REPUBLIC OF SOUTH AFRICA

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

CASE NO: 41235/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED : YES
23 MAY 2022

In the matter between:

MASANGE: KEBONE **(ID NO:[....])**	**APPLICANT**
AND	
MINISTER OF HOME AFFAIRS	**FIRST RESPONDENT**
DIRECTOR GENERAL: HOME AFFAIRS	**SECOND RESPONDENT**

In Re:

MASANGE: KEBONE **(ID NO:[....])**	**APPLICANT**
AND	

MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

DIRECTOR GENERAL: HOME AFFAIRS **SECOND RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 23 May 2022.

JUDGEMENT

NDLOKOVANE AJ

[1]. This is an opposed interlocutory application in terms of Uniform Rule 35(12) read with Rule 30A (2), wherein, the respondents are compelled to produce documents referred to by them in their answering affidavit in the main application.

The material background facts of this matter are to a large extent common cause and can be summarised as:

[2.] The applicant was arrested on 1 September 2020 by the respondents' Immigration Officer, allegedly after the immigration investigation revealed that the applicant was in possession of the South African citizenship through fraud and misrepresentation.[1]

[3.] On 2 September 2020, the applicant approached the high court on an urgent basis to obtain an interim order that he be released from detention pending the

[1] Para 8 of the Respondents' Answering Affidavit dated 27th August 2021; Para 7.3 of the Applicant's Founding Affidavit; Para 2.1 of the Applicant's Heads of Argument; and Paras 1, 11 & 14 of the Respondents' Heads of Argument.

adjudication of the lawfulness of his arrest and subsequent detention.[2] An interim interdict was granted by Van der Westhuizen J and a *rule nisi* issued against the respondents with the return date of 2 November 2020.[3]

[4.] The respondents' alleged that after the applicant was granted the interim interdict on 2 September 2020, they filed their answering affidavit on 30 October 2020 and that the matter was heard on 2 November 2020.[4] The respondents' further alleged that the matter was postponed and the *rule nisi* extended to 15 March 2021 by Mokoena AJ.[5]

[5.] The respondents alleged that the applicant was expected to file his replying affidavit and heads of argument in the main application so that the matter could be ripe for hearing on 15 March 2021.[6] However, the applicant did not file either the replying affidavit or the heads of argument.[7]

[6.] The applicant's contention is that in order to enable him to present a proper replying affidavit in the main application, he ought to be afforded an opportunity to inspect and/or challenge the documents upon which the respondents found him to be an illegal foreigner.[8]

[7.] On 16 April 2021, the applicant allegedly served the respondents with his notice in terms of Rule 35(12) and (14).[9] In terms of the aforesaid notice, the respondents were requested to produce certain documents as referred to in their

---

[2] Para 5.2 of the Applicant's Heads of Argument; Paras 2 & 16 of the Respondents' Heads of Argument; Para 5.1 of the Applicant's Replying Affidavit; and Para 9 of the Respondents' Answering Affidavit.
[3] Para 9 of the Respondents' Answering Affidavit; Para 5.2 of the Applicant's Heads of Argument; Para 16 of the Respondents' Heads of Argument.
[4] Para 16 of the Respondents' Heads of Argument; Para 6.1 of the Applicant's Heads of Argument; and Para 9.1 of the Applicant's Founding Affidavit.
[5] Para 16 of the Respondents' Heads of Argument.
[6] Para 17 of the Respondents' Heads of Argument; and Para 12 of the Respondents' Answering Affidavit
[7] Para 17 of the Respondents' Heads of Argument; and Para 2.5 of the Applicant's Heads of Argument
[8] Paras 2.6 & 2.7 of the Applicant's Heads of Argument
[9] Para 7.1 of the Applicant's Heads of Argument; Para 16 of the Respondents' Answering Affidavit and Para 21 of the Respondents' Heads of Argument.

answering affidavit as well as certain information within five (5) days of receipt of the notice.[10]

[8.] The applicant alleged that the respondents failed to produce the documents sought and that on 28 April 2021, he served a notice in terms of Rule 30A(1) on them.[11] The applicant alleged that the respondents were afforded ten (10) days to remedy their failure to comply with the Uniform Rules of Court, failing which the applicant would launch an application in terms of Rule30A(2).[12]

