



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 084444/25

In the matter between

THE HAJEE SULLAIMAN SHAHMAHOMED 1st APPLICANT

ACADEMY TRUST

SOPHIA BENNIE-CHETTY NO 2ND APPLICANT

MOAMMAD FAADIEL ESSOP NO 3RD APPLICANT

ZIYAAD AHMAD ESSOP NO 4TH APPLICANT

AND

THE DARUL KARAR MASJIED ASSOCIATION RESPONDENT

Heard on: 29 JANUARY 2026

Delivered on: 11 MAY 2026

JUDGMENT

THULARE J

ORDER

- (a) The application is granted.
- (b) The applicants are ordered to provide the respondents attorneys with the documents as set out in the notice of motion: application to compel, within 20 days of the date of this order.
- (c) The respondents are granted an extension of time to file its answering affidavit, such affidavit to be filed within 1 month after the date of compliance by the applicants with the terms of paragraph 2 of this order.
- (d) The applicants are to pay the costs, including costs consequent upon the employment of two counsel on scale C

[1] This is an opposed interlocutory application wherein the respondent sought an order compelling the applicants to discover and provide documentation after the applicants held a view that it was not bound to provide them, pursuant a request in terms of Rule 35(12) and 35(14) notices. The respondent further sought an order wherein the court granted it an extension to file its answering affidavit within 1 month after the applicant had provided the documents sought. In the main application the applicants sought interdictory relief against the respondent which currently occupied and controlled the property. In the main application the order sought included a declaration that the respondent had no right to occupy the property, an order that the respondent vacate the property, directing the respondent to hand over the keys to the property and that the respondent cease all management and everyday business operations.

[2] The first applicant is a Trust and the second to fourth applicants are its trustees. The respondent is running the day-to-day affairs of the Wynberg Mosque (the Mosque) which is owned by the Trust. The relationship between the Trust and the respondent has irretrievably broken down and the trust no longer wants the respondent to run the day-to-day affairs of the Mosque. A new committee has been formed separate from the respondent, whose constitution is in line with the vision of the Trust and its founder. The respondent does not want to vacate the mosque, relinquish control and return the keys of the Mosque to the applicants.

[3] It is in relation to the allegations made by the applicants as part of historical background, that the request for documents arose. The applicants *inter alia* allege that the Mosque was always run under the active oversight and authority of the Trust; that the Trust appointed various individuals to attend to the day-to-day affairs of the Mosque; that all important decisions such as the appointment of the Imam and caretaker as well as all renovations done to the Mosque were made in consultation with the Trust; that the Trust always paid the water, sewage, refuse and electricity home user charge for prepaid electricity being paid by debit order each month and that the city did not bill the Trust for property rates and that the Trust attended to the monthly insurance payments of the Mosque. The applicants also alleged that the respondent acted unlawfully and without authority.

[4] The respondent filed a notice in terms of Rule 35(12) and 35(14) of the Uniform Rules where it required the applicants to produce for inspection and to permit the respondent to make copies of documents which were relevant to a

reasonably anticipated issue in the applicants founding affidavit. The documents sought were:

1. The written authority of the second applicant to attest to the affidavit.
2. The written authority and/or letters of appointment by the Master of the High Court, Cape Town, appointing the Nedgroup Trust as a trustee of the Trust.
3. In respect of the Nedgroup Trust, the supporting documentation which was submitted to the Master of the High Court on the basis of which the written authority of letters of appointment were issued.
4. The trust deed and supporting documents in terms of which the Trust was constituted as a trust with Master reference I[...] since its inception and prior to 2017.
5. The letter of nomination of Nedgroup Trust which appointed the second applicant to serve as a nominee on behalf of Nedgroup Trust.
6. A complete deed of transfer, inclusive of supporting documentation, which preceded and upon which transfer was based.
7. Minutes of meetings between members of the community and the Trust, since inception of the Trust.
8. Minutes of meetings and documents of alleged decisions regarding the mosque allegedly made in consultation with the Trust, since inception of the Trust.
9. Minutes of meetings and written contracts concluded in respect of the appointment of the Imam and caretaker, since inception of the Trust.
10. Documentary proof of payments made in respect of the Imam, other staff and electricity and water bills since the inception of the Trust.

11. Documentary proof of the monthly debit orders in respect of water, sewerage, refuse and electricity home user charge.
12. Documentary proof of the requests by the committee to the Trust for assistance and payment by the Trust of such requests.
13. Documentary proof of the monthly payments made in respect of insurance for the Mosque and the insurance policy.
14. A copy of the records which show that the late Imam Kajee approached the Trust on or about September 2015.
15. Documentary proof of all persons appointed by the Trust to attend to the day-to-day affairs of the Mosque, the resolutions taken by the Trust to appoint these persons and their acceptance and appointment letters since the inception of the Trust.
16. Documentary proof of all the engagements between the trust and the respondent for the 10 years.
17. A copy of the resolution taken by the Trust during 2015, that both the Claremont Mosque and the Wynberg Mosque operate under similar constitutions and structures.
18. A copy of the constitution adopted by the Al-Jamiah Mosque.
19. Documentary proof of all the communications between the trust and members of the respondent from 2015 until 2019.

