

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
5 December 2025	
DATE	SIGNATURE

CASE NUMBER: 14570/2020

In the matter between:

THE FULCRUM GROUP PROPRIETARY LIMITED

PLAINTIFF/RESPONDENT

And

VAUGHAN FRANCIS JONES

FIRST DEFENDANT/APPLICANT

IAN CLARK BAIN

SECOND DEFENDANT/APPLICANT

And

DEAN HYDE

First Third Party

DEAN BURSCOUGH

Second Third Party

PETER GORDON

Third Third Party

PETER COWAN	Fourth Third Party
MIKE BROWN	Fifth Third Party
MATHEW MARAIS	Sixth Third Party
COMPASS INSURANCE COMPANY LTD	Seventh Third Party
LLOYDS SYNDICATE 2987 (BRIT)	Eighth Third Party
LLOYDS SYNDICATE 1247 (ANTARES)	Ninth Third Party
BRYTE INSURANCE COMPANY LIMITED	Tenth Third Party
THE FULCRUM GROUP (PTY) LTD	Eleventh Third Party

Heard: 17 September 2025

Delivered: 5 December 2025

JUDGMENT

WINDELL J:

Introduction

[1] This is an application by the defendants in the main action to compel the plaintiff, Fulcrum Group (Pty) Ltd, (the respondent in this application) to produce documents in terms of Rule 35(12). For ease of reference, the parties will be referred to as they are cited in the main action.

[2] The plaintiff instituted action against the defendants in 2020 for damages based on alleged breaches of fiduciary duties, arising from the approval of loans that were not repaid. The defendants filed their plea in the same year and joined several third parties, who delivered their pleadings in the third-party proceedings.

[3] Extensive discovery followed. Having considered the additional documents and consultations with the third parties, the plaintiff sought to amend its particulars of claim. On 22 December 2023 the plaintiff delivered a notice of intention to amend its particulars of claim. The notice spans approximately 20 pages and includes multiple annexures. In paragraph 5 of the notice, the plaintiff seeks to introduce additional allegations, numbered 9A.1 to 9A.5, containing further factual detail.

[4] The defendants opposed the amendment, relying mainly on an alleged absence of bona fides on the part of the plaintiff in seeking to amend its particulars of claim. The plaintiff consequently delivered an application to amend its particulars of claim (“the amendment application”).

[5] In the founding affidavit supporting the amendment application, the plaintiff stated that the additional allegations sought to be introduced are based on material that emerged during discovery. In paragraph 47.3 of that affidavit, the plaintiff averred that “the vast majority of the evidence relied on for the allegations recorded in paragraph 5 of the notice arose from what was discovered by Cowan”, being the fourth third party joined in these proceedings.

[6] The defendants argue that, without identification of the specific documents on which the plaintiff relies, they cannot determine the evidential basis for each of the new

allegations. According to them, it must follow that the plaintiff identified particular documents when formulating the amendments, and those documents should now be produced. They accordingly seek an order under Rule 35(12) compelling production of the documents referred to in the plaintiff's founding affidavit in the amendment application.

[7] The defendants maintain that, without inspecting the specific documents relied upon, they are unable to assess whether the plaintiff's application to amend is brought bona fide. They submit that access to those documents is necessary for them to meaningfully oppose the amendment and that a Rule 35(12) notice was therefore the appropriate mechanism to compel production.

[8] Pursuant to this stance, the defendants delivered a notice in terms of Rule 35(12) calling upon the plaintiff to produce the documents referred to in the founding affidavit in the amendment application for inspection. The request, as framed, sought production of the documents upon which the plaintiff allegedly relied when formulating the proposed amendments.

[9] The plaintiff responded to the Rule 35(12) notice and made two documents available for inspection. As to the remainder, the plaintiff refused production on the basis that the notice did not fall within the scope of Rule 35(12). The plaintiff's position was that no specific document had been expressly referred to in the founding affidavit, that any relevant material already formed part of the discovery delivered by Cowan, and that the defendants therefore already had access to the documents they sought.

Evaluation

[10] The defendants accept that they have received the full discovery of the fourth third party, Cowan, comprising approximately 6 000 pages. Their case, however, is that mere possession of the bundle does not assist them where the plaintiff expressly states that the new allegations in the proposed amendment arise from documents discovered therein, yet declines to identify which documents it relies on. They contend that without knowing which documents underpin the amendments, they cannot meaningfully respond to the amendment application or test bona fides. The issue is therefore not access, but identification.

