

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 13001/2021

In the matter between:

**PENTAGON FINANCIAL SOLUTIONS
(PRETORIA) (PTY) LTD**

First applicant

ASSOCIATED PORTFOLIO SOLUTIONS (PTY) LTD

Second applicant

APS FIDUCIARY SERVICES (PTY) LTD

Third applicant

CORNELIS RUSSOUW KRUGER

Fourth applicant

JACOB VAN DER WESTHUIZEN NEETHLING

Fifth applicant

HAROLD LENNOX NIMMO

Sixth applicant

PATRICIA JESSIE KOTZE

Seventh applicant

and

**PIETER WILLEM BASSON
THE LEGARE BUSINESS TRUST**

First respondent

herein represented by:

PIETER WILLEM BASSON N.O.

Second respondent

PHILIPPA BASSON N.O.

Third respondent

MILTONS MATSAMELA

Fourth respondent

THE PURCHASER OF THE PROPERTY

Fifth respondent

THE REGISTRAR OF DEEDS

Sixth respondent

JUDGMENT DELIVERED ON 15 MAY 2023

VAN ZYL AJ:

Introduction

1. I have two interlocutory applications before me:

1.1. an application in terms of Rule 30A to compel a response to a notice in terms of Rule 35(12) of the Uniform Rules of Court; and

1.2. an application in terms of Rule 35(13) for an order allowing the discovery of certain documentation.

2. The applications were brought by the respondents in the main application. I shall, for the sake of convenience, refer to the parties as they are in the main application.

The main application

3. The main application in the course of which the interlocutory applications have been brought comprises of two parts. Part A sought interim relief seeking to interdict the first respondent from passing transfer of his immovable property situated in Somerset West pending the final determination of Part B of the application. The interim relief was refused and the property was subsequently transferred.

4. Part B sought final relief in relation to the relief claimed in Part A, but this

relief has been rendered moot because of the refusal of the interim interdict. What remains under Part B is an application for declaratory relief in terms of which the alleged purported rescission by the first respondent of a Rule 34 settlement agreement reached in case number 23759/2016 in this Court, and a related arbitral process before John Butler SC (“the arbitrator”) is declared to be invalid. Finally, relief is claimed in terms of which the first respondent is declared to be in contempt of an order granted by this Court on 24 August 2020 under case number 13917/2020.

5. The history leading up to these applications is for all material purposes common cause. The main application arises out of an arbitration before the arbitrator referred to above as to the fair market value of the first respondent's shares and loan accounts in the first to third applicant companies (referred to respectively as “APS”, “Pentagon”, “APS Fiduciary” as well as “Petprops”) in terms of section 163 of the Companies Act 71 of 2008. The arbitration commenced on 1 April 2019 and continued until 18 December 2019, when an award was issued by the arbitrator entitled “*Award on All Merits Issues, Subject to Quantum Calculations*”. The arbitration proceedings were not finalised at the time the main application was launched, but have since been concluded.

6. There is no material dispute between the parties that during the arbitration the applicants (who were there the defendants) discovered 1309 documents, with the schedules enumerating these documents running to 88 pages. The parties enjoyed the full benefit of Rule 35 during the conduct of the arbitration (the rule was incorporated by way of the arbitration agreement). The first respondent was, according to the applicants (this is not disputed by the respondents), granted unfettered access to all financial information at an early stage.

7. As regards the foreign funds of APS, the commencement of the arbitration was delayed because the first respondent belatedly requested a vast amount of documentation relating to what is called the APS Ci Global Flexible Feeder Fund. The documentation was discovered on a memory stick.

8. After all of the evidence at the arbitration hearing had been led, and after the

publication of the arbitrator's penultimate award (which was not in the first respondent's favour) the first respondent launched what was referred to as a "forensic audit application", seeking relief from the arbitrator in terms of which all financial records of APS and Pentagon relating to the 2014 to 2020 financial years would be made available preparatory to a forensic audit. This was because he suspected the applicants of having committed fraud. Annexure "B" to the notice of motion comprised an extensive list of documentation which the first respondent stated was necessary for the conduct of the forensic audit, similar in nature and scope to the documents now sought in terms of Rule 35(13).

9. The arbitrator ruled that the relief sought was *"a wholesale and arguably overbroad discovery exercise of every financial record "related to" the first and second defendants for the years 2014 to 2020 which cannot be granted."* He noted that, despite the comprehensive answering affidavit in relation to the fraud allegedly perpetrated by the applicants, the first respondent had not given a detailed response in reply.

10. After the arbitration had been running for more than three and a half years, the first respondent, in a letter dated 15 February 2021 (the "avoidance letter"), attempted to avoid the settlement agreement in terms of which the arbitral proceedings were conducted, by *"rescinding"* it on the basis of the abovementioned alleged fraud. He did not attempt to interdict the arbitration proceedings, and did not launch proceedings under the Arbitration Act 42 of 1965 to set aside the arbitration award as having been improperly obtained.

