



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
DATE: 19 June 2026
SIGNATURE: [REDACTED]

Case No. 2025-145455

In the matter between:

VAN ZYL, DIAN JACOBUS

APPLICANT

And

XODUS GOUD KOÖPERASIE BEPERK

RESPONDENT

Coram: Millar J

Heard on: 12 June 2026

Delivered: 19 June 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 13H00 on 19 June 2026.

JUDGMENT

MILLAR J

- [1] This is an application to compel the delivery of documents in terms of Rule 35(12) of the Uniform Rules of Court. The application finds its genesis in an application for liquidation brought by the applicant, Mr. van Zyl against the respondent, Xodus.
- [2] The application for liquidation was launched on 22 August 2025. Mr. van Zyl is a member of Xodus which is a co-operative governed by the Co-Operatives Act.¹ The application was brought by Mr. van Zyl on the basis that as a creditor of Xodus in the sum of R2 577 094.71, notwithstanding demand, payment had been refused. The refusal to pay was communicated to Mr. van Zyl by Xodus on 13 August 2025. There appears to be a dispute regarding the nature of the debt, but this is not an issue before this Court.
- [3] The urgent application was served on Xodus. Complying with the truncated time periods set by Mr. van Zyl in terms of Rule 6(12), a notice of intention to oppose the application was served on 25 August 2025 and an answering affidavit thereafter served on 28 August 2025. A replying affidavit was then filed on behalf

¹ 14 of 2005.

of Mr. van Zyl on 29 August 2025. When the matter was called in the Urgent Court on 4 September 2025, an order was made by agreement, the relevant terms, were as follows:

- “1. *The matter is removed from the roll;*
2. *The applicant may deliver a supplementary founding affidavit within 15 days from date of this order, after which the respondent may deliver a supplementary answering affidavit and the applicant a supplementary replying affidavit within the ordinary time periods prescribed by Rule 6 of the Uniform Rules;”*

[4] On 8 September 2025, the attorneys for Mr. van Zyl addressed a letter to Xodus's attorneys in which copies of certain documents that had been referred to in the answering affidavit (that had already been filed) were requested. The request was not framed as one in terms of Rule 35(12), but this is what it was in substance. This request was met on 16 September 2025 with Xodus expelling Mr. van Zyl as its member together with the removal of his access to the online member portal. Mr. van Zyl now found himself in the proverbial “wilderness” insofar as access to information that he had previously had through the online member portal was concerned.

[5] On 18 September 2025, a formal notice in terms of Rule 35(12) was served on Xodus. It is not in issue that certain of the documents which were sought were referred to in the answering affidavit or that some were not.

[6] Xodus for its part, opposes the application and the disclosure of all the documents requested. The main basis for this is variously that the documents requested are either irrelevant, are confidential in nature or that there are procedural defects (documents already furnished or request for documents not mentioned) in the application. Before dealing with the specific requests, the legal framework within which they are to be considered as well as the objections, is briefly as follows.

[7] Rule 35(12) of the Uniform Rules of Court provides the following:

- “(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.”*

[8] In *Democratic Alliance and Others v Mkhwebane and Another*,² the Court held that the language employed in rule 35(12) is very wide. The Court further provides relevant steps that are taken to test compellability and relevance under rule 35(12) as follows:

“[27] Literally, rule 35(12) appears to indicate that where there is a mere reference to a document or tape recording in an opponent’s pleadings or affidavits, a defendant or respondent is entitled to call for its production and may compel compliance. That is not how our courts approach an application to compel the production of documents sought in terms of rule

² 2021 (3) SA 403 (SCA).

35(12). The first step in the adjudication process is to consider whether 'reference' is made to a document or tape recording.

[28] In *Penta Communication Services (Pty) Ltd v King and Another* above [21] at 475J the court referred with approval, in para 14, to the following passage in *Slomowitz* at 244 where the following appears:

'An essential is, of course, a reference by the opponent, in his pleading or affidavit to the documents whereof such production is required, but the terms of the Rule do not require a detailed or descriptive reference to such documents, nor is any distinction made between documents upon which the action or other proceedings is actually founded and documents which possess merely evidentiary value.'

See also Harms Civil Procedure in the Superior Courts at B23.2. [8] It appears to me to be clear that direct or indirect reference to a document will suffice, subject to what is stated later about relevance.

