IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:	**CASE NUMBER: 44983/2020**
(1) REPORTABLE: ~~YES~~/NO	
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO	
(3) REVISED:	
15 June 2021 DATE	SIGNATURE

In the matter between :

GERHARD VOSLOO N.O **First Applicant**

(Administrator of the South African Medical

Association Trade Union)

THE SOUTH AFRICAN MEDICAL ASSOCIATION

TRADE UNION (under Administration) **Second Applicant**

and

THE SOUTH AFRICAN MEDICAL ASSOCIATION NPC **First Respondent**

THE REGISTRAR OF LABOUR RELATIONS **Second Respondent**

JUDGMENT

Heard on: 31 May 2021

Judgment handed down: 4 June 2021 (by publication on CaseLines)

VAN ZYL AJ

INTRODUCTION

1. This is an interlocutory application by the First Respondent to compel discovery of documents requested from the Applicants in terms of rule 35(12) of the Uniform Rules of Court. The Applicants opposed the application.

A BRIEF BACKGROUND

2. The main application is an application for the final winding-up of the First Respondent brought by Mr Gerhard Vosloo (hereinafter referred to as "*the Administrator*") in his official capacity as the court appointed administrator of the South African Medical Association Trade Union ("*SAMATU*"), the Second Applicant. For purposes of distinction, the winding-up application is referred to as "*the main application*" and this application as "*the rule 35(12) application*" or "*this application*". I also refer to the Administrator and SAMATU jointly as "*the Applicants*".

3. The First Respondent is the South African Medical Association ("*SAMA*"), a non-profit company established in 1927, which represents the interest of the medical profession in South Africa, with a specific focus on medical doctors, who are normally either self-employed or employed by the public sector (e.g. state-run hospitals).

4. The Second Respondent is the Registrar of Labour Relations.

5. The SAMATU was placed under administration by the Labour Court on 10 October 2019 and the Administrator was appointed in terms of an order of the same court on 27 February 2020. These two orders are hereinafter referred to as "*administration order*" and "*the appointment order*" respectively.

6. The terms of reference attached to the appointment order sets out the powers and obligations of the Administrator (these are hereinafter referred to as "*the Terms of Reference*"). In particular, paragraph 1.18 of the Terms of Reference records that the Administrator "*is directed to report on* [SAMTU's] *affairs to the* [Registrar of Labour Relations] *on a monthly basis during the aforesaid 12 months and such further period of administration*" (parenthesis added).

7. These earlier proceedings in the Labour Court were followed by an urgent application by the Applicants, again in the Labour Court, before Van Niekerk J, who gave judgment on 18 May 2020. SAMA sought leave to appeal against this judgment, which leave was refused by Van Niekerk J on 25 June 2020.[1] This was followed by an urgent application by SAMA in this court before Raulinga J, which was struck from the roll with costs.

8. The main application was launched on 9 September 2020 and relies upon two grounds for seeking SAMA's winding-up, namely, on the basis of SAMA being insolvent alternatively deemed insolvent as contemplated in sections 344(f) and

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[1] In the founding affidavit it is recorded that the judgment of Van Niekerk J on 18 May 2020 is the subject of a petition to the Labour Appeal Court and it is also recorded that the judgment and order of Van Niekerk J is the subject of an appeal.

345 of the Companies Act (61 of 1973) ("*the 1973 Act*") and because it is just and equitable to do so in terms of the section 344(h) of the 1973 Act alternatively section 81(1)(c)(ii) of the Companies Act (71 of 2008). The averments made in respect of each of these grounds are germane to determining this application and are dealt with, insofar as is necessary, further below.

THE RULE 35(12) APPLICATION

9. In paragraph 32 of his founding affidavit, the Administrator stated the following:

> "I am obliged to provide regular reports to the Registrar of Labour Relations, who exercises oversight over the administration process."

10. This statement, together with two others, elicited a request from the Respondent in terms of rule 35(12) for *inter alia* "*the reports submitted to the Registrar of Labour Relations referred to in paragraph 32 of the founding affidavit*". For the sake of convenience, these documents are referred to herein simply as "*the reports*" and the notice as "*the rule 35(12) notice*".