11. The main application was therefore instituted because the first respondent, by means of the avoidance letter, made it clear that he intends avoiding the consequences of the arbitration. The fourth applicant, Mr Kruger, was the deponent to the founding affidavit in the main application.

The interlocutory applications

12. The respondents launched their application in terms of Rule 35(13) as a matter of urgency on 26 August 2021. On 2 September 2021 the application was struck off the

roll for lack of urgency.

13. The respondents' notice in terms of Rule 35(12) was delivered on 24 August 2021. The application in terms of Rule 30A was instituted on 30 September 2021 after the applicants had failed to respond by the due date. The applicants did respond after the institution of the application, on 7 October 2021.

14. When no further steps were taken to progress the hearing of these applications, the applicants launched a substantive application on 6 December 2021 claiming relief in terms of which the interlocutory applications should be enrolled for hearing. This application was ultimately resolved by way of an order granted in January 2022 by agreement between the parties, which included an order that the interlocutory discovery applications related to the main application should be heard together first, whilst the main application itself should stand over for later determination. In terms of the order, further, this Court is to make directions as to the further conduct of the main application, and other inter-related applications.

The Rule 30A application in relation to the notice under Rule 35(12)

15. By way of background, in this application the respondents claimed compliance with the Rule 35(12) notice as a whole and, upon receipt of the applicants' response to the notice on 7 October 2021, claimed a "*proper*" response in terms of Rule 35(12) in relation to Items 1, 8 and 14 in a supplementary affidavit delivered by the first respondent. The initial claim was for 25 items of documentation, some containing up to five sub-items.

16. The applicants' response to the Rule 35(12) notice was contained in an affidavit deposed to by the sixth applicant ("the Nimmo affidavit"). The Nimmo affidavit gave comprehensive responses and documentation in relation to the 25 items sought and indicated that, although some documents were annexed, some of the categories of documentation sought were too voluminous for convenient annexation to an affidavit. Some of the items were provided on a memory stick or by way of file transfer.

17. In their heads of argument and at the hearing of the application, the respondents persisted in respect of two items only, namely Item 1, being so-called the shareholders book, and Item 14, comprising the documents submitted to cancel the winding-up process of APS International.

General applicable principles

18. Rule 35(12) provides as follows:

“(a) Any party to any proceeding may at any time before the hearing thereof deliver a notice 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 —

(i) produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or

(ii) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or

(iii) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known.

(b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.”

19. Rule 30A, in turn, provides the following:

“(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court

or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

20. In terms of Rule 30A(1), the Court must first determine whether there has been non-compliance with the Rule 35(12) notice. In *Helen Suzman Foundation v Judicial Service Commission*¹ the Constitutional Court stated that: "...I have no quarrel with the fact that in terms of rule 30A(2) there is an exercise of discretion as to what an appropriate order should be once a court has held - under rule 30A(1) - that there has been non-compliance with the rules. As to the antecedent question arising from rule 30A(1) whether there has, in fact, been non-compliance with the rules, there is no question of an exercise of discretion. The court must determine - as an objective question of fact or law- whether there has been non-compliance."

21. The respondents submit that there has been non-compliance on the applicants' part with the Rule 35(12) notice in respect of Items 1 and 14.

22. It seems that there is no onus on a party in the context of a Rule 30A application seeking documents in terms of Rule 35(12) (although the matter is not completely settled – I shall return to this later). However, a party who seeks such documentation has the burden of adducing evidence as to the relevance of the document, and to show that the document is not privileged and can be produced.

¹ 2018 (4) SA 1 (CC) at para [79].

23. A court retains a *“general discretion to strike a balance between the conflicting interests of the parties to the case. 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. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant ”*.²

24. I proceed to consider whether the respondents are entitled to access to the two items they insist upon.

Item 1: the shareholders' book

25. The respondents claim access to the *“book ” (list of clients) of each shareholder (Basson, Kruger, Nimmo and Neethling)”* referred to in thirteen separate paragraphs in the founding affidavit in the main application.

26. The applicants argue that there are essentially three reasons that the “book” or “books” cannot be produced. The first point is that the shareholders “book” cannot be produced as, properly construed, it is not a document. Allied to this is the second point, namely that, even if there is a document called a “book”, what that document is changes from time to time - it is a moving target. The rule requires production of a specified and identifiable document, which is not possible in relation to this item. The third point is that this “book” of clients is in any event irrelevant to the issues in the main application.

27. The applicants contend in the alternative that, even if a “book” of clients can be produced, they have serious confidentiality concerns and accordingly, should the Court determine that such client information must nonetheless be compiled and divulged, they seek protection *“as to the manner and form in which it is handed over, and from abuse of this information in the hands of [the first respondent].”*

Is the “book” or “books” a document, and can it be produced?

