REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 6580 / 2006

In the matter between:

PENTA COMMUNICATION SERVICES (PTY) LTD Applicant

and

BRENDA ELEANOR KING First Respondent
MARTIN RICHARD HUTCHINSON KING Second Respondent

JUDGMENT : 22 DECEMBER 2006

BOZALEK, J:

1] This matter concerns the limits of a litigant's obligation in terms of Uniform Rule 35(12) to produce documents which it has referred to in an application. More specifically, it deals with the question of whether the production of such documents can be compelled when they are alleged not be functional to the compelling party's case and whether indirect allusions to documents which may exist trigger the provisions of the subrule.

BACKGROUND

2] The parties in this matter have been litigating against each other out of various courts for some considerable time. The present interlocutory application forms part of proceedings instituted by the applicant in June 2006 to sequestrate the estate of the first respondent. The second respondent, the first respondent's husband, is cited by virtue of the fact that he may have an interest in the matter although no relief is sought against him. I shall refer to this as the main application. It was brought on the basis that the first respondent had committed an act of insolvency in terms of s 8(a) of the Insolvency Act, 24 of 1936 or, alternatively, is factually insolvent. The applicant's claim against the first respondent arises pursuant to a judgment granted by the Witwatersrand Local Division of the High Court against the first respondent and two other companies, jointly and severally, the one paying the other to be absolved, in an amount, inclusive of interest and costs, in excess of R10 million. Second respondent is a director of both defendant companies.

3] The first respondent opposes the sequestration order sought against her and has filed an opposing affidavit. The second respondent, represented by a different set of attorneys to the first respondent, also purports to oppose the relief sought against the

first respondent and has filed both an answering affidavit and a supplementary affidavit in the main application despite no relief being sought against him. His answering affidavit, together with annexures, run to some 170 pages.

4] In August 2006 the second respondent caused a notice in terms of Rule 35(12) to be issued stating that, for the purposes of filing an answering affidavit, he required the applicant to make fifteen different documents or sets of documents available for inspection and copying. He stated that these documents were in the applicant's possession and were relevant to the reasonably anticipated issues in the application. No response was forthcoming to this notice. At the end of August 2006, pursuant to the notice, the second respondent launched a compelling application which also sought certain other unrelated relief.

5] In his founding affidavit in the compelling application the second respondent states that, first respondent being overseas, both his and the first respondent's legal representatives were entitled to have sight of the documentation in question. The applicant opposes the compelling application. When the application came before court, certain arrangements were arrived at between the parties and, without admitting that it was obliged to do so, the

applicant agreed to deliver a formal reply to the second respondent's notice in terms Rule 35(12). This was duly done, subsequent whereto the first respondent filed an answering affidavit in the main application and the second respondent filed his supplementary affidavit in the main application having already filed an answering affidavit.

6] The first respondent responded to all the allegations contained in the applicant's founding affidavit in the main application and, save for one instance, did not complain that she was unable to deal with the contents by virtue of the fact that the documents referred to in the founding affidavit were not made available to her.

7] By contrast, in his answering affidavit the second respondent complained of the applicant's failure to produce documents to which reference had allegedly been made in its founding affidavit and stated that it might be necessary for him i.e. second respondent, to file a supplementary affidavit which he duly did. He concluded the latter affidavit by reserving his rights to supplement the affidavit yet further once the application to compel had been decided. Notwithstanding these reservations of right, there are, in my view, no clear indications in the second respondent's opposing affidavit that he was unable to deal with the allegations contained

in the applicant's founding affidavit.

8] What does emerge from his affidavits is the second respondent's outrage at what he describes as the "scandalous, fictitious and gratuitously defamatory" allegations made in the applicant's affidavits against him. These, he stated, led him to instruct his attorney to institute a defamation action against the deponents to the affidavits filed on behalf of the applicant. The second respondent was as good as his word. In a supplementary affidavit filed two-and-a-half months later, he annexed a copy of the particulars of claim in a defamation action which he had launched in the meantime against one of the deponents to the applicant's founding affidavits.

9] In its response to the second respondent's notice in terms of Rule 35(12), the applicant alleges in general that the notice is an abuse of process designed to delay and frustrate the final determination of the main application; further, that the notice calls for unduly large volumes of documents without regard as to whether they are in fact referred to in the applicant's founding affidavit or not. It also complains that most of the documents sought had been in the first and second respondent's possession for a number of years. The applicant also deals in detail with why it cannot or will not produce

each of the documents or sets of documentation called for by second respondent.

