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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 054815/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

DATE 13 NOVEMBER 2025

SIGNATURE

In the matter between:

COCA-COLA BEVERAGE SOUTH AFRICA (PTY) LTD

Applicant

and

CHAVONNES BADENHORST ST CLAIR COOPER N.O

First Respondent

TIRHANI SITOS DE SITOS MATHEBULA N.O

Second Respondent

CAPE BASIC PRODUCTS (PTY) LTD (IN LIQUIDATION)

Third Respondent

In re:

CHAVONNES BADENHORST ST CLAIR COOPER N.O

First Applicant

TIRHANI SITOS DE SITOS MATHEBULA N.O

Second Applicant

CAPE BASIC PRODUCTS (PTY) LTD (IN LIQUIDATION)

Third Applicant

And

COCA-COLA BEVERAGE SOUTH AFRICA (PTY) LTD

Respondent

NEUKIRCHER J:

1] On 2 November 2022, the three respondents launched proceedings against the applicant (Coca-Cola) in which they seek an order that certain dispositions made by a company known as Cape Basic Products (Pty) Ltd be declared void in terms of s34(2) of the Companies Act 61 of 1973 (the 1973 Act) Following on this, they also seek payment of certain monies.

2] Cape Basic Products was finally wound up by the Western Cape High Court on 30 June 2020. The company (in liquidation) is the third applicant in the main application. The first and second applicants in the main application are the joint liquidators (the liquidators) of Cape Basic Products.

3] On 3 February 2023 Coca-Cola filed a combined Notice in terms of Rule 35(12) and Rule 35(14) (the Notice) in which it sought the production of certain documents which it alleges are referred to in the Founding Affidavit and/or which are relevant to a reasonably anticipated issue in the application proceedings.

4] When the liquidators failed to comply with the notice, Coca-Cola launched compel proceedings on 10 March 2023. It is this compel application that stands to be adjudicated.

The main application

5] The allegations in the main application serve as background to the compel application.

6] The liquidators allege that, as the application for the liquidation of Cape Basic Products was issued out of the Western Cape on 14 February 2020, this is the date on which the winding up is deemed to have commenced¹. This is not contentious.

¹ The provisional order was granted on 2 March 2020 and the final order on 30 June 2020

The Master (Cape Town) appointed the liquidators on 25 September 2025 – this is also not contentious.

7] The liquidators allege that after the commencement of the winding up, Cape Basic Products made three payments totalling R174 002-09 to Coca-Cola from its ABSA Bank account. They allege that these payments were included in “batch” payments made by Cape Basic Products from this account which reflect a single payment bearing a particular batch reference number on its bank account. However, the single payment is, in actual fact, composed of various smaller amounts that were paid to and received by various payees or recipients.

8] That the single amount actually comprises of various smaller amounts was confirmed by ABSA’s Special Transactional Banking division which provided the liquidators with a spreadsheet. This spreadsheet identifies the recipients of all the payments made from the account after the deemed date of the commencement of the winding-up proceedings ie 14 February 2020.

9] The spreadsheet also confirms that Cola-Cola received three separate payments from Cape Basic Products as follows:

- a) R64 531-88 on 28 February 2020;
- b) R54 011-95 on 28 April 2020;
- c) R55 458-26 on 5 May 2020

ie a total amount of R174 002-09.

10] However, the demand made by the liquidators regarding repayment of this amount has fallen on deaf ears and the main application was then launched by them to recover this amount.

Rules 35(12) and 35(14)

11] Rules 35(12), (13) and (14) are relevant. They state the following:

- a) Rule 35(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
- (ii) (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) (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”.

b) Rule 35(13)

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

c) Rule 35(14)

“After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to—

- (a) make available for inspection within five days a clearly specified document or tape recording in such party's possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof; or
- (b) 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
- (c) 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”.

12] In *Gorfinkel v Gross, Hendlers and Frank*² the court stated:

“As Rule 35 (12) can be applied at any time, ie before the close of pleadings or before affidavits in a motion have been finalised, it is not difficult to conceive of instances where the test for determining relevance for the purposes of Rule 35(1) cannot be applied to documents which a party is called upon to produce under Rule 35(12), as for example where the issues have not yet become crystalised. Having regard to the wide terms in which Rule 35(12) is framed, the manifest difference in wording between this subrule and the other subrules, ie subrule (1), (3) and (11) and the fact that a notice under Rule 35(12) may be served at any time, ie not necessarily only after the close of pleadings or the filing of affidavits by both sides, the Rule should to my mind be interpreted as follows: *prima facie* there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12).”