[9] 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. [10] Supposition is not enough."

[9] The onus in this case is clear given that the respondent opposes the applicant's application in terms of Rule 35(12). The applicant in this case must satisfy this Court on a balance of probabilities of his entitlement to the documents requested.

[10] In *Centre for Child Law v Hoërskool Fochville and Another*,³ the court held that:

"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."

³ 2016 (2) SA 121 (SCA) at para [18].

[11] Confidentiality does not form part of the recognised grounds that a party may raise to avoid production of a document in terms of Rule 35(12).⁴ Parties are limited to proving privilege or irrelevance to trump a Rule 35(12) application. In this case Xodus raised confidentiality as a ground of objection but even if this is a consideration, it does not militate against the furnishing of the document but rather in favour of the imposition of conditions which would be accommodative of the rights of both parties.

[12] Turning now to the specific items requested.

ITEM 1

[13] *“Copies of the respondent’s audited annual financial statements for the period during which the applicant was a member, as referred to in paragraph 40 of the answering affidavit, including the audited financial statements for the year ending 29 February 2024”.*⁵

[14] Since the main application is one for the liquidation of Xodus, it is self-evident that the financial statements which were referred to and which were sought are relevant to the application.

[15] Since Xodus is registered in terms of the Co-Operatives Act and Section 22 of that Act provides an unqualified right to members of Xodus to attend at its registered office,⁶ where in terms of Section 21, it is obliged to keep all its financial records so that they can be examined and copies made. The audited financial

⁴ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re: Matsetla v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para [27].

⁵ At paragraphs 29 and 82 of the answering affidavit.

⁶ In terms of Section 20 it must have a registered office within the Republic as set out in its constitution.

statements fall within this category and are specifically provided for in Sections 21(1)(g) and 22(2).

- [16] There is no basis upon which confidentiality can be claimed or the furnishing of the documents refused by virtue of Section 22. Mr. van Zyl has the right to examine and make copies as a matter of law let alone for purposes of the present litigation. The purported termination of his membership to thwart access to copies of documents (to which he is as a matter of law entitled) is nothing more than a cynical attempt to by-pass the statutory right contained in Section 22.

ITEM 2

- [17] *"The respondent's "books of account.""*⁷

- [18] In this regard, Xodus argued that the reference to books of account was not to any specific document. It was also argued that for purposes of the liquidation application, Mr. van Zyl was not entitled to books of account showing transactions of other members. It was argued that this would be irrelevant, and the information would be the confidential information of third parties.

- [19] While I do not agree that the documents themselves are necessarily irrelevant or that there is any confidentiality, the request as it is framed, would not be relevant to any inquiry in respect of the liquidation application considering that the information contained in the "books of account" as a class of documents is reflected in the audited financial statements.

- [20] Mr. van Zyl does not seek to, nor would it be permissible for him to conduct an audit of the veracity of the audited financial statements at this stage. There is no

⁷ *Ibid* at para 30.5.

allegation that the audited financial statements do not accurately reflect the true financial position. Given that the request is framed as widely as it is and that I intend to order the production of the audited financial statements, the request for the books of account is refused.

ITEM 3

[21] *"The "agreed written terms applicable when applying for membership."⁸*

[22] Section 21(1)(a) of the Act provides that Xodus must keep at its registered office, *"The constitution of a co-operative and its rules, if any, including any amendments."*

[23] These documents fall within the scope of Section 22(1) and there is no basis for Xodus to refuse examination and copying of these documents by Mr. van Zyl. The reasons set out in paragraph [9] above apply to this request also.

ITEM 4

[24] *"RBK's application "to establish a unit trust with tangible Kruger Rands as underlying assets," together with the Financial Services Board ("FSB") reply declining the application".⁹*

[25] It was argued that these documents relating to events some 17 years before Mr. van Zyl became a member of Xodus were irrelevant. In the context of the liquidation application, they are clearly irrelevant. Nothing further need be said on this save that this request is to be refused.

⁸ *Ibid.*

⁹ *Ibid* at para 18.