[11] Rule 35(12) entitles a party to production of a document referred to in a pleading or affidavit. The rule is not confined to expressly annexed or named documents; a reference may arise by necessary implication where it is clear that the litigant has relied on specific material for an asserted fact. Here, the plaintiff stated that the amendments arise from what was discovered by Cowan and that the evidence supporting its new case appears in the Cowan discovery. This is a reference to documents. Once reliance has been placed on documents as the evidential source for expanded allegations, fairness requires that the opposing party be allowed to inspect those documents in an identifiable form.

[12] The plaintiff argued that because the defendants already have the Cowan discovery, production is unnecessary. That approach is too narrow. Possession of a mass of documents does not equate to meaningful access to those documents when the relying party has already isolated the material it considers relevant. In *Copalcor Manufacturing*

(Pty) Ltd v GDC Hauliers (Pty) Ltd,¹ the court held that where documents are relevant and indicated by pleadings or reference, they must be made available in a manner that enables the opponent to identify and assess them. Likewise in *Minister of Land Affairs and Agriculture and Others v D&F Wevell Trust and Others*,² the court cautioned against requiring a litigant to trawl through difficult or voluminous material to discern relevance, emphasising that litigation is not a trial by ambush. The principle applies here. The plaintiff cannot on the one hand rely on documents for new allegations, yet on the other refuse to identify those documents on the basis that they lie somewhere within thousands of pages.

[13] The object of Rule 35(12) is to ensure that where reference is made to a document in support of an allegation, the opposing party is entitled to see that document so that the case can be understood and met. In the context of an amendment where bona fides is challenged, identification of the evidential material becomes especially significant. Without access to the specific documents underpinning the new allegations, the defendants are unable to address whether the amendment is supported by evidence or whether the plaintiff seeks to expand its case without foundation. Rule 35(12) exists precisely to avoid such uncertainty.

[14] The procedural context matters. This is a Commercial Court matter under active case management. The Commercial Court Practice Directive emphasises proportionality, cooperation between litigants, early identification of issues, avoidance of satellite disputes, and focused interlocutory processes. Requiring the plaintiff to identify the documents it has relied on is consistent with these objectives. It clarifies the factual basis

¹ 2000 (3) SA 181 (WLD)

² 2008 (2) SA 184 (SCA) para 43.

of the amendment, reduces the scope for later discovery disputes, and promotes efficient resolution rather than piecemeal litigation. Requiring the defendants instead to analyse 6 000 pages unaided in search of documents the plaintiff has already located would run counter to the directive's aim of streamlining commercial litigation.

[15] No prejudice to the plaintiff arises from the order sought. The documents are already in its possession and have been used to formulate the amendment. Identifying them is a finite and reasonable obligation. The potential prejudice lies rather with the defendants, who would otherwise have to prepare for the amendment application without knowing the evidentiary foundation for the allegations introduced. They are entitled to a fair opportunity to oppose the amendment on a fully informed basis. That outcome accords with both Rule 35(12) and the spirit of the Commercial Court system.

[16] I am satisfied that reference to the documents has been sufficiently made within the founding affidavit to trigger the application of Rule 35(12), that relevance is established, and that fairness and case-management considerations support requiring identification. The defendants are entitled to the relief they seek.

[17] In the result the following order is made:

1. The plaintiff is ordered to produce the following documents for the defendants' inspection with five days of date of this Order:

- 1.1 The specific documents discovered by Cowan giving rise to the allegations made in paragraph 5 of the plaintiff's notice of intention to amend ("the Notice") referred to in paragraph 47.3 read with paragraph 55.3 of the

founding affidavit in the plaintiff's application for leave to amend ("the founding affidavit").

1.2 The specific documents discovered by Cowan giving rise to the allegations made in paragraph 6 of the Notice referred to in paragraph 48.1 read with paragraph 55.3 of the founding affidavit.

1.3 The specific documents discovered by Cowan giving rise to the allegations made in paragraph 7 of the Notice referred to in paragraph 49.1 read with paragraph 55.3 of the founding affidavit.

1.4 The specific documents obtained through discovery giving rise to the amendments referred to in paragraph 55.3 of the founding affidavit.

2. The plaintiff is to pay the defendants' costs on Scale C, including the costs consequent the employment of two counsel.



L WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 5 December 2025.

Appearances

For the applicants:	CM Eloff SC
	T Dalrymple
Instructed by:	Knowles Husain Lindsay Inc
For the respondent:	B Berridge SC
	A Berkowitz
Instructed by:	Bowman Gilfilian Inc
Date of Hearing:	17 September 2025
Date of Judgment:	5 December 2025