11. It bears pointing out that the winding-up application was launched on 9 September 2020. The appointment of the Administrator occurred on 27 February 2020. Assuming that the Administrator thereafter submitted monthly reports to the Registrar of Labour Relations, the request would notionally be in respect of reports for the months of March to August 2020, i.e. 6 reports.

12. The Applicants satisfied two of the three requests, but refused to provide the reports on grounds formulated in its response to the rule 35(12) notice as follows:

> "2 Ad paragraph 2
>
> 2.1. The Applicants dispute the relevance of the said reports. Further to the aforementioned these reports are submitted to the Registrar of Labour Relations who exercises oversight over the administration process.
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> 2.2. The reports so submitted are for the sole benefit of the Registrar of Labour Relations in exercising his statutory powers in respect of the Second Respondent.
>
> 2.3. The reports are therefore confidential and or privileged."

13. Paragraph 2.1 of the rule 35(12) response bears specific mentioning since it alerted SAMA to a challenge to the relevancy of the reports. As explained below, the other grounds of resistance fell by the wayside and the issue of relevance is the only issue remaining.

14. SAMA was not satisfied with the response and on 29 October 2020, SAMA's attorney of record, Mr Bloem, advised the Applicants' attorneys that:

> "We have been instructed to withhold service of our client's answering affidavit until such time as your client complies with the notice in terms of Rule 30A, by making available for inspection and permitting the production of copies of the reports requested in paragraph 2 of our client's notice in terms of rule 35(12).

15. On the same day, SAMA also gave notice in terms of rule 30A that it persisted in seeking discovery of the reports. In that notice, SAMA *inter alia* recorded that "*the reports supra is (sic) relevant to a reasonably anticipated issue in the winding-up*

application". While it is not required in terms of rule 35(12) for an issue to be "reasonably" anticipated (I deal with this further below), SAMA made the statement that the issue (singular) to which the reports would be relevant was one that was reasonably foreseeable.

16. The Applicants did not respond to the SAMA's rule 30A notice and SAMA thereafter applied to compel discovery of the reports as requested by it. This is the application before me.

THE PARTIES' MAIN CONTENTIONS

17. In the founding affidavit in the rule 30A application, deposed to by Mr Bloem, the statement is made that the failure to make discovery of the reports "*has severely prejudiced* [SAMA] *in that it is forced to litigate in the dark without having access to the reports which are referred to in the Applicants' founding affidavit*" and also alleges that as a result SAMA "*has been unable to deliver its answering papers in the absence of the remainder of the requested reports*".

18. Mr Bloem also states in his founding affidavit that the reports were being requested because they "*are relevant to reasonably anticipated issues in the main application and which documents the First Respondent (sic) requested for purposes of preparing a comprehensive answering affidavit in the main application.*" That is the only statement made by Mr Bloem in support of the question of relevance. It is, however, once again worth emphasising that Mr Bloem himself indicated that the anticipated issues are ones that may be "reasonably anticipated". As an attorney, he is no doubt appreciative of the substantive difference between categorising the issues as "reasonably anticipated" as opposed to issues that might arise.

19. Mr Bloem then proceeds to attack the Applicants' refusal to make discovery on the basis that the reports are confidential and / or privileged. The attack became moot when counsel for the Applicants indicated that the Applicants were not persisting with the contention that the documents are privileged, which is mentioned in paragraph 2.3 of the Applicants' response to the rule 35(12) notice. The Applicants persisted that the documents were confidential, but this was correctly not argued as a ground for resisting discovery on its own.[2]

20. In answer, the Administrator contended that the reports were only mentioned in passing and so as to simply highlight and confirm his duties as Administrator, but that he places no reliance on the reports. In the heads of argument filed on behalf of the Applicants, the submission was made that "*the Applicants do not rely on the "reports" submitted to the Registrar of Labour Relations, in fact reference is made to a process and the obligations of the Administrator*". If the intention of the submission is to suggest that the reference to the reports does not refer to actual documents, it cannot be correct. A verbal report is "made" and a documentary report is "submitted", which is also what is contemplated in paragraph 1.18 of the Terms of Reference. Any suggestion that the reference to "reports" is not to actual documents should therefore be discounted immediately.