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

28. As regards their first and second points, the applicants argue that the shareholders "*book (list of clients)*" as claimed by the respondents is not a document but rather a concept. It is not an existing list, whether electronic or on paper. They explain, in an answering affidavit deposed to by Mr Kruger in the present matter, that *"if one were, for example, to ask me to provide information as to which clients comprise my book, I would have to compile such a list, bringing a document into existence in order to provide this information. Moreover, every time I acquired a new client, my "book" would change. If one were notionally to create a client list comprising my "book" on a specific date in 2017, it would be different from such a list on other date in 2017 or the following year, and materially different from such a list in 2010. Where the word "book" is used in the thirteen instances relied upon by First to Third Respondents, not one of them is time bound as to a particular date from which information could be compiled."* [Emphasis added.]

29. They point out further (in an affidavit deposed to by Mr Nimmo) that *"the data used to generate client lists is dynamic, constantly changing as new clients are added, and others ceased to be clients by their decease or by choice. There is no specific client list referred to by Kruger in his affidavit ... instead he referred to it as a concept, not a list at any given time."* [Emphasis added.]

30. The respondents, however, refer to what that Mr Nimmo states in relation to the "book" in a second affidavit delivered in this application: *"... the companies are in possession of electronic data comprising of the identities of its clients from time to time, and whose 'book' that client belonged in. This data is captured inter alia from the type of documents referred to by Basson in paragraph 16 of his affidavit. From this raw electronic data, it is conceivable that a document can be brought into existence reflecting a 'list' of clients at any given time."*

31. The respondents argue that Nimmo's evidence means that there are both electronic and hard copy documents recording the prescribed detail of the clients that constitute the "book of clients" of each shareholder. The word "book" is a collective noun used to refer to a batch of specific documents containing client

details which are used on a regular basis for the following purposes, as appears from various allegations contained in Kruger's founding affidavit in the main application:

31.1. To identify those clients for whom a particular person rendered financial services: *"Each shareholder had a 'book'. A 'book' was a reference to those clients for whom a particular person rendered financial services. There was no overlap. To take a simple example, I did not render financial services to First Respondents' clients, and he did not render financial services to my clients."*

31.2. To allocate income derived from the clients: *"This had the consequence that the value to be accorded to shares owned by shareholders would be determined entirely by the income they derived from rendering financial services to their "book" of clients. To quote an example, mv book of clients was responsible for over 40% of the revenue of the group of companies; that of First Respondent for approximately 7%. My shares accordingly had a greater value."*

31.3. To determine and distribute earnings by book size: *"Butler SC held in favour of the Defendants in relation to the applicability of the EWYK principle. ... Accordingly, Butler SC upheld the Respondents' pleaded contention that the applicable principle governing distribution of earnings to shareholders in APS and Pentagon is (as he found in paragraph 66) that: '... that which [First Respondent as a shareholder would] look to, and which a buyer would also look to, in terms of future cash flows would essentially be represented by advice fees and asset management fees accruing on the book administered by the shareholder, as distinct from the pro rata shareholding in those entities'.*

... With effect from 1 March 2016, First Respondent suggested (and I agreed) that we would no longer pool earnings at all; in other words our earnings would be determined by book size alone."

32. The "book" of clients of each shareholder is, accordingly, not some esoteric concept without concrete existence. The list of clients comprising the book of each shareholder exists and has been used and referred to each time earnings from clients were determined and distributed to the shareholders.

33. All of this, the respondents say, demonstrates that:

33.1. The "books" are at least data messages as defined in section 1 of the Electronic Communications and Transactions Act 25 of 2002 ("the ECTA"), which provides that a data message *"means data generated, sent, received or stored by electronic means and includes- (a) voice, where the voice is used in an automated transaction; and (b) a stored record"*;

33.2. They are in writing, as contemplated in section 12 of the ECTA: *"A requirement in law that a document or information must be in writing is met if the document or information is- (a) in the form of a data message; and (b) accessible in a manner usable for subsequent reference"*;

33.3. They are subject to production under section 17(1)(b) of the ECTA: *"(1) Subject to section 28, where a law requires a person to produce a document or information, that requirement is met if the person produces, by means of a data message, an electronic form of that document or information, and if - ... (b) at the time the data message was sent, it was reasonable to expect that the information contained therein would be readily accessible so as to be usable for subsequent reference"*; and

33.4. They fall within the ambit of section 19(2) of the ECTA: *"(2) An expression in a law, whether used as a noun or verb, including the terms 'document', 'record', 'file', 'submit', 'lodge', 'deliver', 'issue', 'publish', 'write in', 'print' or words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message unless otherwise provided for in this Act"*.