10] The applicant's reply did not completely satisfy the second respondent who renewed his application to compel compliance and at the same time used the opportunity to dispute various claims made by the applicant in relation to the documentation being sought. I shall detail some of the conflicting claims when I deal with the remaining documents in dispute.

11] By the time the matter was argued only six items of documentation remained in dispute between the parties. Apart from the specific ground upon which the applicant stated it was under no obligation to produce any such document, namely, that the document/s did not exist or had not been referred to in the founding affidavit, it raised two general defences. Firstly, it contended that there was no connection between the relief sought by the applicant in the main application and the second respondent, with the result that he did not require any document to mount a defence to the relief sought by the applicant. Secondly, it was contended that second respondent's insistence on documentation was an abuse of the court process intended only to harass the applicant or to obtain an advantage in the form of early discovery in the defamation action

which the second respondent had launched.

12] I shall first deal with those items of documentation in respect of which there is a dispute as to whether they exist or not or were referred to in the founding affidavit, or both.

ITEM NO. 3

13] The following passage appears in the applicant's founding affidavit in the main application:

> "*The aforesaid funds were then systematically transferred to another ABSA account (number 4053213709) and eventually found its way into the accounts of Blue Sky and then into the personal accounts of Blue Sky's shareholders which included the respondents and Arleen Klein.*"

In terms of Rule 35(12) the second respondent called for production of any and all documents relating to the specified ABSA bank account. The response given by the applicant in this and other instances was that there were no documents of this sort referred to in the founding affidavit. I take this statement as falling short of stating that no such documents exist or are in the possession of the applicant. Rather, it appears to be based upon the proposition that there was no reference in the founding affidavit to such documents such as would trigger the provisions of Rule 35(12). The subrule in question provides for the

service of a notice on "*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*". The penalty for non-compliance with the rule is that the offending party is not permitted, save with the leave of the court, to use such document or tape recording in the proceedings.

14] A leading case dealing with the provisions of the subrule is *Protea Assurance Company Ltd and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 in which it was held that it is inherent in the subrule that a litigant cannot ordinarily be required to draft and file his own pleadings and affidavits before being given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's, pleadings or affidavits. In dealing with the nature of the reference required, Marais J (as he then was) stated as follows:

> "*This is therefore not a case in which no reference whatsoever had been made to tape recordings, but it is sought to deduce that they exist by an elaborate process of reasoning and inference drawing. It is a case in which applicants had made direct reference to tape recordings and placed reliance upon them without explicitly describing them as such by name. The*

omission, whether it be studious or not, to refer to them by name does not derogate from the fact that they were indeed referred to. Compare Erasmus v Slomowitz (2) 1938 TPD 242 at 244 where Murray J said of a substantially similarly worded rule:

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

15] Clearly therefore, even a reference to a document (or tape recording) which is not detailed or descriptive will suffice to trigger the provisions of subrule 35(12). The question which arises in the present instance is whether Rule 35(12) can be invoked when not only has no detailed or descriptive reference been made to the document/s, but neither has there been any indirect reference to such document/s and it is only through a process of reasoning and inference drawing that it can be deducted that the document does or may exist. In neither of two other leading cases dealing with the subrule, *Gorfinkel v Gross, Hendler and Frank* 1987 (3) SA 766 (C) and *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA

329 was this question directly considered.

16] Mr. Vetten, who appeared for second respondent, argued for a very wide interpretation of the concept of a "reference" to a document as envisaged in Rule 35(12). In so doing he relied on *Protea Assurance* as authority for proposition that the documents hit by the provisions of the subrule are those whose existence may be deduced through a process of reasoning and inference. However, I do not read Marais J's remarks, quoted above, as authority for the proposition that where the existence of a document can be deduced by such a process, it falls to be produced in terms of Rule 35(12), notwithstanding the lack of any direct or even indirect reference thereto.

17] This was in effect the argument adopted by the second respondent in the compelling application. The approach was developed by Mr. Vetten in argument, his submission being that where, upon analysis of a statement made by a deponent it can reasonably be inferred that a document/s must exist relating to that fact or allegation, then the opposing party is entitled to call for the production of such documents. In my view this extends the provisions of Rule 35(12) too far in that it gives the concept of a "reference" to a document so broad a meaning as to make it almost superfluous. In my view this does not fit within the purpose

or scope of Rule 35(12). The subrule provides a mechanism for a party to obtain production and inspection of documents prior to making out his case where these documents have been referred to by another litigant but not annexed. To give the subrule the wide meaning contended for by Mr. Vetten would be to sanction immediate and full discovery as provided for by Rule 35(1). This is not the purpose of the subrule 35(12).