21. The fact of the matter is, whether mentioned to in passing or not, the affidavit refers to the reports. In relevant part rule 35(12) provides:

> "(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice […] to any other party in whose […] affidavits reference is made to any

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2 Crown Cork & Seal Co Inc v Rheem SA (Pty) Ltd 1980 (3) SA 1093 (W)

> document […] to produce such document […] for his inspection and to permit him to make a copy or transcription thereof."

22. Reference is clearly made to the reports and notionally the provisions of rule 35(12) come into play. Mere reference is, however, not the only requirement to be met for discovery to take place under this rule. This is dealt with further below.

23. In addition, the fact that the Applicants do not rely on the reports is also not a bar to discovery under rule 35(12). The reports might not be relied on by the Applicants, but might be material in relation to the issues that might arise or to a defence that is available to SAMA.[3]

24. In his answering affidavit the Administrator also, again, put the relevance of the reports in question and advanced an argument that no case had been made out for the relief being sought.

25. The Administrator also stated the following regarding the content of the reports:

> "The reports have no bearing on the winding up application it can neither influence and or determine the outcome of the main dispute as it relates to my duties as Administrator. The reports clearly have no relevance to any "reasonably anticipated issue in the main application", it cannot assist the First Respondent in its defence, being the ultimate test in applications of the nature."

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[3] Democratic Alliance and Others v Mkhwebane and Another 2021 (3) SA 403 (SCA) at [34].

26. This denial of relevance under oath has significance. In Continental Ore Construction v Highveld Steel & Vanadium Corp Ltd [4]at 597E – F it was held:

> "… when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect. The affidavit denying relevance is generally taken as conclusive, and the Court will not reject it unless a probability is shown to exist that the deponent is either mistaken or false in his assertion."

27. Caution must by necessity apply to applying this principle at this stage of the present proceedings given that Continental Ore *supra* dealt with a situation that arose after pleadings had closed in an action. Different considerations are at play in the present context since the issues have not yet crystalised

28. In his replying affidavit Mr Bloem relies on the fact that SAMA is entitled to participate in the administration process and that the reports are public documents. Neither contention has any relevance for the present application since SAMA's remedy to compel its participation in the administration process lies elsewhere and the fact that the reports are public documents similarly gives it different mechanisms to obtain the reports if it so chooses, but it is not relevant to the present application, save that it could have been a counter to contentions regarding confidentiality.

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[4] Continental Ore Construction v Highveld Steel & Vanadium Corp Ltd 1971 (4) SA 589 (W) at 597E – F.

29. In reply, Mr Bloem also states that "*some of the trade union members will be members of the first respondent. It is however unclear how many members the trade union have, and these reports will give some indication of the membership of the trade union, and may well also give an indication as to why the Applicants have launched the winding up application*". I deal with this particular statement in greater detail below.

30. In paragraph 8 of the replying affidavit, Mr Bloem then states the following:

> "The initial perusal of the winding up application indicates that the winding up application is an abuse of process and stands to be dismissed. The reports may well validate that view."

31. Lastly, Mr Bloem states that unless and until SAMA has inspected the reports it will not be in a position to determine whether they have any bearing on the winding-up application or whether they may assist SAMA in its defence in the winding-up application. At face value these statements accord with Thring J's *dictum* in Unilever plc at 336H - I. SAMA's stance in this aspect can accordingly not be faulted, but, as the authorities make clear, it does not exonerate SAMA from dealing with the issue of relevance.

THE APPLICABLE LEGAL PRINCIPLES

32. In Democratic Alliance and Others v Mkhwebane and Another[5], Navsa ADP summarised the application of rule 35(12) and the role that relevance plays. It is worth repeating the relevant passage in full:

> "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."

33. Schreiner A said in R v Mathews[6] that relevancy is based upon a blend of logic and experience lying outside the law and referred to this as "*a practical or common sense approach*", to which the considerations of legally relevant or irrelevant are added. In Van den Berg v Cooper & Lybrandt Trust (Pty) Ltd[7] it was said that, ultimately, the concept of relevance is essentially a matter of common sense, having its foundation in the facts, circumstances and principles of each particular case.

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5 Democratic Alliance and Others v Mkhwebane and Another (1370/2019) [2021] ZASCA 18 (11 March 2021) at [41].