[9.] The applicant alleged that the respondents' *dies* to comply with the applicant's notice in terms of Rule 30A(1) expired on 12 May 2021.[13]

[10.] The applicant alleged that although on 20 May 2021, the respondents made available some of the documents for inspection, the documents made available for inspection are the documents which the respondents attached to their answering affidavits.[14]

[11.] The applicant further alleged that the production of the documents attached to the respondents' answering affidavit is incomplete, inadequate, and unsatisfactory for the purposes of Rule 35(12).[15]

[12.] The respondents on the other hand alleged that they furnished the applicant all the documents necessary to prove their case against him and that the applicant was further given an opportunity to inspect the documents at the respondents' offices.[16]

---

[10] Para 7.2 of the Applicant's Heads of Argument.
[11] Para 7.3 of the Applicant's Heads of Argument; and Para 21 of Respondents' Heads of Argument.
[12] Para 7.4 of the Applicant's Heads of Argument.
[13] Para 7.5 of the Applicant's Heads of Argument.
[14] Paras 7.6 & 7.7 of the Applicant's Heads of Argument; Para 21 of Respondents' Heads of Argument and Para 16 of the Respondents' Answering Affidavit.
[15] Para 7.8 of the Applicant's Heads of Argument.
[16] Paras 35.3, 42.3, 44.1, & 47.1 of the Respondents' Answering Affidavit.

[13.] The court is implored to determine whether the discovery procedure invoked in terms of the relief sought by the applicant is automatically applicable to application proceedings without a directive from the court.[17]

APPLICABLE LEGAL PRESCRIPTS

[14.] The applicable rules forming the subject matter of this application are *inter alia* premised on Rule 35(12), (13) and (14) of the Uniform Rules of Court. The applicant approached the court in terms of Rule 30A(2) of the Uniform Rules of Court to compel discovery.

[15.] Rule 35(12) provides that:

> "*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 court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."*
> [Emphasis added]

[16.] In *Erasmus v Slomowitz (2)*[18], it was held that Rule 35(12) authorises the production of documents which are referred to in general terms in a party's pleadings or affidavits and further that the terms of the sub-rule do not require a detailed or descriptive reference to such documents.

[17.] In *Protea Assurance Co Ltd v Waverley Agencies CC*[19], the court held that the entitlement to see a document or tape recording arises as soon as reference is made thereto in a pleading or affidavit and that a party cannot ordinarily be told to

---

[17] Para 4.2 of the Respondents' Heads of Argument.
[18] 1938 TPD 242 at 244.
[19] 1994 (3) SA 247 (C) at 249B.

draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleadings or affidavits.

[18.] In *Unilever v Polagric (Pty) Ltd*[20], it was held that the rights under the sub-rule may be exercised before the respondent or defendant has disclosed his defence or even before knowing what his defence, if any, is going to be. Further that he is entitled to have the documents or recordings produced for the specific purpose of considering his position.

[19.] In *Protea Assurance Co Ltd v Waverley Agencies CC*[21], the court further held that Rule 35(12) plainly entitles a litigant to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely.

[20.] In *Gorfinkel v Gross, Hendler & Frank*[22], the court 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 when called upon to do so in terms of Rule 35(12).

[21.] In *Democratic Alliance v Mkhwebane*[23], the Supreme Court of Appeal held 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 possession of that party, must be produced.

[22.] Rule 35(13) provides that the provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications.

[23.] It would appear that the application of Rule 35(12) can only be triggered by prior application to court in terms of Rule 35(13).

---

[20] 2001 (2) SA 329 (C) at 336G-J.
[21] 1994 (3) SA 247 (C) at 249B-D.
[22] 1987 (3) SA 766 (C) at 774G.
[23] [2021] ZASCA 18; [2021] JOL 49889 (SCA) 41.

[24.] In *Loretz v MacKenzie*[24], the court held that the starting point in the enquiry as to the application of Rule 35(13) is that there is no discovery in applications and that it is only possible for discovery to apply in applications if, in terms of Rule 35(13), a court has been approached to make the rules relating to discovery, or some of them, applicable and makes an order to that effect.

