REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/12549

DATE: 23/09/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

NOEL CHENJERAYI MACHINGAWUTA

JOHAN FEDERICK OOSTHUIZEN

SHANE TREVOR FERGUSON

in their capacities as trustees for the

time being of the MOGALE ALLOYS TRUST **First Applicant**

PGR MANGANESE (PTY) LTD **Second Applicant**

and

MOGALE ALLOYS (PTY) LTD **First Respondent**

RUUKKI SOUTH AFRICA (PTY) LTD **Second Respondent**

DEZZO TRADING 184 (PTY) LTD **Third Respondent**

PGR 17 INVESTMENTS (PTY) LTD **Fourth Respondent**

JUDGMENT

NOTSHE AJ:

[1] The Applicants brought an application in terms of section 252 of the Companies Act to set aside a management agreement concluded in December 2010 between the Respondents.

[2] The Respondents filed an answering affidavit to the application brought by the Applicants.

[3] Thereafter the Applicants delivered upon the Respondents a notice in terms of Rule 35(12) of the Uniform Rules. The aforesaid notice required the Respondents to produce for inspection by the Applicants the following documents:

"1. *The 'numerous documents' referred to in paragraph 29.1 of the affidavit of Ruiters.*

2. *The 'original company statutory documents' referred to in paragraph 29.1 of Ruiters affidavit.*

3. *The 'contracts' referred to in the first line of paragraph 29.2 of the affidavit of Ruiters.*

4. *The 'copies of all contracts' referred to in the first sentence of paragraph 29.2 of the affidavit of Ruiters.*

5. *The 'contacts register' referred to in the third sentence in paragraph 29.2 of the affidavit of Ruiters.*

6. *The 'previous agreements' referred to in the sixth sentence in paragraph 29.2 of the Ruiters' affidavit.*

7. *The 'documentation' referred to in paragraph 31 of the affidavit of Ruiters.*

8. *The minutes of the board meeting referred to in paragraph 49 of the affidavit of Ruiters (the respondents have attached only certain pages of those minutes).*

9. *The 'listing requirements' referred to in paragraph 52.1 of the affidavit of Ruiters.*

10. *The 'papers' referred to in paragraph 74.2 of Ruiter's affidavit.*

11. *The existing contracts referred to in the second sentence in paragraph 82.1 of Ruiter's affidavit.*

12. *The 'contract register' referred to in the second sentence in paragraph 82.1 of Ruiter's affidavit.*

13. *The purchase agreements, credit applications, slag processing agreements, rental agreements, lease and purchaser agreements, toll smelting agreements, security contracts, I.T. mandates, Eskom agreements, purchase and recovery contracts of EAF Dust and the gas supply agreements etc referred to in paragraph 82.2 of Ruiter's affidavit.*

14. *The correspondence referred to in the first sentence in paragraph 82.3 of Ruiter's affidavit.*

15. *The 'secretarial files' referred to in the first sentence of paragraph 85.1 of Ruiters s affidavit.*

16. *The 'documents' referred to in the second sentence of paragraph 85.1 of Ruiter's affidavit.*"

[4] The Respondents furnished only documents mentioned in paragraphs 8, 9 and 10 of the request, namely, the minutes of the board meeting referred to in paragraph 49 of the affidavit of Ruiters, the listing requirements referred to in paragraph 52.1 of the affidavit of Ruiters and papers referred to in paragraph 74.2 of Ruiters' affidavit.

[5] In respect of the remainder of the documents requested their response was variously that they do not have the documents in their possession, or that they are irrelevant or that they are privileged. As a result thereof the Applicants brought the present application to compel the production of such documents.

[6] The Respondents have opposed the application on the grounds that the Applicants are not entitled to the relief that they seek and that in any event the documents sought do not exist, are irrelevant or are privileged.

[7] As regards the defence of absence of remedy, as I understand it, is to the effect that Rule 35(12) does not provide a relief that is sought by the Applicants. The relief provided for in the aforesaid Rule is to the effect that the party who fails to comply with the notice in terms of the aforesaid Rule should not be allowed to use such document in such proceedings save with the leave of Court, so the argument goes. It is then argued that the Applicants are confined to that relief only.

[8] I am of the view that the Applicants are not confined to the relief provided in Rule 35(12) only.[1] The relief provided in rule 30A is wide enough to cover the failure to comply with the request made in terms of Rule 35(12) of the Uniform Rules. Rule 30A provides as follows:

"*Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.*"

[1] See: Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W) at 460 – 461
Universal City Studios v Movie Time 1983(4)SA736 (D) at 746.

[9] The "*rules*" referred to in rule 30A refer to all the Uniform Rules[2] including rule 35(12).

[10] The fact that the Applicants in their notice referred to Rule 35(12) does not imply that they rely only on the relief provided in 35(12).

[11] In the circumstances the Applicants are entitled to rely also on the provisions of 30A for the relief that they seek.