ITEM 5

[26] *"A register of members."*¹⁰

[27] The argument in this regard for refusing to make the documents available was as follows:

- "22. *Paragraph 3 of the respondent's answering affidavit does not make reference to the 'register of members'.*
23. *To the extent that article 10 of the respondent's Constitution provides for the respondent to keep 'a register of members,' the contents thereof are irrelevant in the determination of the application for liquidation.*
24. *The respondent's board, as has been stated in the answering affidavit, in terms of section 22(2) of the Co-Operatives Act, has reason to believe that the disclosure of this information to the applicant will be to the disadvantage of the co-operative and other members.*
25. *This has been dealt with in the respondent's supplementary answering affidavit referred to in the answering affidavit of this application.*
26. *This information is also totally irrelevant for purposes of the liquidation application and is made for mala fide reasons."*

[28] There are two aspects which arise regarding the request for this item. The first is that Section 21(1)(d) requires that Xodus keep a list of its members on which

¹⁰ *Ibid* at para 31 and annexure XG7, para 10 thereof.

is set out the name and address of each member, the date on which person became a member, date of termination of membership (if applicable) together with the amount of any membership fees paid, the number of membership shares owned and the number and amount of member loans.

[29] The right to inspect this list resides in Section 22(1) read together with Section 22(2). The present request is made in terms of Rule 35(12) and not in terms of the relevant Sections.

[30] The second is this – for purpose of the liquidation application, the audited financial statements requested in item 1, will contain a fair representation of all the assets and liabilities of Xodus. The specific personal information of the members is not relevant to the liquidation application.

[31] The application is predicated on the inability of Xodus to repay a member – it follows as a matter of common sense that if this is so, that one member cannot be repaid in full, that if that member were to be paid, it would necessarily result in a shortfall for all the other members. Put simply, the membership list (while of interest) is not relevant for purposes of the litigation and for that reason, notwithstanding the provisions of Section 22, I intend to refuse the request for this item in terms of Rule 35(12).

ITEM 6

[32] *“The minutes of the meeting at which the special resolution was passed on 31 March 2021 amending the constitution of the respondent.”¹¹*

¹¹ *Ibid* at paras 30.1.3(b) and 34.

[33] Regarding this item, Xodus asserted that Mr. van Zyl is already in possession of the document requested. It pointed to annexure DZ8 to the founding affidavit. This annexure is a letter from the Companies and Intellectual Properties Commission recording an amendment of the Constitution. Attached to this letter is a copy of the special resolution together with the amended Constitution. Since Mr. van Zyl is in possession of this document, it already forms part of the Court record, the request is of no moment in terms of Rule 35(12) and is to be refused.

ITEM 7

[34] *"Identification and particulars of the underlying assets in the cryptocurrency pool."*¹²

[35] It was argued for Xodus that there was no reference to this anywhere in its answering affidavit and that it was entitled to refuse this request. I agree. The request does not fall within the ambit of Rule 35(12) and is to be refused.

[36] In summary and regarding the items requested in Mr. van Zyl's notice in terms of Rule 35(12) –

[36.1] This item is to be furnished.

[36.2] This item is refused.

[36.3] This item is to be furnished.

¹² *Ibid* at para 22.

- [36.4] This item is refused.
- [36.5] This item is refused.
- [36.6] This item already forms part of the Court record.
- [36.7] This item is refused.
- [37] Regarding costs, Mr. van Zyl sought a punitive order for costs as between attorney and client. While I intend to order that certain of the items be furnished, and in this respect, Mr. van Zyl has been successful, not all the items requested are to be furnished. In respect of those items that are not to be furnished, the opposition by Xodus was entirely justifiable. I am not persuaded that a punitive order for costs is merited and intend to make an order for costs as between party and party.
- [38] In the circumstances, it is ordered:
- [38.1] The respondent is ordered to produce and allow the inspection and copying of items 1 and 3 listed in the applicant's Rule 35(12) Notice served on 18 September 2025, within 15 days of the granting of this order.
- [38.2] In the event of the respondent failing to comply with paragraph 1 of this order set out above, the applicant is granted leave to approach this Court on the same papers duly supplemented for an order striking out the respondent's defence.

[33.3] The respondent is ordered to pay the costs of this application on the scale as between party and party with the costs of counsel on scale C.



A MILLAR

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

HEARD ON:

12 JUNE 2026

JUDGMENT DELIVERED ON:

19 JUNE 2026

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