[25.] Rule 35(14) provides that:

> "After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made."

[26.] In *Investec Bank Ltd v Blumenthal and others*[25], Sutherland J stated that:

> "There is therefore no room for applications to be brought at the same time under Rule 35(13) for leave to procure discovery and to compel a reply to a Rule 35(14) request. Accordingly, this application is premature and for that reason fatally irregular. Consequently, the respondents were perfectly entitled to ignore the demand and to oppose this application."

[27.] In *Investec Bank Ltd v Blumenthal and others*[26], Sutherland J further held that in application proceedings the court's specific authorisation is required before a demand can be made under Rule 35(14).

[28.] Rule 30A provides that:

> "(1) *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*

[24] 1999 (2) SA 72 (T) at 75B-C.
[25] 2012 ZAGPJHC (05 March 2012) para 7-9.
[26] 2012 ZAGPJHC (05 March 2012) para 7-9.

that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

[29.] The applicant indicated in his founding affidavit that his application is in terms of Rule 35(13) read with Rule 30A(2) of the Uniform Rules of Court to compel the respondents to comply with his notice in terms of Rule 35(12) and (14).[27]

[30.] This rule is a general rule to remedy non-compliance with rules where no other remedy exists as set out in Absa Bank v The Farm Klippan 490 CC 2000(2) SA 211, Epstein AJ found at 214 I-J:

"Rule 30A has an important place in the rules, in that, as I stated, it provides a remendy where none exist elsewhere. However, it could not have been intended by the drafter of rule 30A to jettison the existing and effective remedies provided in the specific remedy rules. If it was so intended, it would render such remedies negatory. The remedies in the specific rules have always been effective and there is no reason to denude them of their efficacy".

[31.] It is common cause that the applicant served the respondents with a notice in terms of Rule 35(12) and (14) on 16 April 2021 requesting the respondents to produce certain documents referred to in their answering affidavit as well as certain information within five (5) days of receipt of the notice.[28]

[32.] The respondents did not respond to the notices.[29] The applicant served the respondents with a notice in terms of Rule 30A(1) on 28 April 2021, in terms of which

---

[27] Para 3.1 of the Applicant's Founding Affidavit.
[28] Para 7.1 of the Applicant's Heads of Argument; and Para 21 of the Respondents' Heads of Argument.
[29] Para 21 of the Respondents' Heads of Argument; Para 16 of the Respondents' Answering Affidavit and Para 7.3 of the Applicant's Heads of Argument.

they were afforded ten (10) days to remedy the failure to comply with the Rules of Court, failing which the applicant would launch an application in terms of Rule 30A(2).[30]

[33.] On 20 May 2021, the respondents made available documents requested by the applicant in his notice for inspection.[31]

[34.] The applicant has not filed his replying affidavit in the main application.[32]

[35.] The applicant has been charged with fraud and the contravention of certain section of the Immigration Act 13 of 2002.[33]

[36.] It is disputed that in the main, the applicant contended that he is a lawful South African Citizen.[34] The respondents on the other hand alleged that the applicant was granted South African Citizenship as a result of a misrepresentation which he made to the officials of the Department of Home Affairs, and that he is an illegal foreigner and a prohibited person from the Republic of South Africa.[35]

[37.] The above mentioned issue is the subject of the main application. This court is not called upon to make a determination in this regard.

[38.] Whereas the applicant acknowledged that the respondents made available some documents requested by him in his notice for inspection, he alleged that the documents which were made available for inspection are the documents which the respondents attached to their answering affidavit.[36]

---

[30] Paras 7.3 & 7.4 of the Applicant's Heads of Argument; Para 21 of the Respondents' Heads of Argument; and Para 16 of the Respondents' Answering Affidavit.
[31] Para 7.6 of the Applicant's Heads of Argument; Para 21 of the Respondents' Heads of Argument.
[32] Para 24 of the Respondents' Heads of Argument; Para 15 of the Respondents' Answering Affidavit.
[33] Para 2.2 of the Applicant's Heads of Argument; Paras 1 & 11 of the Respondents' Heads of Argument; Para 4.1 of the Applicant's Heads of Argument.
[34] Para 5 of the Applicant's Heads of Argument; Paras 8.3 & 8.4 of the Applicant's Heads of Argument.
[35] Para 9.2 of the Applicant's Founding Affidavit; Paras 7 & 8 of the Respondents' Answering Affidavit
[36] Para 7.7 of the Applicant's Heads of Argument.

