

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 2854/2020

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

In the matter between:

TSHEHLA TSHUPAJA MORAKALADI

FIRST APPLICANT

PETA MORGAN

SECOND APPLICANT

MTD 8 GROUP (PTY) LTD

THIRD APPLICANT

MINISTER OF POLICE

FOURTH APPLICANT

And

BAKONE BA MASHA MAKOPOLE COMMUNAL

PROPERTY ASSOCIATION

FIRST RESPONDENT

MASHA MAKILOPE TRIBAL AUTHORITY

SECOND RESPONDENT

KGOSHI MASHA LEGWAI ARON

THIRD RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The respondents are the applicants in the main application, whilst the applicants are the respondents in the main application. In the main application, the respondents have instituted an interdict application against the applicants. On 6th August 2020 the applicants served and filed their notice to oppose the

applicants main application. On 11th August 2020 the applicants served and filed their Rule 35(12) notice on the respondents seeking certain specified documents to enable them to prepare their answering affidavit. On 21st August 2020 the respondents' served and filed their reply to the applicants' Rule 35(12) notice.

[2] On 24th August 2020 the applicants' attorneys wrote a letter to the respondents' attorneys notifying them to reconsider their refusal to discover certain documents failing which they will launch an application to compel in terms of Rule 30A. On 27th August 2020 the applicants served the respondents with their Rule 30A notice. On 28th August 2020 the applicants served and filed their answering affidavit together with a counter application to the respondents application. On 16th September 2020 the respondents served and filed their replying affidavit.

[3] On 19th October 2020 the applicants launched their notice to compel application seeking orders that the respondents be compelled to file their reply to the applicants Rule 35(12) notices; that in the event the respondents fail to file their reply to the applicants' Rule 35(12) notices, the applicants be allowed to approach the court on supplemented papers for an order striking out the respondents main application; and that should the applicants succeed with an order compelling the respondents to discover, the applicants be given leave to file a supplementary affidavit. In the founding affidavit for the notice to compel, the applicants have stated that when they served the respondents with their Rule 35(12) notices, they deemed the requested documents necessary to prepare their answering affidavit. However, in their conclusion the applicants have stated that they are seeking the documents requested as per their Rule

35(12) to prepare their case in the main application. The documents that the applicants have requested the respondents to discover are the Deeds Registry records; notices, minutes and resolutions of annual and general meetings of the first respondent; a complete constitution of the first respondent; and list of beneficiaries of the first respondent.

- [4] The respondents are opposing the applicants' application. The respondents in their answering affidavit have submitted that what the applicants are seeking, it appears that they are calling upon this court to re-open the land claim, dissolve the CPA and to install the applicants as the leadership of the CPA. It is the respondents' contention that they have furnished the applicants with all documents relevant for the determination of the main application, and that the documents that the applicants are now seeking are irrelevant.
- [5] The applicants have argued that the wording of Rule 35(12) does not expressly note requirements that must be satisfied for the documents required in terms of this rule to be discoverable, however, the wording of Rule 35(12) only suggests that the documents as required in terms of the rule must have been referred to in the founding papers of the respondents. The respondents have submitted that whereas the purpose of discovery and inspection is to limit issues between the parties, the relevance and privilege remain the key consideration for discovery. The respondents have further submitted that the applicants have filed their answering affidavit and thus the horse had bolted. The respondents further submitted that Rule 35(12) may be used in cases where the horse has not yet bolted.
- [6] Rule 35(12) read as follows:

“Any party to any proceedings 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 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 documents or tape recording.”

[7] In *Penta Communication Services (Pty) LTD v King and Another*¹ Bozalek J said:

“The question of how the provisions of Rule 35(12) are to be applied was considered in *Gorfinkel* (supra), where Friedman J (as he then was) found that the Rule should be interpreted as providing for a prima facie obligation on a party who refers to a document in a pleading or an 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, or the document is privileged or is irrelevant, the Court will not compel him to produce such document. It was further held that since it would not necessary be within the knowledge of the person serving the notice whether the document is one which falls within the limitations mentioned, the onus would be on the recipient of the notice to set up the facts relieving him of the obligation to produce the document.”

[8] Rule 35(12) applies to both applications and action proceedings. Any party to any proceedings is entitled to use this rule any time before the hearing of the matter. The applicants in the case at hand has delivered their Rule 35(12) notices immediately after filing their notice to oppose. When the applicants delivered their Rule 35(12) notices, they wanted the respondents to discover the specified documents to enable them to prepare their answering affidavit. However, the applicants have delivered their answering affidavit before the respondents could adequately reply to their Rule 35(12) notices. The

¹ 2007 (3) SA 471 (C) at 479G-I

applicants' application to compel was filed after they have filed their answering affidavit and the respondents have also filed their replying affidavit. Under normal circumstances pleadings are closed and the matter is ripe to be heard.