34. Our courts have held that electronically stored information is discoverable under Rule 35 procedures.

35. Sections 12 and 17 were applied in *Le Roux v Viana*.³ The question was whether books and documents belonging to a company in liquidation and recorded on a hard drive were documents for the purposes of section 69(3) of the Insolvency Act 24 of 1936, which provides that: *"If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document".* [Emphasis added.]

36. It was argued that if it was correct that the books and documents recorded on the hard drive, even though they belonged to the companies in liquidation, were not in the form contemplated in the section, they were not susceptible to seizure in terms of that section.

37. The Court found⁴ that, properly construed, the reference to books and documents in section 69(3) had nothing to do with the format of those books and documents. Relying on the *Concise Oxford English Dictionary*⁵ the Court was satisfied that "document" included "written, printed or electronic matter that provides information or evidence or that serves as an official record".

38. The Court continued:⁶ *"There is no dispute in this case that the books and documents stored on the hard drive and targeted by the warrant relate to the financial and business affairs of the companies in liquidation. That being the case those books and documents, irrespective of the form they are in, are clearly within*

³ 2008 (2) SA 173 (SCA).

⁴ At para [10].

⁵ 10th edition, revised.

⁶ At para [10].

the contemplation of s 69 and are susceptible to seizure under a warrant in terms of that section. It can hardly be suggested ... that we should not take judicial notice of the technological advancements regarding electronic data creation, recording and storage because this was unheard of in 1936 when the Insolvency Act was passed." Here the Court expressly referred to the provisions of sections 17 and 19 of the ECTA in a footnote.

39. The Uniform Rules of Court do not contain any specific provision for the discovery of electronically stored information in High Court litigation. Rule 35(1) provides for the discovery of "documents and tape recordings". The word "document" is not defined in the rules and, accordingly, bears its ordinary meaning. I agree with the respondents' counsel's submission that the approach taken in *Le Roux v Viana* applies equally to a consideration whether information stored on a computer constitutes a "document" for the purposes of discovery under Rule 35.

40. In *Makate v Vodacom*⁷ the Court held that: *"I am accordingly satisfied that an e-document, ie. electronic material whether it be in the form of a communication or stored data that is retrievable through a filtering process or a data search, is discoverable under Rule 35 procedures. Even if it were not so it would be open to utilise the provisions of Rule 35 (7) in order to ensure that the discovery process achieves its objective in the electronic age."*

41. The Court made the further point⁸ that: *"Certainly electronic data-recordal fits within the term 'tape-recording' in its extended rule (15) form. In any event, s 12 of the Electronic Communications and Transactions Act 25 of 2002 provides that, insofar as a data message is concerned, such message, provided certain requirements are satisfied, would constitute a document for the purposes of rule 35."*

42. The Court remarked⁹ that: *"It is necessary to add that information stored on a computer's hard drive or remote server is extracted by means of commands*

⁷ 2014 (1) SA 191 (GSJ) at para [40].

⁸ At para [38].

⁹ At para [39].

which can either limit the data by means of a search request for corresponding data or through a filter process (most commonly found in basic off- the shelf personal use accounting packages) by reference to date, subscriber and innumerable other programmed criteria. I am satisfied that it still retains the characteristic of a document or tape recording, the filtering or search function simply limiting the amount of data retrieved into a relevant form for its purpose."

43. These findings were not disturbed in the subsequent litigation of the matter.

44. A similar approach was taken to the meaning of "document" in the English case of *Derby and Co Ltd v Weldon (No 9)*.¹⁰ The first question in that case was whether the database of a computer's on-line system on which backup files were recorded is a document within the meaning of a relevant ordinance. This question was answered affirmatively. Whilst that judgment is not binding on this Court, it illustrates the general acceptance of a broader view of what constitutes a "document" in the context of litigation.

45. In this Court, the matter of *Bertie van Zyl (Pty) Ltd v Up To Date Tomatoes (Pty) Ltd*¹¹ concerned an application for disclosure of the electronic records of the Johannesburg Fresh Produce Market, from which certain figures contained in one of the affidavits before the court had been obtained. The respondent in that case contended that it was not enough for the applicant to have merely supplied a report printed from those electronic records, and that it (that is, the respondent) was entitled to access the records from which the report had been taken. The Court upheld this contention,¹² stating that "*I agree with its contention in this regard because reference by Daniels and Range is made to the electronic records which Range had access to. He then printed a report from those records*".

46. The Court concluded:¹³

¹⁰ [1991] 2 All ER 901 (Ch).

¹¹ [2016] ZAWCHC 105 (28 July 2016).

¹² At para [24].

¹³ At para [40] and [41].