[39.] The applicant further alleged that the production of the documents attached to the respondents' answering affidavit is incomplete, inadequate, and unsatisfactory for the purposes of Rule 35(12).[37]

[40.] The respondents on the other hand alleged that they have responded adequately to the applicant's request even though they had no obligation to do so and have provided the applicant with more documents to enable him to establish his defence.[38]

[41.] It is noteworthy that the applicant in his notice, he requested the respondents to produce:[39]

> *"Copies of the full applications for South African identity document/s or status made by the applicant on 'no less than three occasions', together with* ***all supporting documentation attached to such applications****."*
> [Emphasis added]

[42.] The respondents contend that the applicant is not able to specify which supporting documents he is seeking the respondents to discover or for the respondents to respond adequately or to enable the court to grant an enforceable order.[40]

[43.] To my mind on proper construction, the applicant's notice seems to request under the rubric "***all supporting documentation attached to such applications***", those documents which were submitted with the applications for South African identity document/s or status made by the applicant on 'no less than three occasions.

[44.] Contrary to the respondents' assertion, to my mind there does not seem to be any ambiguity on the applicant's request in his notice.

---

[37] Para 7.8 of the Applicant's Heads of Argument.
[38] Para 5.3 of the Respondents' Heads of Argument.
[39] Para 9.2 of the Applicant's Heads of Argument.
[40] Para 5.2 of the Respondents' Heads of Argument.

[45.] I therefore tend to disagree with the respondents' assertion that the applicant is already in possession of the documents that he wants the respondents to discover.[41]

[46.] In the circumstances I tend to agree with the applicant that when faced with allegations of fraud and that he is an illegal immigrant, the applicant ought to be afforded an opportunity to inspect and/or challenge the documents upon which the respondents found the applicant to be an illegal foreigner.[42]

[47.] The respondents alleged that the applicant's interlocutory application is a delaying tactic to delay the adjudication of the main application.[43]

[48.] The applicant on the other hand denied that his interlocutory application is a delaying tactic and asserted that it was as long as 15 April 2021 that the respondents were first called upon to produce the documents.[44] Further that the demand was reiterated on 6 May 2021.

[49.] It is worth reiterating that on 20 May 2021, the respondents made available documents requested by the applicant in his notice for inspection.[45]

[50.] It is clear from the evidence traversed that the respondents responded to the applicant's notice only after being served with a notice in terms of Rule 30A(1).

[51.] Both the applicant and the respondents sought to lay the blame at each other for the delay in the hearing of the main application.[46]

[52.] In my view nothing turns on the counter allegations of delaying tactics by both parties for the purpose of the determination of the gist of the interlocutory application.

---

[41] Para 5.4 of the Respondents' Heads of Argument.
[42] Para 2.6 of the Applicant's Heads of Argument.
[43] Para 6.1.1 of the Applicant's Heads of Argument; Para 5.6 of the Respondents' Heads of Argument.
[44] Para 24.5 of the Applicant's Heads of Argument.
[45] Para 7.6 of the Applicant's Heads of Argument; Para 21 of the Respondents' Heads of Argument.
[46] Para 23.3 of the Applicant's Heads of Argument; Paras 15-24 of the Respondents' Heads of Argument; Paras 5.1 – 7.5 of the Applicant's Replying Affidavit.