18] Reverting to the particular documents sought, no doubt where a bank account is utilized there must exist somewhere documents evidencing its existence and its use. It does not follow, however, that a reference to that bank account, without more, constitutes a reference, for the purposes of Rule 35(12), to documentation relating to such bank account.

ITEM NO. 10

19] In a founding affidavit the applicant's deponent states:

"*In addition thereto the first respondent is no doubt aware (or at the very least suspects) that criminal charges are in the process of being laid against her and others (including Klein and the second respondent) with the South African Police Services.*"

In his Rule 35(12) notice the second respondent calls for "*a copy of the complaint/list of charges which the applicant intends laying with the*

South African Police Services against first respondent" and was met with the response, not surprisingly, that there was no such document referred to in the founding affidavit.

20] It was argued on behalf of the second respondent that, if charges had been laid, then there would likely be a written statement by the complainant and the applicant was obliged to produce it in response to the notice. This submission entirely misses the point since there is no reference, direct or indirect, to any document in the passage quoted. Thus, even if such a list or written complaint exists and is in the possession of the applicant, for the reasons I have set out above, the second respondent is not entitled to production thereof in terms of Rule 35(12).

21] The provisions of Rule 35(12) exists for a specific purpose and it is not a mechanism whereby a litigant can go behind the words of an affidavit or pleading and argue that, although there is no direct or even indirect reference to a document/s, such documents would in the ordinary course of events exist and must, if in the possession of the opposing party, be produced for inspection.

ITEM NO. 11

22] The second respondent called for the production of any and all documents relating to a bank account number 417016 under the

name "*Fos Partnership*", this in response to the following statements in the founding affidavit:

> "*I have also been advised (by a third party who does not want me to disclose his/her involvement in the matter) that bank account number 417016 under the name 'Fos Partnership' was opened by or on behalf of the first respondent, either alone or together with the second respondent and her other co-shareholders and directors, with Kleinwort Benson at PO Box 44, The Grange, St. Peter Point in Guernsey. I have been told that the first respondent is either the sole beneficiary in respect of such offshore account or is one of a number of beneficiaries*."

23] The applicant stated in its reply to the second respondent's notice that there was no such document referred to in the founding affidavit. There is no direct reference to a document/s in the passage quoted above nor is there an indirect reference thereto. Again, best it can be said there probably exists documentation somewhere which, if the allegations are true, confirm the existence of such an account and record details of its use. This is, however, in my view, not a reference envisaged or encompassed by the provisions of Rule 35(12). Apart from anything else the passage quoted indicates that the deponent received the information in question second hand from an informant with no indication that

any documentation passed hands.

ITEM NO. 12

24] This is a further instance where the second respondent sought the production of any and all documents relating to various bank accounts, namely those referred to in the following passage from the applicant's founding affidavits:

> "*Certain information in regard to bank account details has recently come into my possession. Whether the bank accounts pertain to Blue Sky, Aspect or the first respondent (or perhaps even the second respondent or Klein) I do not know but a trustee, once appointed, will have the opportunity to investigate same. Furthermore as indicated to the above Honourable Court in this affidavit, it is to be noted that the first respondent's modus operandi involved a mingling of funds between her and the defendant companies. These bank account details are the following…*"

There follows a list of 14 bank account numbers specifying in each case the bank in question.

25] In its reply to the second respondent's Rule 35(12) notice, the applicant states that there are no such documents referred to in in the founding affidavit and that all these accounts are those of the

first and/or second respondents or of companies in their direct or indirect control. The latter part of the answer can be ignored since it is no answer to a valid request for documents in terms of Rule 35(12) to state that the party requiring the documents already has them in his/her possession or control. However, there is, in my view, no direct reference in the passage quoted to the documentation sought. Furthermore the allegations relating to these bank accounts are so vague and uncertain that they cannot be construed as even an indirect reference to documentation relating to the bank accounts in question. In the circumstances the applicant cannot be compelled to produce the documents sought in terms of Rule 35(12).