6 R v Mathews 1960 (1) SA 752 (A) ay 758A - B.

7 Van den Berg v Cooper & Lybrandt Trust (Pty) Ltd 2001 (2) SA 242 (SCA) at paragraph [26].

34. The test for relevance, accepted and applied by our courts[8], was laid down by Brett LJ in Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co[9] where it was held that:

> "It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

35. Logically, depending on the stage of the proceedings, determining whether documents are relevant can be done with more or less precision. The former situation would be when, for example, a document is referred to in a replying affidavit, at which stage the court has the benefit of a full set of affidavits before it. The latter would be when proceedings are still at an embryonic stage, such as the present. In the context of rule 35(12), Friedman J said in Gorfinkel v Gross, Hendler & Frank[10] at 774B – C that deciding where the line should be drawn between what is relevant and what is irrelevant is difficult.

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8 See *inter alia* Rellams (Pty) Ltd v James Brown & Hamer Ltd 1983 (1) SA 556 (N) at 564A, Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd 1971 (4) SA 589 (W) at 596H, Carpede v Choene NO and Another 1986 (3) SA 445 (O) at 452C—J and Swissborough Diamond Mines (Pty) Ltd v Govt of the RSA 1999 (2) SA 279 (T) at 317F – G.

9 Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55.

10 Gorfinkel v Gross, Hendler & Frank 1987 (3) SA 766 (C) at 774B – C.

36. By necessity drawing this proverbial line entails a judicial discretion. In Centre for Child Law v Hoërskool Fochville[11], Ponnan JA stated that 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. Ponnan JA further stated that:

> "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."

37. Navsa ADP approved of this approach in Democratic Alliance *supra* at [40], albeit when dealing with what Navsa DPA described as "*the question of onus in relation to an application to compel the production of documents in terms of rule 35(12)*". After approving of Ponnan JA's approach in Fochville *supra*, Navsa DPA goes on to state the following regarding how a court should approach exercising this discretion:

> "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

38. Of particular relevance to the present matter is the statement by Navsa DPA that, in the context of relevance, "*the basis for requiring the document, at the very least, has to be provided*". What is to be understood from the term "basis"? The answer

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[11] Centre for Child Law v Hoërskool Fochville 2016 (2) SA 121 (SCA) at [18].

to that lies in paragraph [41] of the Democratic Alliance (quoted in paragraph 32 above). This passage contemplates it is for the applicant seeking discovery to identify aspects or issues that might arise in the pleadings or affidavits; that the requesting party must identify 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.

39. The level of particularity that is required to provide this basis for the request is not one that can be cast in stone, but will depend upon the facts of the particular matter. To argue otherwise would be to undermine the discretion referred to by Ponnan JA in paragraph [18] of Fochville *supra.* Self-evidently, if a party refers to and places reliance on a document to advance its own case, then the document is obviously relevant. Laying the basis in such a situation ought to be a straightforward enough exercise.

40. The test at this stage of the proceedings is not what “will be” or “is” relevant, but rather what “might” be relevant. It is self-evidently a much lesser hurdle to overcome. In Ismail v R[12] the Supreme Court of the Transvaal were called upon to consider the word “might” as used in section 4(2) of the Immigrants Restriction Act (Act 2 of 1907) which read as follows:

> "Prohibited immigrant shall mean" (inter alios) "any person who at the date of his entering or attempt to enter this colony is subject, or would if he entered this colony be subject, to the provisions of any law in force at such date which might render him liable

[12] Ismail v R 1908 TS 1091.

> either at such date or thereafter, if found therein, to be removed from or to be ordered to leave this colony, whether on conviction of an offence against such law or for failure to comply with its provisions or otherwise in accordance with its provisions."

41. In interpreting the word “might” as used in the section, Innes CJ said the following at 1091 - 1092:

> “Now, in the ordinary sense, anything might happen which it is possible could happen. But I am clear that "might" cannot, in this connection, be taken, in its literal and widest sense, as meaning "might under any conceivable circumstances" render him liable to be removed from the colony; because that construction would lead to the most extraordinary results. […]
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> The only way to construe it so as to make the definition reasonably consistent is to read it as meaning "might, under circumstances then existing" --- "might, under circumstances existing at the date of entry.""