[53.] The respondents further contended that they do not have to produce the documents sought for the following reasons:[47]

> 53.1 the applicant had an opportunity to inspect the documents;[48]
>
> 53.2 the documents which the applicant seeks the respondents to produce is the same documents which are attached to their answering affidavit;[49]
>
> 53.3 as a result of the documents which are attached to the answering affidavit, the applicant is therefore in possession of the documents which he seeks;[50] and
>
> 53.4 the applicant has failed to clearly and with sufficient particularity state the documents that he seeks.[51]

[54.] The respondents made the following allegation against the applicant, which triggered the applicant to request the supporting documents in that regard:[52]

> "7. An investigation into the immigration status of the applicant has revealed that the applicant **has made application[s] for a South African identity document/s or status on no less than 3 (three) occasions** and in all those occasions, the applicant has submitted details of **3 (three) different people whom he claim to be his mother(s).** And in the process, he has claimed to have been born in 4 (four) different places, that is, Zimbabwe, Johannesburg, Pietermaritzburg and Brits."
> [Emphasis added]

[55.] The applicant alleged that respondents responded as follows to his request for the documents:[53]

---

[47] Para 4.1 of the Applicant's Replying Affidavit; Para 6.1.2 of the Applicant's Heads of Argument.
[48] Para 4.1.1 of the Applicant's Replying Affidavit; Para 6.1.2.1 of the Applicant's Heads of Argument.
[49] Para 4.1.2 of the Applicant's Replying Affidavit; Para 6.1.2.2 of the Applicant's Heads of Argument.
[50] Para 4.1.3 of the Applicant's Replying Affidavit; Para 6.1.2.3 of the Applicant's Heads of Argument.
[51] Para 4.1.4 of the Applicant's Replying Affidavit; Para 6.1.2.5 of the Applicant's Heads of Argument.
[52] Para 7 of the Respondents' Answering Affidavit.
[53] Para 9.3 of the Applicant's Heads of Argument.

"1. Copies of full application for South African identity document/s or status made by the applicant on no less than 3 (three) occasions together with all supporting documentation attached to such application copies of those applications for ID's and status are attached to the application as follows:

1.1 Annexure 'HA2' – application for exemption;
1.2 Applications for temporary residence permit/change condition or purpose/renewal of existing permit;
1.3 Annexure 'HA4' – application for late registration of birth;
1.4 Annexure 'HA5' and copies of acknowledgement of applicant's application for 3 (three) ID's;
1.5 Annexure 'HA6' – late registration of birth;
1.6 Late registration of birth affidavit;
1.7 Annexure 'HA11' – application for certificate of naturalisation for the applicant's then wife Buhlenkosi Claret Masange;
…
4. There is no proper reason to request the abovementioned documents except as an abuse of the Court process."

[56.] The applicant was adamant the supporting documentation is respect of all the alleged applications for South African citizenship were not attached to the respondents' answering affidavit.[54]

[57.] The applicant queried "HA1" and "HA4" on the basis that on "HA1" reference is made to "*traveller's particulars*" and a "*traveller's record system*" wherein is indicated that on 11 May 1997 the applicant left the Republic of South Africa and only returned on 29 November 1997, whereas "HA4" which is a notice of birth, it appears that the applicant signed the document on 5 July 1997.[55]

[58.] The applicant contended that this means the applicant was not present in the Republic of South Africa when the alleged notice of birth was completed.

---

[54] Para 10.3 of the Applicant's Heads of Argument.
[55] Paras 11.1 & 11.2 of the Applicant's Heads of Argument.

[59.] The applicant contended that there is no indication what the documents are in "HA5" – copies of acknowledgement of the applicant's applications for the three identity documents.[56] The applicant submitted that it can no doubt be expected from him to concede that annexure "HA5" are copies of the acknowledgement of his application(s) for three different identity documents. He further submitted that there is no indication that except for the fingerprints (the authenticity of which is disputed), he acknowledged receipt of three identity documents.

[60.] The applicant further challenged "HA6" on the basis that the respondents alleged that it is a late registration of birth document, however, it is a Notice of Birth Form allegedly completed by him on 3 December 2013.[57] The applicant contended that from a perusal of annexure "HA6", it is apparent that no supporting documents have been submitted with the alleged application for the late registration of birth.