13] In *Democratic Alliance a.o v Mkwabane and Another*³ the SCA dealt with the meaning and application of Rule 35(12):

- a) the first step in the adjudication process is to consider whether “reference” is made to a document or tape recording⁴.
- b) direct or indirect reference to a document will suffice, subject to the issue of whether it is relevant⁵;
- c) “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”;⁶
- d) reliance on a document by the party from whom the document or tape recording is sought is a primary indicator of relevance. “Given the purpose of Rule 35(12) it cannot, however, be the sole indicator. The document in question might not be relied on by the party from whom it

² 1987 (3) SA 766 (C) at 774E-H

³ 2021 (3) SA 403 (SCA)

⁴ Par 27

⁵ Par 28

⁶ *ibid*

is sought but might be material in relation to the issues that might arise or to a defence that is available to the party seeking production.”;⁷

- e) documents not specifically mentioned in affidavits, but which are referred to in annexures are equally compellable⁸.

14] In *Centre for Child Law v The Governing Body of Hoërskool Fochville* (Fochville)⁹ it was said:

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

15] This approach was endorsed in *Mkhwebane*¹⁰:

“...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*...” (my emphasis)

⁷ Par 34

⁸ Par 36

⁹ 2016 (2) SA 121 (SCA) at par 18

¹⁰ At par 40

- 16] An analysis of the prevailing case law indicates that
- a) 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;
 - b) 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;
 - c) 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;
 - d) 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.

17] Thus it is clear that 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.

18] But in casu, this is not the end of the enquiry – Coca-Cola has not just filed the compel application in respect of the documents sought in terms of Rule 35(12) but also in terms of Rule 35(14).

19] Rule 35(14) is clearly only applicable to action proceedings if one has regard to the wording of the rule. In order to apply it to applications the permission of the court is required in terms of Rule 35(13)¹¹ – it is common cause that no such permission has been, or is presently, sought by Coca-Cola.

¹¹ *Minister of Public Works and Others v NMPS Construction CC and Others* 2023(6) SA 314 (ECB) par 8 (*NMPS Construction*)

20] In *First Rand Bank Ltd t/a Wesbank v Manhattan Operators (Pty) Ltd and Others*¹² (Manhattan) Molahleni AJ stated¹³ that Rule 35(14)

“is limited ‘in application and is aimed at operating’ only in the very specific circumstances set out in the rule. To interpret it more widely would make inroads into the general principle that prior to the institution of an action a party cannot snoop around other people’s backs.”

21] The learned Judge then remarked that once a court finds that Rule 35(13) applies to Rule 35(14) the question of whether the court should exercise its discretion in favour of the party requiring discretion in terms of Rule 35(14) “has to be answered by investigating whether exceptional circumstances exist that would warrant such a directive. In this respect, considerations of fairness, equity, openness and transparency serves to provide guiding principles.”¹⁴

22] In *NMPS Construction* a composite Notice in terms of Rules 35(12) and 35(14) was filed identifying documents referred to in an answering affidavit to be produced for inspection. An application was brought to set aside this notice on the basis that:

- a) the notice and the subrules of Rule 35 do not permit the application of any part of Rule 35, save with direction of the court as set out in Rule 35(13);
- b) that Rule 35 in its entirety applies to applications only insofar as the court may direct; and
- c) it was common cause no such direction was given by the court.

23] That application was opposed and one of the arguments was that if Rule 35(12) was appropriately used the additional reference to Rule 35(14) is by the way.

24] In dismissing the objection to the composite notice, Lowe J stated:

“[43] I also agree that in context the Rule 35(14) issue, though clearly not applicable to the notice, is not such as to disturb substantial success.”

¹² 2013 (5) SA 238 (GSJ)

¹³ With reference to *Quayside Fish Suppliers CC v Irvin and Johnson Ltd* 2000 (2) SA 529 (C) par 16

¹⁴ Para 24 of *Manhattan*

25] The liquidators *in casu*, argue that it is not proper to combine a Rule 35(12) and a Rule 35(14) request into one composite notice. They argue that the provisions of Rule 35(14) require a separate notice and a separate direction from the court. Inasmuch as Coca-Cola has failed to identify which documents are sought in terms of Rule 35(12) and which are sought in terms of Rule 35 (14), the Notice conflates the two rules and thus constitutes an irregular step and the application to compel must be dismissed.