42. Applied to the present context it would mean that the documents requested (*in casu* the reports) need only be relevant to aspects, issues or possible grounds of opposition that could possibly arise, but it must be a possibility rooted in the circumstances of the matter at the time of the application, which would include affidavits filed of record, as well as any other information placed before the court considering the application.

43. In argument counsel for SAMA submitted that the law in regard to the role that relevance plays as a requirement for seeking discovery under rule 35(12) was only laid down in Democratic Alliance *supra*. That submission cannot be correct – the

role of relevance was already clearly stated in Fochville *supra* at [18][13] – a case to which no reference was made by SAMA in its heads of argument. SAMA therefore knew or ought to have known that it had to deal with the issue of relevance of the reports and a failure to do so cannot be excused on this basis.

THE NOTIONAL ISSUES IN THE WINDING-UP APPLICATION

44. The present matter concerns a winding-up application and these matters must be considered in that context.

45. In argument I put it to SAMA's counsel that the thrust of the request seems to be aimed at the just and equitable ground for winding-up. He agreed with me on this score, albeit that he did not concede that SAMA's alleged insolvency had no bearing whatsoever. It is therefore appropriate that I deal briefly with the aspect of SAMA's alleged indebtedness and the possible bearing that the reports may have on that.

46. In paragraph 7 of his replying affidavit in the rule 35(12) application Mr Bloem stated that:

> "Some of the trade union members will be members of the first respondent. It is however unclear how many members the trade union have, and these reports will give some indication of the membership of the trade union, and may well also give indication as to why the Applicants have launched the winding up application."

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[13] Centre for Child Law v Hoërskool Fochville 2016 (2) SA 121 (SCA) at [18]; see also: Potch Boudienste CC v Firstrand Bank Limited (23898/15) [2016] ZAGPPHC 335 (25 April 2016) at 21.

47. It is not clear whether Mr Bloem's statement is intended to go to the question of SAMA's alleged indebtedness or the just and equitable ground. In the heads of argument filed by SAMA's counsel, it was submitted that "*the reports may contain important information regarding the administration process which may include information regarding the assets and liabilities of the second applicant and the debt which it alleges is owed by the respondent.*" This submission is followed by the submission that the reports may therefore give an indication why the Applicants launched the main application and reference is made to paragraph 7 of Mr Bloem's replying statement. Mr Bloem does not couple his statement to SAMA's indebtedness, but rather to the reason why the Applicants launched the application. The submission accordingly does not accord with what Mr Bloem states in his replying affidavit.

48. SAMA's alleged indebtedness is dealt with in paragraphs 91 to 106 of the founding affidavit, to which I was not referred in argument. The alleged indebtedness of R12,283,317.33 is stated to be the bargaining council levies received by SAMA on behalf of SAMATU for the period 2009 until 2020. The make-up of the amount of R12,283,317.33 is stated to be:

48.1 Payments received from the Public Service Bargaining Council for the period of 1 April 2012 to 1 November 2018, amounts to R8,474,157.39;

48.2 Proof of contributions received as declared in the annual financial statements of SAMA for the period of 1 April 2009 to 31 March 2012, in the total amount of R1,140,483.00;

48.3 A calculation of the Agency fee levies for the period of 1 April 2005 to 31 March 2009, in the amount of R2,668,676.94 as calculated by actuaries appointed by the Administrator.

49. Each of the amounts making-up the R12,283,317.33 is supported by annexures attached to the founding affidavit.

50. Mr Bloem made no attempt to indicate what relationship, if any, the reports will have to the abovementioned allegations or to the annexures relied upon by the Applicants to support the amounts making-up the R12,283,317.33, nor was any such attempt made in argument before me.

51. The question of whether the reports may bear any relevance to the question of SAMA's alleged indebtedness is therefore stillborn. It comes as no surprise therefore that in argument I was only referred to the paragraphs in the founding affidavit that dealt with the just and equitable ground of winding-up.

52. In Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd[14] at 349I, Coetzee J stated that "*just and equitable' basis for winding up a company 'is rather a special ground under which only certain features of the way in which a company is being run or conducted can be questioned to the point of requesting the court to wind it up*". He then identified five categories, which were conveniently summarised in Wiseman v Ace Table Soccer (Pty) Ltd[15] as:

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[14] Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W) at 349I.