[61.] The applicant further contended that the late registration of birth affidavit allegedly deposed to by him is incorrectly deposed to and out of context and that his mother could not have been born on 16 July 1969 in Pietermaritzburg.[58]

[62.] The applicant challenged "HA11" on the basis that it is application for certificate of naturalisation for his then wife Buhlenkosi Claret Masange and therefore it can never be regarded as an application made by him for a South African identity document or status.[59]

[63.] The applicant contended that in his notice he requested copies of the three different identity documents allegedly issued to him by the officials of the Department of Home Affairs but the respondents failed to provide him with such.[60]

[64.] The applicant alleged that the respondents responded as follows:[61]

---

[56] Para 12.1.1 of the Applicant's Heads of argument.
[57] Paras 12.2 & 12.2.1 of the Applicant's Heads of Argument.
[58] Paras 12.2.2 & 12.2.3 of the Applicant's Heads of Argument.
[59] Paras 13.1 & 13.1.1 of the Applicant's Heads of Argument.
[60] Para 14 of the Applicant's Heads of Argument.
[61] Para 14.2 of the Applicant's Heads of Argument.

"Copies of three identity documents issued to the applicant by the officials of the respondent;

6.1 Annexure 'HA7' is a copy of the applicant's latest smart identity document.

6.2 Annexure 'HA8' is the applicant's acknowledgement of three identity documents – this is where the applicant renounces the two other identity documents.

6.3 Annexure 'HA5' – it's an acknowledgement of receipt of three different applications for an ID by the applicant."

[65.] The applicant contended that he did not accept all the identity documents issued to him by officials of the respondents as those identity documents reflected incorrect information.[62]

[66.] The respondents' on the other hand contended that the applicant stated in the sworn statement of 1 September 2020 that he is in possession of the identity documents.[63]

[67.] I am constrained to make a determination in this regard as I do not have access to the applicant's sworn statement of 1 September 2020.

[68.] Nonetheless I am of the view that the respondents should be able to produce copies of those identity documents in order to enable the applicant to respond to the allegations of fraud and misrepresentation.

[69.] The applicant further challenged "HA3" – exemption application of Mario Celso Rangel Nduli on the basis that it reflects the same exemption application no: 2397/96

[62] Para 15.2 of the Applicant's Heads of Argument.
[63] Para 28 of the Respondents' Heads of Argument.

PAP(P) SADC Bundle: 98/30385 as “HA2” which is a certificate of exemption containing the applicant’s particulars as the exempted person.[64]

[70.] I am of the view that on that basis alone, the applicant is entitled to peruse “HA3”. It is not enough for the respondents to allege that the annexure was inadvertently attached to its papers if it bears the same exemption application number with the applicant’s alleged certificate of exemption.

[71.] Finally the applicant challenged “HA5” on the basis that the respondents alleged that it is acknowledgement of receipts which he allegedly signed and which reflect that he indeed took possession and /or accepted three different identity documents issued to him by officials at the Department of Home Affairs.[65]

[72.] The applicant contended that “HA5” does not comprise acknowledgements of receipts of identity documents but rather incomplete and unidentified forms.[66]

[73.] I am of the view that the respondents should be in a position to unequivocally prove that the applicant signed for the three different identity documents. The respondents should be in a position to produce a document signed by the applicant in that regard.

[74.] Ordinarily Rule 35(12) of the Uniform Rules of the Court entitles the applicant to be provided with the documents/information he requires for the main application. In *Protea Assurance Co Ltd v Waverley Agencies CC*[67], the court held that the entitlement to see a document arises as soon as reference is made thereto in a pleading or affidavit and that a party cannot ordinarily be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary’s pleadings or affidavits.

---

[64] Para 16.1 & 16.2 of the Applicant’s Heads of Argument.
[65] Para 17.1 of the Applicant’s Heads of Argument.
[66] Para 17.4.1 of the Applicant’s Heads of Argument.
[67] 1994 (3) SA 247 (C) at 249B.

[75.] Contrary to the respondents' assertion that the applicant failed to clearly and with sufficient particularity state the documents that he seeks, in *Erasmus v Slomowitz (2)*[68], it was held that Rule 35(12) authorises the production of documents which are referred to in general terms in a party's pleadings or affidavits and further that the terms of the sub-rule do not require a detailed or descriptive reference to such documents.

[76.] It is clear from the evidence that the respondents did not provide the applicant with all the supporting documents he requested. In *Protea Assurance Co Ltd v Waverley Agencies CC*[69], the court further held that Rule 35(12) plainly entitles a litigant to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely.