“[40] In conclusion on this issue, I am of the view that the offer to inspect copies of a printed report does not fully comply with the provisions of Rule 35(12). As I have already indicated reliance is placed on the electronic records of the Johannesburg Fresh Produce Market as a source document. The printed report is a product of the electronic records. Secondly, the respondent is entitled to inspect the electronic records of Johannesburg Fresh Produce Market as discussed above and should that not be possible, the respondent is entitled to approach the court in terms of rule 30A.

[41] I am in agreement with the respondent that if the applicant wishes to rely on the information attained from the electronic records of Johannesburg Fresh Produce Market, it must make those records available for inspection in terms of the rules. To rely upon those documents without affording inspection to the respondent would, in my view, result in an injustice as the respondent would not be able to test the averments made by Van Zyl with reference to the Johannesburg Fresh Produce Market.”

47. In view of these authorities, I agree with the respondents in the present matter that the "books" as they existed at various relevant dates are documents for the purposes of Rule 35, and that they can be produced.

48. As to the date of the information to be provided, the respondents point out that, in the founding affidavit in the main application, Mr Kruger made assertions as to the position “at all times”. This encompasses, at least, the period from the beginning of 2016 until 30 May 2017, and arguably until the disputed award of the arbitrator made on 18 December 2019. Elsewhere in the affidavit Mr Kruger refers in broad terms to the position "by 2016", without specifying a date. He is nevertheless able to quantify the book of the first respondent, which he alleges was 7% of the total assets under management.

49. On the face of it, therefore, so the respondents argue, the state of the book from the beginning of 2016, until the disputed award of the arbitrator made on 18 December 2019, should be made available.

Relevance

50. The applicants dispute, thirdly, the relevance of the "book" of clients to the main proceedings, pointing out that *"at issue [in the main application] is whether [the first respondent] has validly avoided the settlement agreement concluded in May 2017, and client lists are irrelevant to this question"*.

51. In the supplementary affidavit the respondents do not deal with this issue, and do not explain why the "book" of clients is relevant to the issue in the main application. Instead, they state that Mr Nimmo's allegations are *"contradicted by various allegations in Kruger's founding affidavit in the main application"*. The respondents suggest that Mr Kruger's references to the client "book", given in his history of the arbitration process, make the issue which has already been arbitrated – the fair market value of the first respondent's immovable property - relevant in the main application.

52. In their heads of argument, the respondents point out that Mr Nimmo does not substantiate the alleged irrelevance of the shareholders' book. They say that *"the shareholders' books are relevant as the allocation of earnings and dividends is a prominent issue in the main application proceedings. The First Respondent resiled from the settlement and arbitration agreement on the basis of fraud, which in part relates to the allocation of earnings and dividends according to the book size and assets under management of each shareholder."*

53. The applicants argue that this is in fact not the issue in the main application; it is an issue already arbitrated. If the avoidance letter is considered it is clear that the *"allocation of earnings and dividends according to the book size"* is not an issue. The grounds of rescission referred to in the avoidance letter is based on alleged fraudulent misrepresentations constituted by:

53.1. An allegedly *"forged matrix"* used as a basis for the financial model to calculate the value of the first respondent's shares;

53.2. Material evidence which was allegedly *"deliberately withheld"* pertaining

to APS International, the foreign income of APS, the valuation of APS shares, minutes of directors and Exco meetings, and details of how the legal fees of the majority shareholders were paid;

53.3. An allegation that the legal fees payable by the majority shareholders were not company expenses;

53.4. Mr Kruger's "*fraudulent denial*" of the 2013 Grundling valuation of APS; and

53.5. An allegation that Mr Kruger made false statements in relation to the first respondent's abscondment from his employment.

54. The issues in the main application thus relate to whether these misrepresentations were made, and whether the relevant documents were withheld. This is a factual enquiry which does not, whether directly or indirectly, traverse the issue of the allocation of earnings according to book size. The production of a "book" of clients, even if it were possible, is not relevant to the issues at hand in the main application.

55. The respondents refer, however, to the matter of *Democratic Alliance and others v Mkhwebane and another*¹⁴ as being apposite with regard to the question of relevance:

"[34] Reliance on a document by the party from whom the document or tape recording is sought is a primary indicator of relevance. That appears clearly from what is set out above. Given the purpose of rule 35(12) it cannot, however, be the sole indicator. The document in question might not be relied on by the party from which it is sought but might be material in relation to the issues that might arise or to a defence that is available to the party seeking production.

¹⁴ 2021 (3) SA 403 (SCA) at paras [34] and [35].

[35] In refusing production of the requested documents, Papier J appears to have attached some significance to the fact that the appellants, prior to the launching of the main proceedings, claimed to have evidence to substantiate their allegations against Ms Mkhwebane. To the extent that the judge held or implied that the appellants, in defending the main case, were limited to the evidence at their disposal when the impugned publication was made, he erred. A person defending a defamation claim on the grounds of truth and public benefit or fair comment is entitled, after the launching of proceedings, to gather further evidence to support those defences and to use the rules of court for that purpose, including the rules relating to the discovery and production of documents.” [Emphasis added.]