26] In view my, the liquidators' objections to the Notice is overly technical and puts form over substance. Had the notice been solely one in terms of Rule 35(14), perhaps the argument would have been better suited – but I make no finding or further comment on this. The point is that a Rule 35(12) request requires no prior authorization by a court. The present notice is also framed in terms of Rule 35(12) and the question is whether the application should be granted or refused because the documents sought cannot be produced or are privileged or are irrelevant.¹⁵

27] The Notice requires the liquidators to make available for inspection a host of documents which Coca-Cola states “are referred to in the founding affidavit and/or which are relevant to a reasonably anticipated issue in the application proceedings.”

28] The notice then demands the payment instructions, payment requisitions, payment approvals and payment confirmations exchanged between the liquidators, and ABSA Bank or its employees. It also seeks “any and all audit trails” from ABSA Bank. The argument is that the documents sought are referenced in paragraphs 27 and 32 of the Founding Affidavit in the main application which states:

- a) “27. After the commencement of its winding up, the third applicant¹⁶ made
three payments totalling R 174 002-09 to the respondent from its banking account held with ABSA Bank under account number 1[...] (“the account”);
- b) “32. The third applicant's bank statement, read together with the

¹⁵ See *Hoërskool Fochville* supra

¹⁶ Ie Cape Basic Products

spreadsheet provided by ABSA Bank serving to identify the different recipients (including the respondents of the various batch payments and other payments made from the account post the commencement of the third applicant's winding up, confirm that the respondent received the following payments from the account on the following dates:

- 32.1 A payment of R64 532 -88 on 28 February 2020 (forming part of batch "K6407), as appears from the extract of the third applicant's bank statement hereto annexed marked annexure "FA14"
- 32.2. A payment of R54 011-95 on 28 April 2020 (forming part of batch "K6436), as also appears from the extract of the third applicant's bank statement hereto annexed marked annexure "FA14"
- 32.3. A payment of R55 458-26 on 5 May 2020 (forming part of batch "K6440), as also appears from the extract of the third applicant's bank statement hereto annexed marked annexure "FA14"

29] The application to compel simply states that the respondent's have refused to comply with its Notice. In my view, this cryptic submission is insufficient. Where Coca-Cola seeks to enforce its Notice, it must explain in the application why the documents are required and why the production falls within the ambit of Rule 35(12)¹⁷. It fails to do so. It seeks enforcement based on what can only be described as supposition which is impermissible.¹⁸

30] The liquidators attach to the main application a spreadsheet in which the transfers are set out. They also attach an affidavit by Pierre Olivier¹⁹ from ABSA Bank who confirms how the individual recipients of the various batch invoices were identified. They further attach an affidavit by Glynn Arendse of ABSA's Specialist

¹⁷ *Mkhwebane* at par 40

¹⁸ *Mkhwebane supra*

¹⁹ A Relationship Executive in the employ of ABSA Bank

Transactional Banking (Corporate and Investment Banking) division who conducted the investigation and provided the information set out in the spreadsheet²⁰.

31] Absent an explanation under oath of why the information already provided is insufficient to put Coca-Cola in a position to respond to the allegations that these payments was made after the liquidation proceedings commenced, *prima facie* the request appears to be little more than a fishing expedition and a play for time.

32] The remainder of the information sought in the Rule 35(12) must fare the same fate. Absent a proper explanation of why the information sought is relevant and is necessary to answer to the allegations, how the documents have been directly or indirectly referenced, or why they are at all material to the issues, this court is not of a mind to bait the fishing rod.

33] The application being without any substance or motivation, it must be dismissed.

34] The liquidators have sought Costs on Scale B. Given the issues, I am of the view this is appropriate but with the caveat set out in paragraph 13 supra.

ORDER:

1. The application is dismissed with costs, which costs are to be taxed in accordance with Scale B.

**NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment 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 13 November 2025.

²⁰ This being who the actual recipient is of each individual payment included in any particular batch payment from the relevant account on or after 14 February 2020; what the amount was that was paid to that particular recipient under that particular batch payment; and when the relevant payment was made to that particular recipient

Appearances

For the applicant	:	Adv Meyer
Instructed by	:	Bowman Gilfillan Inc
For the first to third respondents	:	Adv AR Newton
Instructed by	:	Scholtz Attorneys
Matter heard on	:	3 September 2025
Judgment date	:	13 November 2025