[77.] It therefore follows that the respondents are obliged to provide the applicant with the all the supporting documents which form the basis of their finding that the applicant misrepresented the facts in obtaining South African Citizenship.

[78.] The respondents seem to suggest that the applicant did not make a proper case for the applicability of the discovery procedure at this stage of the application and under the circumstances.[70] In *Unilever v Polagric (Pty) Ltd*[71], it was held that the rights under the sub-rule may be exercised before the respondent or defendant has disclosed his defence or even before knowing what his defence, if any, is going to be. Further that he is entitled to have the documents or recordings produced for the specific purpose of considering his position.

[79.] In *Gorfinkel v Gross, Hendler & Frank*[72], the court 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 when called upon to do so in terms of Rule 35(12).

---

[68] 1938 TPD 242 at 244.
[69] 1994 (3) SA 247 (C) at 249B-D.
[70] Para 4.1 the Respondents' Heads of Argument.
[71] 2001 (2) SA 329 (C) at 336G-J.
[72] 1987 (3) SA 766 (C) at 774G.

[80.] In *Democratic Alliance v Mkhwebane*[73], the Supreme Court of Appeal held 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 possession of that party, must be produced.

[81.] However, Rule 35(13) provides that the provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications.

[82.] It is inescapable that the application of Rule 35(12) can only be triggered by prior application to court in terms of Rule 35(13).

[83.] In *Loretz v MacKenzie*[74], the court held that the starting point in the enquiry as to the application of Rule 35(13) is that there is no discovery in applications and that it is only possible for discovery to apply in applications if, in terms of Rule 35(13), a court has been approached to make the rules relating to discovery, or some of them, applicable and makes an order to that effect.

[84.] It is noteworthy that in the circumstances of this case, the applicant did not approach the court to have the rules relating to discovery to apply to its application, prior to launching the interlocutory application to compel the production of the documents he requires.

[85.] It would also appear that it is irregular for the applicant to bring the applications at the same time in terms of Rule 35(13) and Rule 30A(2) to compel the respondents to comply with his notice in terms of Rule 35(12) and (14).[75]

[86.] In *Investec Bank Ltd v Blumenthal and others*[76], Sutherland J stated that:

> "There is therefore no room for applications to be brought at the same time under Rule 35(13) for leave to procure discovery and to compel a reply to a

[73] [2021] ZASCA 18; [2021] JOL 49889 (SCA) 41.
[74] 1999 (2) SA 72 (T) at 75B-C.
[75] Para 3.1 of the Applicant's Founding Affidavit.
[76] 2012 ZAGPJHC (05 March 2012) para 7-9.

Rule 35(14) request. Accordingly, this application is premature and for that reason fatally irregular. Consequently, the respondents were perfectly entitled to ignore the demand and to oppose this application."

[87.] In *Investec Bank Ltd v Blumenthal and others*[77], Sutherland J further held that in application proceedings the court's specific authorisation is required before a demand can be made under Rule 35(14).

[88.] In the circumstances the applicant was obliged to first approach the court in terms of Rule 35(13), failing the respondents to produce the documents as requested in terms of Rule 35(12) then approach the court in terms of Rule 30A(2).This is evident that rule 30A(2) was pre-maturely invoked by the applicant when another remedy existed at its disposal as set out in the Absa Bank apex court decision as stated above.

[89.] Whereas the applicant is entitled to the documents sought in terms of Rule 35(12), he failed to approach the court first in terms of Rule 35(13) to make the rule relating to discovery applicable to his main application.

[90.] In the circumstances the applicant failed to make out a case for the relief sought and therefore his interlocutory applications stands to be dismissed.

COSTS

[91.] Since both the applicant and respondent are partly successful *in casu,* for that reason, I make no order as to costs.

ORDER

[92.] In the result, I make the following order:

92.1. Interlocutory application is dismissed.

---

[77] 2012 ZAGPJHC (05 March 2012) para 7-9.

NDLOKOVANE N
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the Applicant	: ADV. GROENEWALD
Counsel for the Respondent	: ADV. M. MOJAPELO & ADV. F. THEMA
Date of Hearing	:15 FEBRUARY 2022
Date of Judgment	: 23 MAY 2022

Judgment transmitted electronically