56. The *"primary indicator(s) of relevance"* in the present case are the references to the "book(s)" in various paragraphs of the founding affidavit in the main application. The most significant references are the instances where:

56.1. Mr Kruger compares the proportionate size of his book (over 40%) with that of the first respondent (approximately 7%). Mr Kruger does not refer in this respect to any particular date. In the context of the founding papers this must be taken to have applied at least between 31 May 2016 and 18 December 2019;

56.2. Mr Kruger alleges that his *"book-size dwarfed First Respondent's at all times"*;

56.3. Mr Kruger refers to the size of the First Respondent's "book" as "always small. By 2016, it was 7% of the total assets under management (AUM)"; and

56.4. Reference is made to the payment of dividends according to book-size. At the very least this comprehends comparisons of the various "books" as at the dates of determination of those dividends.

57. *Mkhwebane*¹⁵ makes it clear that, apart from being relevant if referred to, a document is relevant for the purposes of Rule 35(12) if it might be material to the issues that might arise or to a defence that is available to the party seeking production. The ambit of Rule 35(12) is very wide. The position is contrasted with the assessment of relevance once pleadings have closed.

58. *Mkhwebane* summarises the position as follows:¹⁶ “... *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....*” [Emphasis added.]

59. The requirement of relevance in the present matter is thus satisfied by reference to the applicants' papers. Mr Kruger's references to and reliance upon the "book" are "primary indicator(s) of relevance" in those aspects or issues in relation to it might arise in the course of the further conduct of the litigation.

60. I agree with the respondents' submissions. The requested documents relating to the shareholders' book can be determinative of the issues relating to the allocation of earnings and dividends for the purposes of valuing the parties' shares. This is an issue that might very well arise in the main application. In the circumstances, I am of the view that the client book or list may well be relevant and should be provided, and that an appropriate order should be made to prevent the abuse of the information contained therein. The respondents have no dispute with

¹⁵ At para [34].

¹⁶ At para [41]. See also *Caxton and CTP Publishers v Novus Holdings* [2022] 2 All SA 299 (SCA) at para [32].

an arrangement as to confidentiality, and I do not have to go into the authorities usefully set out by the parties in their heads of argument. I intend following the format of the order granted in *Value Logistics Ltd v Britz and others*,¹⁷ as suggested by the applicants.

Item 14: Documents submitted to cancel the winding-up of APS International

61. These documents comprise "*documents submitted in the steps taken to cancel the winding up process of APS International*", and those "*which were required in paragraphs (a) to (i) of the FSC letter dated 20 October 2019 (CRK 50-h, page 671).*" The latter includes the following documentation:

- 61.1. An updated business plan;
- 61.2. Certified true copies of the shareholders' resolution rescinding the winding up process;
- 61.3. An undertaking that the company has not transacted without a valid Global Business Licence;
- 61.4. Outstanding Annual Reports pursuant to section 55 of the Securities Act (if any);
- 61.5. Management accounts (duly signed and dated) from the date it has surrendered its licences;
- 61.6. Confirmation that Intercontinental Trust Ltd hold updated customer due diligence documents on the shareholders and beneficial owners/ultimate beneficial owners;
- 61.7. An updated register of shareholders/beneficial owners (including a chart of the shareholding structure) and directors of the company;
- 61.8. Confirmation that the company is in good standing in terms of fees with the Registrar of Companies;
- 61.9. Settlement of annual fees for the year 2019/2020.

62. The applicants did not produce any of the requested documents for the

¹⁷ [2021] ZAGPJHC 682 (15 November 2021) at para [84], and see *Caxton and CTP Publishers v Novus Holdings supra* at para [33].

following reasons stated Mr Nimmo's affidavit: *"I am a minority member on this board, and certainly do not control it. I have no authority on behalf of APS International to furnish its documentation, nor do I even have access to the documentation referred to. From my own knowledge, APS International was given certain items which needed attending to in order to reverse the winding up process. These requirements were attended to in Mauritius, and the result was that the winding up process was reversed."*

63. The respondents argue that Mr Nimmo's allegations do not justify the failure to produce the documents in question. They say that the fourth to sixth applicants (Messrs Kruger, Neethling, and Nimmo), in contravention of the Companies Act and in breach of their fiduciary duties, misappropriated a corporate opportunity pursued by the second applicant (APS), established APS International in Mauritius, and made their family trusts the shareholders. They effectively control APS International. Those three applicants have failed to make proper disclosure to the shareholders of APS that they have misappropriated the corporate opportunity pursued by APS.

