the impugned notice, the first respondent requires various other documents, without reference to specific paragraphs of the founding affidavit. Once again none of the documents required in the aforesaid paragraphs are referred to are the founding affidavit, either directly, indirectly or in general terms.

[22] Moreover, the wording of the impugned notice are almost identical to the wording of Rule 35(14)(b), in that it requires the applicant to make "*make available for inspection within (5) five days the following documents or recordings which are relevant to a reasonably anticipated issue in the applicant's court application dated 26 March 2025 and to allow copies thereof to be made*". Similar wording does not appear in Rule 35(12).

Conclusion

[23] Accordingly, even though the impugned notice purports to be a combined Rule 35(12) and Rule 35(14) notice, it is in essence a Rule 35(14) notice. It cannot be properly characterised as a Rule 35(12) notice. Since the court's directions in

terms of Rule 35(13) were not sought, the impugned notice is an irregular step as contemplated in Rule 30.

[24] Other than a bare denial, the first respondent has not genuinely challenged the applicant's allegations related to prejudice. I am therefore satisfied that the applicant will suffer prejudice in relation to the continuation of the main application if the irregularity is not removed.

Order

[25] Accordingly, it is hereby ordered that:

[1] The first respondent's notice to produce in terms of Rule 35(12) and Rule 35(14) is set aside as an irregular step.

[2] The first respondent is ordered to pay the costs of the application on a party and party basis, taxed on Scale B.

G APPELS

ACTING JUDGE OF THE HIGH COURT

Heard: 7 August 2025

Delivered: 30 October 2025

APPEARANCES:

For the Applicant:	Ms Mostert
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