ITEMS NO. 4 AND 13

26] In respect of the two remaining disputed items the applicant concedes the existence of the documents being sought by second respondent but refuses to produce them on other grounds. The first document is described as a written Agreement dated 27 July 1995. In its response to the second respondent's Rule 35(12) notice, the applicant states that there were three versions of the Agreement and identifies them in relation to their use in the litigation recently concluded in Johannesburg. The second

respondent replied that he was not in possession of the documents, adding that he was entitled to require the document's production from the applicant and that he persisted in seeking to enforce his rights in this regard. The applicant counters this by stating that the second respondent appears to require the document not in relation to the main application but rather in regard to his recently launched defamation action.

27] The final documents in dispute were described in the following terms in the applicant's founding affidavit:

> "*During the trial in the Witwatersrand Local Division it was proved by means of documents (which the first respondent tried to prevent being produced in evidence on the ground that they were "irrelevant") that part of the monies defrauded and stolen from the applicant was used to artificially and fraudulently inflate the earnings of the company which they and Klein, together with others, were shareholders namely BLGK.*"

28] In its reply to the second respondent's Rule 35(12) notice, the applicant stated that the documents used during the trial in the Witwatersrand Local Division comprised over 7000 pages contained in 14 lever arch files. It went on to state that as the judgments in that matter had been pronounced and there was no

prospect of success in the application for leave to appeal, the abusive nature of the notice was made manifest by the request. Finally the applicant's deponent states:

> "*As stated above, the Respondents are in possession of an entire bundle and an appeal record incorporating all of these documents and they had been in possession of same for a number of years.*"

[29] Thus, notwithstanding the clear reference to documents in these two instances, the applicant declines to produce them. The question which arises is whether it is justified in this refusal, either for the reasons given above or for the general reasons which it advances elsewhere. In my view, neither the bulkiness of the record in the Johannesburg litigation nor the fact that the second respondent may have once been in possession of such documents entitles the applicant to refuse to produce them. Applicant itself clearly referred to a limited number of documents when its deponent added the qualification "which the first respondent tried to prevent being produced on the ground that they were irrelevant". As I have previously stated, furthermore, a litigant may call for the production of a document under Rule 35(12) notwithstanding that he may already possess a copy thereof, if only to confirm that it is such document upon which the other party relies.

[30] 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 subrule should 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 held further that since it would not necessarily 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. The learned judge's analysis and reasoning, at 773H – 774I, bears quoting:

> "*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……

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), (3) or (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, i.e. 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, i.e. subrules (1), (3) and (11) and the fact that a notice under Rule 35(12) may be served at any time, i.e. 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 documents 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. 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."

[31] The approach enunciated by Friedman J was approved of by Thring J in *Unilever plc (supra)*. I too am in respectful agreement with this approach. It remains then to apply it to the facts of the present matter in relation to the two remaining documents in dispute.

[32] Firstly, it was argued on behalf of the second respondent and also averred in the papers, that he seeks some of the documentation not only on his own behalf but on behalf of the first respondent. In this regard it was stated on his behalf that no purpose would have been served by the first respondent also filing a notice in terms of Rule 35(12) seeking the documents in question. I cannot accept this reasoning. It is not proper, in my view, for a litigant, whether represented by the same legal representatives or not, to purport to seek documentation or invoke a rule on behalf of another litigant. For

one thing I do not understand the second respondent to purport to bind the first respondent to pay her share of the costs in the event that the compelling application, launched pursuant to the Rule 35(12) notice, is unsuccessful. I propose then, for this reason alone, to disregard any claim which the first respondent may have to production of the documents in question.

[33] The applicant contends that the compelling application was launched simply to frustrate the main application and furthermore alludes to the fact that no relief is being sought against the second respondent. These themes were expanded upon in argument, the contentions being that the application was an abuse of the court process. It is the applicant's case that the underlying cause for the judgment against the first respondent and certain related companies in the sum of R10 million odd related to cheques allegedly stolen by the first respondent. On several occasions in the applicant's founding affidavits the second respondent is alleged to have been involved in one or other aspect of the first respondent's fraudulent or irregular dealings. The overall suggestion is moreover that the second respondent was assisting in frustrating other creditors and the applicant in its attempts to execute on its judgment against the first respondent. It is furthermore alleged that the first and second respondent's financial affairs are intermingled. In his opposing affidavits the second respondent baldly denies that his

wife is insolvent. He takes umbrage at, and denies the allegations of, complicity on his part in commercial and financial irregularities allegedly committed by the first respondent.