[12] The respondents further aver that the documents sought to be produced fall outside the documents required to be produced in terms of rule 35(12).

[13] The entitlement and the obligation to produce the documents arise as soon as reference is made thereto in the pleadings or affidavit. Rule 35(12) reads as follows:

"*Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be 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 produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice 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."*

[2] Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa.

[14] There is no dispute that the respondents did refer, in their affidavits, to the requested documents. The question, however, is whether a party who receives a notice to produce the documents that he referred to in the pleadings or affidavit may object to the production on the grounds that he does not have them in his possession, or that they are not relevant or are privileged.

[15] There can be no dispute that a party may resist a request to produce documents on the grounds that they are not in his possession.[3] He will however be obliged to state their whereabouts, if known to him. The remaining question would be whether that party is truthful in its response or not.

[16] As regards the question of whether such a request can be resisted on the grounds that the requested documents are privileged or irrelevant, the authorities are not unanimous.

[17] In *Universal City Studios v Movie Time*[4] Booysen J said the following:

"*It seems to me though that it must be implied that the document should be relevant to the issues between the parties and therefore reasonably required by the opposing party before it can be said to be hit by the provisions of this Rule. So, for example, if a wife seeking an interdict to prevent her husband from assaulting her were to allege that he assaulted her shortly after she had read the evening newspaper,*

[3] See: Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W) at 461.
[4] Supra.

there being no relevance alleged of the paper, one could hardly imagine that her husband, the respondent, would be entitled to production of that newspaper."

The problem I have with this dictum is that it does state the provisions, words or circumstances from which such an implication should be drawn. On the contrary the other provisions of rule 35 seem to indicate otherwise. (more of this hereunder)

[18] In *Magnum Aviation Operations v Chairman NTC*,[5] this Court, per Vermooten J, held that the grammatical meaning of the words in Rule 35(12) are clear and are to the effect that once a reference is made to a document it must be produced. The Court therein compared the provisions of Rule 35(12) to the provisions of Rule 35(1). Rule 35(1) provides that discovery must be made of documents "*relating to any matter in question in such action*". The Court held that it is significant to note that no such qualification is made in Rule 35(12).

[19] In *Gehle v McLaughlin*,[6] the decision in *Magnum Aviation Operations* was followed. Therein it was held that the purpose of Rule 35(12) was to entitle a party to production of documents referred to in an opponent's pleading or affidavits to enable him to consider his position.

[20] In *Gorfinkel v Gross, Hendler and Frank*,[7] the Western Cape High Court (previously the Cape Provincial Division), Friedman J, refused to

[5] 1984(2) SA 398 (W)
[6] 1986(4) SA 543 (W)
[7] 1987(3) SA 766 (C)

follow the *Magnum Aviation Operations* and *Gehle* decisions. That Court held that in any event the *dictum* in *Magnum Aviation Operations* was *obiter*. It said the following:

"*There was no question in the Magnum Aviation case that the documents in question were relevant; it was accordingly unnecessary for the Court to decide whether relevance was a requirement of the Rule or not.*"

[21] That Court concluded that it is implicit in the wording of rule 35(12) that a party cannot be compelled under rule 35(12) to produce a document which is irrelevant or privileged. It said the following:

"*There are undoubtedly differences between the wording of Rule 35(12) and the other subrules relating to discovery, for example subrules (1), (3) and (11) of Rule 35. The latter subrules specifically refer to relevance whereas subrule (12) contains no such limitation and is prima facie cast in terms wider than subrules (1), (3) and (11).*

It is nevertheless to my mind necessarily implicit in Rule 35(12) that there should be some limitation on the wide language used. One such limitation is that a party cannot be compelled under Rule 35(12) to produce a document which is privileged...

With regard to relevance there must also, in my view, be some limitation read into Rule 35(12). To construe the Rule as having no limitation with regard to relevance could lead to absurdity. It would be

absurd to suggest that the Rule should be so construed that reference to a document would compel its production despite the fact that the document has no relevance to any of the issues in the case. It is not difficult to conceive of examples of documents which are totally irrelevant. Booysen J in the Universal City Studios case gave one such example. What is more difficult to decide is where the line should be drawn. A document which has no relevance whatsoever to the issues between the parties would obviously, by necessary implication, be excluded from the operation of the Rule. But would the fact that a document is not subject to discovery under Rules 35(1), 35(3) or 35(11) render it immune from production in terms of Rule 35(12)?

In my view the parameters governing discovery under Rules 35(1), 35(3) and 35(11) are not the same as those applicable to the question whether a document is irrelevant for the purposes of compliance with Rule 35(12). A party served with a notice in terms of Rule 35(1) is obliged to make discovery of documents which may directly or indirectly enable the party requiring discovery either to advance his own case or to damage that of his opponent or which may fairly lead him to a train of enquiry which may have either of these consequences. Documents which tend merely to advance the case of the party making discovery need not be disclosed. 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 crystallised. 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 subrules (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). That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. (See the Moulded Components case supra at 461D - E.) Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within the limitations which I have mentioned, the onus would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document. Cf Quilter v Heatly (1883) 23 ChD 42 at 51."