[15] Wiseman v Ace Table Soccer (Pty) Ltd 1991 (4) SA 171 (W) at 182D – E.

"1. The disappearance of the substratum of the company .

2. The illegality of its objects and fraud committed in connection therewith.

3. A deadlock in the management of the company's affairs.

4. Grounds analogous to the dissolution of partnership.

5. Oppression."

53. Although these categories do not constitute a complete and closed list, they do serve the purpose of useful practical guidelines.[16] I mention them because these grounds are notionally what relevance of a document has to be assessed against in the context of a just and equitable winding-up. It is not clear upon which of these grounds the Applicants rely. More pertinently for the present application, it is also not clear to me which of these grounds SAMA intends attacking since none were specifically identified by SAMA.

ANALYSIS

54. The founding affidavit in the rule 35(12) application only contains the conclusionary statement that the documents are relevant to "*reasonably anticipated issues in the main application*". The only statements that elucidate what is actually a conclusionary statement are the following:

54.1 That the reports may give an indication as to why the Applicants have launched the application;

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[16] Cuninghame v First Ready Dev 249 (Assoc Incorporated under Section 21) 2010 (5) SA 325 (SCA) at paragraph [14].

54.2 That the refusal to provide the reports "*is suspicious and may be an indication of collusion between the Applicants and the Registrar*"; and

54.3 That the discovery of the reports is in the interest of "justice and transparency".

I deal with each these propositions in turn.

55. In paragraph 64 of the founding affidavit, the Administrator makes the following statements:

> "64. SAMA has engaged in a campaign to persuade union members to cancel their union subscriptions (deducted via stop order on the PERSAL payroll system). This campaign persists despite the Labour Court order. As far as I have been able to ascertain from inquiries to the Department of Health, this has resulted in approximately 1440 union members cancelling their union subscriptions to date. I estimate that there are approximately 7500 doctors in total who have union subscription stop orders in place. If my information is correct, this means that to date, SAMA has managed to persuade approximately 19% of the total union membership to cancel their union subscriptions."

56. If the intention is to raise an issue about the number of union member referred to in paragraph 64 of the founding affidavit, the intention is evidently misplaced. The Administrator is not contending for these numbers as matters of fact – he states these numbers as estimations and the statement has no relevance to the Applicants' causes of action. How the reports can be of relevance in this regard is not clear.

57. In regard to Mr Bloem's statement that the reports may shed light on why the Applicants brought the winding-up application, the import of the statement is not clear. More particularly, why is this important and why would the reports be relevant to such a topic? Again, no detail was provided to place the court in a position to evaluate this statement. If it sought to obliquely make a suggestion in the direction of the so-called clean hands principle[17], that is not stated by Mr Bloem in his affidavits and it was also not argued before me by counsel for SAMA.

58. In regard to Mr Bloem's statement that the reports may validate the view that "*the winding up application is an abuse of process and stands to be dismissed*" the statement is clearly hitched to what Mr Bloem describes as an "*initial perusal*" of the founding affidavit. However, what the court is not told is in what respects a perusal of the founding affidavit indicates an abuse of process and in what respects the reports could even notionally contribute to supporting the abuses which Mr Bloem states he perceives in the founding affidavit. My earlier comment in regard to a possible suggestion in the direction of the clean hands principle also applies to this statement.

59. Mr Bloem states that the founding affidavit shows abuses of process and that the reports may validate this. In that context it is to be expected that Mr Bloem would state what these abuses are that he has identified and why, given the reporting obligations of the Administrator and the topics upon which he is expected to report,

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[17] Henochsberg on the Companies Act 2008, page 329; Thunder Cats Inv 92 (Pty) Ltd v Nkonjane Economic Prospecting & Inv (Pty) Ltd 2014 (5) SA 1 (SCA) at [27]; Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 (HL) at 374; [1972] 2 All ER 492 at 507.

the reports may be relevant to an argument that there is an abuse of process. None of these details were provide.

60. The relevance of the contention that the reports may show "*collusion between the Applicants and the Registrar*" is also not clear. For this loaded statement to be of any worth in the present context it would have been necessary for Mr Bloem to indicate why such collusion is suspected at this stage, why it is relevant to the present application and how reports by the Administrator to the Registrar might have a possible bearing on this topic. No such information was provided and none is readily apparent.