[9] The first question which this court must determine is whether the applicants' application to compel has still some relevancy or is moot since they were able to formulate their defence without the required documents and have also filed a proper answering affidavit. Rule 35(12) does not suspend the time period within which the applicants were required to file their answering affidavit. (See *Potpale Investment (Pty) Ltd v Mkize*²). When the time period within which to file an answering affidavit is about to expire, the affected party had an election to file an answering affidavit with the little facts he/she might be having, or to launch the application to compel. However, even if he/she launches an application to compel, that does not bar the other party from proceeding to obtain a default order on unopposed basis.

[10] A party who had filed an answering affidavit before the other party adequately replied to its Rule 35(12) is not bared from pursuing his/her Rule 35(12) notice by compelling the other party to discover the specified documents, and thereafter apply to court to file a supplementary affidavit should he/she find a need to supplement on receipt of the required documents. That is the route that the applicants have followed in the case at hand and there is nothing wrong with that procedure.

[11] Rule 35(12) may be used to authorize production of documents referred to in the founding affidavit or answering affidavit. Generally a party who made

² 2016 (5) SA 96 (KZP) at para 23

reference to documents in his/her founding affidavit or answering affidavit is obliged to discover them when called upon to do so. As held in *Penta Communication Services* case, above, the limitation to the obligation to discover are if the document is not in his/her possession and he/she cannot discover it, the document is privileged or irrelevant.

[12] The respondents in their answering affidavit have stated that the grounds upon which they are opposing the applicants' application is that it is clear that the applicants miscomprehended the respondents' case against them, and further that it ought to be clear that if the applicants are mistaken about the gravamen of the application, they ought to be mistaken about the evidence required to resolve the issues. The respondents concluded their answering affidavit by stating that they have furnished all documents relevant for the determination of the dispute in the main application and that documents required by the applicants are irrelevant.

[13] In *Centre for Child Law v Hoerskoel Fochville*³ Ponnann JA said:

"In general terms, the rules exist to regulate the practice and procedure of courts. Their object is to secure the "inexpensive and expeditious completion of litigation before the courts" and they are not an end in and of themselves. Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules."

[12] The applicants in their founding affidavit have stated that they have filed their Rule 35(12) notice requesting certain documents which they deem necessary to prepare their answering affidavit. The respondents in answering to this submission by the applicants have stated that the applicants have filed an answering affidavit which is comprehensive and voluminous, and that the issue

³ 2016 (2) SA 121 (SCA) at para 17

in their main application for interdict is the entitlement of the respondents to issue residential and business sites on the farm. It is not for the respondents to determine to the applicants whether their answering affidavit is comprehensive. The applicants are the ones who are going to argue their case and they cannot be dictated how to prepare for their case and which document to use in advancing their defence.

[13] What the respondents were supposed to show the court in justifying their refusal to discover was to show that the required documents were not in their possession, or that they are irrelevant or privileged. The only reason that was furnished by the respondents is that the documents as requested by the applicants are irrelevant. By merely stating that the documents required are irrelevant is not sufficient. Strong grounds substantiating that must be advanced, of which the respondents have failed to do. Under the circumstances, the applicants are entitled to the documents they are requesting. However, at this stage it is premature to deal with prayer 3 of the applicants' notice of motion wherein they are seeking an order granting them leave to file a supplementary affidavit. The applicants in their papers have also not made out a case for such an order. After receipt of the specified documents, should they find a need to supplement their papers, they will bring a proper application for that.

[14] In the result I make the following order

14.1 The respondents are ordered to file their reply to the applicants' notices in terms of Rule 35(12) of the Uniform Rules of Court within 10 days of date of this order.

14.2 In the event that the respondents should fail to file their reply to the notices as envisaged herein, the first and second applicants are allowed to approach this Court on supplemented papers for an order striking out the respondents main application.

14.3 The respondents to pay the costs of this application on party and party scale

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the applicants	: Masipa N
Instructed by	: Mphahlele & Makhumbila attorneys
Counsel for the respondents	: Adv Monene
Instructed by	: MT Ramabala attorneys
Date heard	: 15th September 2021
Electronically delivered on	: 4th October 2021