64. The respondents contend that the three applicants subsequently misled the APS shareholders in the directors' report contained in the audited financial statements for the 2017 financial year, being the year in which APS International had been set up in Mauritius, by stating: *"During the financial year, no contracts were entered into which directors or officers of the company had an interest and which significantly affected the business of the company"*. The shares held by the applicants' family trusts are in fact the property of APS. The assets and income of APS International must therefore be taken into account in valuing the shares of APS.

65. The respondents contend that the documents referred to under Item 14 are relevant to determine the issues relating to APS International in the application proceedings. Mr Nimmo is a director and the family trusts are shareholders of APS International. They are thus entitled to copies of the requested documents and can produce them in order to comply with the Rule 35(12) notice.

66. The applicants essentially have three grounds of opposition to the disclosure of the documents sought:

66.1. Firstly, the respondents have not explained how the documents they seek will assist in the proof of misappropriation by the applicants of the corporate opportunity represented by APS International;

66.2. As a matter of law a person who is a director of a company not party to the present proceedings cannot be ordered to produce documentation not in his possession, but which is in the position of that other company; and

66.3. The provisions of the Mauritian Companies Act 15 of 2001 referred to by the respondents have not been adequately proven.

Relevance

67. The applicants refer to the respondents' submission that these documents "*are relevant to determine issues relating to APS International in the application proceedings.*" The respondents aver that Messrs Kruger, Nimmo and Neethling misappropriated a corporate opportunity when they established APS International in Mauritius. They do not, however, explain in their affidavits how the documents they seek will conduce to the proof of this misappropriation.

68. Against this contention the respondents point out that the documents sought under Item 14 are referred to in various paragraphs of Mr Nimmo's affidavits in the interlocutory application. He does not object to the production of those documents on the ground of irrelevance – the point was raised for the first time in the applicants' heads of argument. There are accordingly no facts on oath supporting the alleged absence of relevance.

69. The respondents return to the issue of onus in this respect. Although it seems that the incidence of the onus (in the full sense) in relation to relevance in applications under Rule 35(12) has not been finally settled,¹⁸ the *dicta* in *Universal*

¹⁸ See *Mkhwebane supra* at paras [38] to [40].

City Studios v Movie Time,¹⁹ *Gorfinkel v Gross, Hendler & Frank*,²⁰ and *Centre for Child Law v Hoërskool Fochville and another*²¹ indicate that, before there is even an evidentiary onus on the party delivering the notice, the receiving party must at least deny relevance, and the burden to set up facts relieving him of the obligation to produce the document falls on the recipient of the notice.

70. *Gorfinkel* was followed in *Unilever v Polagric*.²² It was criticised but not overruled in *Mkhwebane*.²³ *Gorfinkel* and *Unilever* remain binding precedents unless this Court finds that they were clearly wrong. I am not inclined to do so. *Hoërskool Fochville*²⁴ indicates that provided "*the term onus is not ... confused with the burden to adduce evidence*" the approach in those cases can safely be followed. Thus, the burden to set up facts must be understood as an evidentiary burden and not a full *onus*. It is nevertheless a duty incumbent on the party seeking to be relieved of the obligation to produce a document to which it has referred. This the applicants have not done.

Production of the documents and proof of Mauritian company law

71. As indicated, the applicants did not produce the requested documents as Mr Nimmo stated that he had "*no authority on behalf of APS International to furnish its documentation, nor do I even have access to the documentation referred to.*"

72. The respondents submit that "*with Nimmo as an appointed director and the family trusts the shareholders of APS International, they are entitled to the copies of the requested documents and they can produce them in order to comply with the Rule 35 (12) notice.*" The respondents quote from section 153 of the Mauritian Companies Act, submitting that this allows Mr Nimmo as a director to disclose

¹⁹ 1983 (4) SA 736 (D).

²⁰ 1987 (3) SA 766 (C).

²¹ 2016 (2) SA 121 (SCA).

²² 2001 (2) SA 329 (C).

²³ See also *Caxton and CTP Publishers v Novus Holdings* [2022] 2 All SA 299 (SCA) at para [24].

²⁴ At para [18], and supported in *Mkhwebane* at para [40] and *Caxton* at para [24].

information "as *required by law*".

73. Various other sections from the statute are also quoted in support of the contention that Mr Nimmo has the right to procure and disclose this information. The respondents submit that *"in light of his statutory powers and duties as a director, Nimmo's allegation in paragraph 31.4 of his affidavit ('nor do I even have access to the documentation referred to') cannot be accepted as a valid basis for refusing to produce the documentation"*.

74. The applicants argue that even if the respondents' submissions in relation to the Mauritian Companies Act and Mauritian company law are correct, this Court cannot have regard thereto, because it is foreign law that has not been proved. Foreign law is a question of fact to be proved by experts, failing which it is presumed to be the same as the relevant South African law.²⁵ Although section 1 of the Law of Evidence Amendment Act 45 of 1988 empowers a court to take judicial notice of foreign law when such law can be ascertained readily and with sufficient certainty, the applicants argue that the provisions relied upon by respondents are not readily ascertainable with sufficient certainty.