61. As to SAMA's the reliance on "justice and transparency" as a ground for compelling discovery, this was not argued before me and it is not clear what Mr Bloem intended by this. If it seeks to import considerations applicable under administrative law and reviews to the present proceedings, it is a misplaced endeavour. This contention should accordingly be ignored as a ground for compelling discovery.

62. As mentioned above, in argument counsel for SAMA referred me to a series of paragraphs in the founding affidavit which he submitted showed that the documents would have relevance. This was not raised in the affidavits filed in the rule 35(12), but I nonetheless deal with them.

63. It is alleged that the Administrator started engaging with SAMA immediately after his appointment and meetings with SAMA were held on 5, 16, 19 and 25 March 2020.

64. In an email dated 25 March 2020 (attached to the founding affidavit as Annexure "GV16") the statement is made that "*there is an agreed goodwill on both sides to reconcile on previous personal and business differences*".

65. It seems that shortly after this recordal relations soured and eventually led to urgent application under case number J1973/19 in the Labour Court on 13 May 2020 and the subsequent judgment of Van Niekerk J issued on 18 May 2020. In his judgment Van Niekerk J recorded the following facts:

> "[11] After the union was placed in administration, SAMA has continued to deduct what it refers to as monthly membership subscription payments. There were a number of meetings during March 2020 between SAMA and the administrator where SAMA avers that it was explained to him that there was no membership of the union and that the union had no structures. In SAMA's view, it remains the administrator's function to determine which of SAMA's members wish to be union members and it was for him to create the formal structures of the trade union and to see to the election of office bearers. After the meetings, the administrator insisted that the monthly membership payments of all employed doctors be paid over to him, in his representative capacity. SAMA avers that the administrator 'could not or would not understand that the monthly membership subscription payments were the subscription fee paid to SAMA by its members, whether they are in private practice or whether they are employed'.
>
> [12] The difference between the administrator and SAMA led ultimately to the communiqué issued by SAMA to its members in which it advised them of the problems experienced with the intended separation of SAMA and the union. It also informed employed doctors of the intention to migrate their debit orders from PERSAL to personal debit orders. It would appear that this communiqué

had the consequence of the letter of demand, addressed by the administrator to SAMA. In that demand, certain information in respect of the membership of the union was required. In the interim, the administrator approached the chief director: health sector bargaining, with a demand that the banking account for the payment of monthly membership subscriptions deducted from PERSAL be changed from SAMA to the union. On 20 April 2020, the chief director addressed a letter to the director: PERSAL with a request that the administrator's demand be executed. SAMA's attorneys addressed a letter to the director: PERSAL to demand that the instruction from the Department of Health be ignored. This demand was refused, and proceedings were instituted in the High Court to interdict and restrain the National Treasury from heeding to the Department of Health's instruction. That application has been set down for hearing the High Court on 19 May 2020.

[13] In short, SAMA takes the view that the union was always an integral part of its own organisation, and established solely for the purpose of providing services to those of its members who are employed, as opposed to those members in practice for their own account. The union never existed as a discreet legal entity, certainly since 2016 it has had no separate structures, and no separate list of union members was ever maintained, and in reality, there are no union members. The deductions effected through the PERSAL system are in respect of SAMA membership fees; they are not trade union membership subscriptions. On this basis, the information sought by the administrator is simply not in the position of SAMA, and there is no basis for the interlocutory and other relief sought by administrator."

66. Mr Bloem's affidavit does not suggest that these facts would be in issue, nor was I told from the bar that they would be placed in issue. On a plain reading of these

passages I also fail to see how they could in any way be contentious or give rise to aspects, issues or possible grounds of opposition that would need to be dealt with.

67. In paragraphs 52 to 62 of the founding affidavit, the Administrator relates the lead-up to the judgment of Van Niekerk J, as well as the subsequent litigious travails between the parties. These are all recordals of fact that are evident from the judgments of Van Niekerk J (both on 18 May 2020 and his subsequent refusal of leave to appeal on 25 June 2020) and Raulinga J (on 17 July 2020). I was not told which of these facts would be placed in issue, if any.

68. Paragraph 62 of the founding affidavit repeats paragraphs out of the judgments of Van Niekerk J. I fail to see how this recordal could conceivably raise any issues.