[34] It is clear then that the second respondent is not merely cited in a nominal capacity or solely by virtue his marriage to the first respondent. Rather, he is alleged to be a role player in the underlying commercial transactions which led to the litigation culminating in the judgment against the first respondent and hence the sequestration application.

[35] S 9(3)(a)(ii) of the Insolvency Act, 24 of 1936, requires the full names, date of birth and identity number of the spouse of a respondent to be set out in a sequestration application. Such spouse need not be cited as a party if the marriage is out of community of property and therefore no joint estate is sought to be sequestrated. However, Cape Practice Note 15 (having effect from 1 August 2001) requires that notice of intention to apply for a provisional order of sequestration shall, if married, be given to the debtor's spouse, whether married in or out of community of property, which spouse shall be joined as a respondent.

[36] It was necessary, therefore, for the applicant to join the second respondent in the main application. No relief was sought against him although at one stage there appears to have been an erroneous

reference to a sequestration order being sought against the joint estate of the respondents. I am satisfied, however, that it was entirely clear from the papers as a whole that no relief was sought against the second respondent and that he was at no stage misled into believing that this was not the case notwithstanding the final paragraph in his opposing affidavit wherein he prays that the application be dismissed against him with costs on the attorney and client scale.

[37] When the second respondent's replying affidavit in the compelling application is considered it would appear that his main concern is to defend himself against the "*scandalous, vexatious and defamatory*" allegations made against him in the main application. He motivates for the production of documents in terms of his Rule 35(12) notice on the ground that this will serve the legitimate purpose of allowing him to test the allegations of wrongdoing made against him. It would seem, therefore, that the second respondent is greatly concerned with defending his good name and this is borne out by the fact that has already launched a defamation action arising out of the allegations made in the founding affidavits. The second respondent's reputation is, however, by no means a central issue in the main application hence the applicant's contentions that the Rule 35(12) notice constitues abuse of the court's process and is purposeless since no substantive relief is sought against the second respondent. The applicant goes

further and states that what the second respondent in fact seeks is early discovery in the defamation action.

[38] There is no certain method of determining precisely what motivates the second respondent in seeking to obtain the documentation he has called for and more specifically whether he is motivated simply by a desire to obtain early discovery in his action for defamation. Furthermore, I consider that a court would be embarking on a slippery slope were it to withhold from a litigant the right to invoke a rule of court because his/her motives in so doing might be mixed or less than pure.

[39] The second respondent could, if he had so wished, simply have ignored the allegations made against him, filed no opposing affidavits and not sought the production of any documents. However, he has been cited as a party to the action, serious allegations have been made against him and, as a party, he is in principle entitled to entitled to invoke the provisions of Rule 35(12).

[40] Furthermore, any sequestration of the first respondent's state will have far-reaching effects for the second respondent. In terms of s 21 of the Insolvency Act the effect of the sequestration of the estate of a spouse is to vest in the Master, until a trustee has been appointed, and in the trustee on his appointment, all the property of the spouse whose estate

has not been sequestrated, as if it were the property of the sequestrated estate and to empower the Master or the trustee to deal with such property accordingly. Such acquisition is not necessarily permanent because the solvent spouse may secure the release of his or her assets by proving that they fall into any of a number of categories. But until the spouse actually does this he/she has none of the ordinary powers of ownership over the assets and cannot alienate or encumber them.

[41] It is clear therefore that, although no direct relief is sought against the second respondent, should the first respondent's estate be sequestrated this will have potentially far-reaching consequences for him.

[42] Reverting to the test formulated by Friedman J in *Gorfinkel*, I have, for the reasons cited, come to the conclusion that the applicant has not discharged the *onus* of proving, on a balance of probabilities, that the second respondent is not entitled to the two sets of documents which he requires the applicant to produce in terms of paragraphs 4 and 13 of his notice in terms of Rule 35(12).

[43] Insofar as the costs of the application are concerned I do not consider it appropriate to make any order at this stage. The second respondent

has ultimately been successful in compelling production in respect of only two of the various documents which were initially sought in the compelling application. He has, moreover, already filed an opposing affidavit and a supplementary affidavit and it remains to be seen as to what use the documentation compelled will be put and what role, if any, it will play in the main application. In the circumstances I propose to let the question of the costs of this compelling application stand over for determination in the main application.

[44] In the result it is ordered as follows:

1. Applicant is ordered to produce the documents called for in paragraphs 4 and 13 of second respondent's notice in terms of Rule 35(12), served on 25 August 2006, by not later than 15 January 2007;
2. The costs of this application will stand over for later determination.

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