[5] For purposes of Rule 35(12) the applicants answer was that in respect of points 1 to 16 and 19, they made no reference to a document or tape recording and that accordingly the request was not in compliance with Rule 35(12). For purposes of Rule 35(14) the applicants answer was that the rule related to

actions and not applications; that the applicants launched an application which fails under applications or motion proceedings; that a notice of intention to oppose was filed and no appearance to defend was entered as envisaged in Rule 35(14) and that accordingly, the applicants were not obliged to comply with the respondents rule 35(14) notice, which related to documents and/or tape recordings not provided for in rule 35(14) and as such the requests were improper and irregular.

[6] Rules 35(12), 35(13) and 35(14) reads 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

(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.

(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications.

(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.

[7] Discovery is typically limited to trial actions. If necessary for fair court proceedings, rule 35(13) allows a court a discretion to order discovery in applications [*Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) at paragraphs 4-5]. It is a tool to allow a party to gain access to documents that contain relevant evidence [*Erasmus Superior Court Practice*: RS 26, 2025, D1 Rule 35-29]

[8] In *Democratic Alliance and Others v Mkhwebane and Another* (1370/2019) [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) (11 March 2021) the SCA discussed rule 35(12) (the DA case). At para 34 the court said:

[34] Reliance on a document by the party from whom the document or tape recording is sought is a primary indicator of relevance. That appears clearly from what is set out above. 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 which it 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.

In *Rule 35(12): The principles drawn bare by the SCA in Democratic Alliance and Others v Mkhwebane and Another*, Rakhee Bhoora and Kedibone Seroke, Fasken, South Africa March 31 2022, the authors said:

However, whilst relevance is limited to the issues to the matter, it is not assessed on such issues that have already been crystallised, but rather on issues or aspects that may arise from what is canvassed in the pleadings or affidavits as well as any defences or grounds of

opposition that may be available or arise to a party in order for such party to better assess its position and assist in asserting its opposition to the matter.

[9] The documents sought by the respondent might be material in relation to the issues that might arise or to a defence that is available to them, from what is canvassed in the applicants' affidavits. For instance, it is flimsy reasoning for the applicants to refer to meetings in their affidavits, and when asked to produce the minutes of those very meetings, to say they made no reference to a document or tape recording, as an answer to the party seeking production. It is unreasonable for the applicants to allege the existence of a Trust, and when asked to produce the Trust deed and supporting documents in terms of which the Trust was constituted, at different times which the applicants set out in their founding affidavits, to answer that they made no reference to a document or tape recording in their affidavits. At para 41 of the DA case it was said that:

[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. ... 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.

[10] In the examples that I have given, of the documents sought, the meetings and the existence of a Trust were material facts relied upon by the applicants to establish their claim, so much so that they were pleaded in their founding affidavits. The minutes of the meetings and the Trust deed and supporting documents are documents in respect of which there is indirect reference in the affidavits, which are relevant, and there is no indication that they are privileged, and should ordinarily be in the possession of the Trust and must be produced. They are documents which might have evidentiary value and might assist the respondent in their defence to the relief claimed in the main case. They are documents to which there is reference in the affidavits within the meaning of that expression in rule 35(12).

[11] There is no bar to the use of rule 35(14) at an earlier stage of court proceedings especially where the issues in dispute can be reasonably contemplated or are clearly defined [*Makate v Joosub NO and Another* (57882/19) [2020] ZAGPPHC 248 (30 June 2020) at para 59] (*Makate case*). Where the request for the documentation does not constitute a fishing expedition but is relevant to what may be described as a reasonably anticipated issue in the main application, a court may be required to invoke the flexibility of the interpretation and application of the rules of the court that affords the applicants access to documents they sought, and avoid a mechanical application of a particular rule that may lead to an injustice [*Makate case* at para 60 to 61].

[12] In *PFE International And Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 30 the Court said:

"[30] Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables the superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this court may in the interest of justice depart from its own rules.

[13] Having regard to the how rule 35 reads as a whole, and its purpose, against the background of the heavy court rolls in the High Courts, the cost of litigation in the High Courts, the purpose of rule 35(13) and the context of applications, I am not persuaded that every request for discovery and production of documents should be preceded by an application for such direction by a court. In many instances the documents may be discovered and produced by agreement between the parties. Moreover, courts are not there to argue the law, but to resolve disputes. The respondent was entitled to first approach the applicants through delivery of Rule 35(12) and 35(14) notices without first approaching the court. Rule 35(13) becomes operative when there is a dispute or refusal necessitating judicial intervention. Judicial intervention cannot be a ritual in litigation in the High Courts but is there to ensure procedural fairness. For these reasons I make the order.

DM THULARE

JUDGE OF THE HIGH COURT