69. Paragraphs 64 to 67 of the founding affidavit deal with what the Administrator calls a "campaign to persuade union members to cancel their union subscriptions".

70. I have already dealt with paragraph 64 of the founding affidavit above. Paragraphs 65 and 66 of the founding affidavit deal with what the Administrator calls "*false and deliberately misleading messages*" from SAMA. The documents relied upon by him for his statement in paragraph 65 are referred to in the sub-paragraphs of paragraph 66 (later numbered erroneously as sub-paragraphs of paragraph 67) and attached to the founding affidavit. He states his opinion on what is to be gleaned from these documents. Paragraph 67 deals with conclusions that the Administrator seeks to draw from the communications referred to in paragraph 66. Again, this is his opinion on the documents attached to the founding affidavit. I fail to seek what possible aspects, issues or possible grounds of opposition might arise on these paragraphs to which the reports could have relevance.

71. Paragraph 68 of the founding affidavit relate the steps taken by him to normalise the SAMATU's affairs. In the context of the main application this is at best a neutral statement but more probably irrelevant to the main application. What possible issue might arise from this is not clear nor does SAMA seem to contend for any. The reports could accordingly not be relevant in this regard.

72. Paragraphs 70 to 74 of the founding affidavit all deal with submissions made by the Administrator based on the facts related by him in the paragraphs 52 to 66 of the founding affidavit. The reports could have no conceivable relevance to these submissions.

73. In paragraphs 75 to 83 of the founding affidavit and under the heading of "*It is just and equitable that SAMA be placed in winding up*", the Administrator advances a series of arguments, again all based on the facts related by him in the paragraphs 52 to 66 of the founding affidavit. Again, it is not clear how the reports could possibly relate to these arguments. They are either well-made or not. The reports cannot contribute to the debate on this score.

74. Paragraph 86 deals with submissions made in regard to extracts from SAMA's audited financial statements. The reports could have no conceivable relevance to the statements in this paragraph.

75. Paragraph 87 deals with SAMA's refusal "*to account for and or pay over to the Trade Union all funds received from SAMA for an on behalf of the Trade Union since its registration*". This does not seem to be in issue that SAMA is refusing to make payments. Again, how the reports could in any meaningful way contribute to a notional dispute of this statement is not clear.

76. Paragraphs 88 of the founding affidavit contains a submission that an investigation of the sums of money received by SAMA, in the form of subscription fees and bargaining council levies, is in the interest of SAMATU's members. This seems to be self-evident if the prior submissions based on the facts related by the Administrator in paragraphs 52 to 66 of the founding affidavit are correct.

77. Paragraph 90 of the founding affidavit is a submission regarding the interest that the Registrar of Labour relations has in the application. The reports can have no bearing whatsoever on this paragraph.

78. As is evident from the above analysis, the reports cannot be relevant to aspects, issues or possible grounds of opposition that might possibly arise.

79. The case made out by SAMA for discovery simply does not measure up to the standard in Democratic Alliance *supra*. The application accordingly falls to be dismissed.

80. The Applicants sought a punitive costs order against SAMA's legal representatives *de bonis propriis*. On the facts there is no basis for such a request.

81. The parties agreed that, depending on the outcome of the application, I should set time periods for the filing of the further affidavits in the matter. The order caters for this as well.

ORDER:

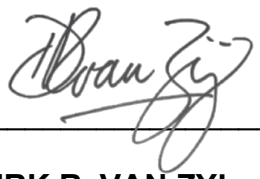
82. In the premises I make the following order:

82.1 The First Respondent's application for discovery in terms of rule 35(12) is dismissed.

82.2 The First Respondent is to pay the costs of the application on the scale as between party and party, including the costs consequent upon the use of two counsel.

82.3 The First Respondent is directed to file its answering affidavit within 10 court days from the handing down of this judgment.

82.4 The time periods for the filing of further process as provided for under the Uniform Rules of Court shall apply thereafter.



DIRK R. VAN ZYL

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant:	Adv G. Fourie SC
	Adv D. Groenewald
Instructed by:	Serfontein Viljoen & Swart
For the Respondent:	Adv T. P. Kruger SC

Adv F. Storm

Instructed by: Welman & Bloem Incorporated