[22] In *Penta Community Services (Pty) Ltd v King*[8] the Court followed the decision of the court in *Gorfinkin*. It held that *prima facie* there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection unless the document is not in his/her

[8] 2007(3) SA 471 (C)

possession and it cannot be produced or the document is privileged or irrelevant. It further held that the *onus* is on the party receiving the notice to set up the facts relieving it of the obligation to produce documents. [9]

[23] As matters stand the decision of this Court in the Magnum case has not been overruled by this Court or a court of higher status. The court that refused to follow it is the then Cape Provincial Division (now Western Cape High Court) – a decision of a single Judge of another division.

[24] The question is which of these two decisions I must follow. I am obliged to look to the rules of judicial precedent for guidance. The Supreme Court of Appeal recently said the following regarding judicial precedent[10]:

"*The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of*

[9] See also: Gorfinkin v Gross, Endler and Frank, 1987(3) SA 766 (C)

[10] Per Cameron JA (as he then was) in True Motives 84 (Pty) Ltd v Mahdi and Another 2009 (4) SA 153 (SCA) at 185 [100].

precedent, and its proper implementation, are therefore vital constitutional questions."

[25] The import of this decision is that - as a starting point I am bound to follow one of the two streams of decisions unless I come to the conclusion that they are both wrong. As a Judge sitting alone I am bound to follow the decision of the Court within my division.[11] In this case I am bound to follow the decision of the South Gauteng High Court. I am therefore bound by the *ratio decidendi* of this Court in the *Magnum Aviation Operations* case.

[26] Even if the rules of judicial precedent did not oblige me to follow the *Magnum* case I would have still followed it. The Court in the *Gorfinkin* case refused to follow the decision of this Court in Magnum Aviation case on the bases that the issue of relevance in that case did not arise. I cannot agree with that view. The dictum of the Court in *Magnum Aviation* is wide enough to include the issue of relevance. The *Gorfinkin* decision did not place significant attention on the fact that subrules 35(1), (3) and (11) differ from the provisions of rule 35(12) because they all expressly require that the documents to be discovered must be relevant to the matters.[12] Rule 35(12) does not have such an express requirement.

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[11] The South African Legal System and its background, (Hahlo and Kahn) (Juta) 1968 at 252.

[12] Subrules 35(1) and (11) require the discovery of documents "*relating to any matter in question in such action…*", whereas rule 35(3) refers to documents "*which may be relevant to any matter in question …*"

[27] In my view the express requirement of relevance in subrules 35(1), (3) and (11) and absence of such in subrule 35(12) is a clear indication that relevance is not a requirement in respect of subrule 35(12). Otherwise it would have been expressly required as in other subrules. There is no other plausible explanation.

[28] I am not even convinced that privileged documents are excluded from the ambit of subrule 35(12). Why would a document be referred to in an affidavit or pleadings if it is privileged? How does the other party deal with the contents of that document if he is prohibited from demanding that it be produced? These questions demonstrate that once a document is referred to in the pleadings or affidavit it is liable to be requested to be produced.

[29] In any event, insofar as there is a difference between the decisions in the *Magnum Aviation* and the Gorfinkin cases *supra* I prefer the former. Accordingly I approach the case on that basis.

[30] The Applicants no longer proceeded with the request contained in paragraphs 1 and 2 of the Rule 35 notice. The documents sought in paragraphs 8, 9 and 10 have been furnished. Counsel for the Respondents has referred me to the affidavit in respect of documents sought in paragraphs 3, 4 and 5 of the notice. The paragraphs referred to in the answering affidavit and read in its context indicate that the contracts are not in the possession of the Respondents. I am of the

view that the Respondents have met their obligation and indicated that the documents are not in their possession.

[31] Insofar as the other documents are concerned the Respondents are obliged to produce those.

[32] Even if I were to follow the decision of the Court in *Gorfinkin* matter the Respondents in my view have not succeeded in their defense. In terms of the aforesaid dictum the Respondents had an onus to set up facts relieving them of the obligation to produce the documents. In this case the Respondents have not set up any facts that relieve them of the obligation to produce the requested documents.

[33] As a result I make the following order:

1. The Respondents are directed to produce documents referred to in paragraphs 5, 6, 7, 11, 12, 13, 14, 15 and 16 of the Applicants' notice in terms of Rule 35(12) dated 27 June 2011.

2. The Respondents are directed to pay the costs of this application.

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V.S NOTSHE
ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicants: P.J Van Blerk SC

Attorneys for the Applicants:	Martini – Patlanski
Counsel for the Respondents:	A. Bava SC
Attorneys for the Respondents:	Cliff Decker Hofmeyer Incorporated
Date of the Hearing:	9 September 2011
Date of Judgment:	23 September 2011