75. A consideration of *Mkhwebane*, however, makes it clear that it is unnecessary for purposes of the application under Rule 35(12) to prove these provisions. The respondents are correct in their submission that I do not have to decide any issue by applying the Mauritian law. The enquiry is limited to the requirements of Rule 35(12).

76. The applicants argue that the leap which the respondents ask this Court to make - namely that Mr Nimmo can and should be compelled to use his powers as a director to compel APS International, a foreign entity not a party to these proceedings, to procure from Mauritius and produce in these proceedings that company's documentation - is a bridge too far. A person who is a director of a company not party to the proceedings cannot be ordered to produce documentation not in his possession but in the possession of such other

²⁵ *SS v HP* [2019] 3 All SA 645 (GJ) at para [53].

company. Where a party seeks documents in terms of Rule 35(12) and those documents are not in the other party's possession, a court will generally not make an order against such party to produce the document.²⁶

77. The principle is however not immutable, but is dependent on the particular facts of the matter. In *Moulded Components & Rotomoulding SA (Pty) Ltd v Coucarakis*²⁷ the Court acknowledged that "... it is easy to conceive of cases where a document is not in the actual physical possession of a party, but where the Court would nevertheless not hesitate to make an order in terms of Rule 35(12)".

78. One of the items claimed under Item 14 is "*an updated register of shareholders/beneficial owners (including a chart of the shareholding structure) and directors of the Company*" which must be available for public inspection in terms of section 225 of the Mauritian Companies Act. The applicants argue that these are thus documents which are kept available for public inspection and which can be procured by the respondents themselves by following the prescribed procedures.

79. I do not think that that is relevant for the purposes of Rule 35(12). The facts of the matter at hand should be considered. The notice under Rule 35(12) was issued in respect of an affidavit made by Mr Kruger in the main application. He testified that the requirements in annexure "CK 11" (comprising the documents listed earlier in identifying the scope of Item 14) were complied with, and the winding-up process was stopped. The defence that Mr Nimmo does not have authority to produce the requested documents on behalf of the Mauritian company is a red herring. Mr Kruger's affidavit refers to actions to which he was apparently a party (resolving to seek the liquidation of the company), and it is Mr Kruger who asserts that the requirements of CK 11 were satisfied. Whether Mr Nimmo has authority to produce the requested documents on behalf of the company is beside the point. Mr Kruger is the deponent of the affidavit in relation to which the documents are sought.

²⁶ See *Moulded Components & Rotomoulding SA (Pty) Ltd v Coucarakis* 1979 (2) SA 457 (W) at 461A-B; Cilliers *et al* *Herbstein and Van Winsen Civil Practice of the High Courts of South Africa* (4ed) p 788.

²⁷ 1979 (2) SA 457 (W) at 461D.

80. In these circumstances, I am of the view that the documentation comprising Item 14 of the Rule 35(12) notice should be produced.

The Rule 35(13) application

General principles

81. The applicants have not given any indication of their defence to the respondents' Rule 35(13) application other than to contend that *"the founding papers fail to make out a case"* and that they intend to *"oppose the matter on the basis of the Respondents' own papers"*. The respondents thus argue that the applicants' failure to deliver an answering affidavit which responds to the allegations in the respondents' founding affidavit has the consequence that such allegations must be taken to be established facts.²⁸

82. Rule 35(13) reads as follows: *"The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications"*.

83. The Court has the discretionary power in terms of Rule 35(13) to direct that all the provisions of Rule 35 relating to discovery shall apply to applications. It was held in *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd*²⁹ that this power should be exercised only in exceptional circumstances:

"[7] The cases on Rule 35(13) make one thing clear. An order in terms of the Rule is not simply there for the asking. It is only in exceptional circumstances that the Rules of discovery should be made to apply to application proceedings shall deal with this in more detail below.

²⁸ *Municipality of Mossel Bay v The Evangelical Lutheran Church* [2013] ZASCA 64 (24 May 2013) at para [6].

²⁹ 2003 (6) SA 190 (SE).

[8] On the other hand, certain important constitutional values must also be borne in mind... “

84. In *Cancom (Pty) Ltd and others v TMT Services and Suppliers (Pty) Ltd and others*,³⁰ the Court stated: “Our courts are more inclined to exercise its discretion in favour of ordering discovery in motion proceedings, in cases where discovery is asked for by a respondent who requires documents to answer the case it has to meet. This is understandable, as it is the applicant who chose motion proceedings and the respondents would be prejudiced, without the opportunity to resort to the usual discovery process provided for in Rule 35, to answer a case against it.”

85. The applicants emphasise that an order in terms of Rule 35(13) making discovery applicable to motion proceedings is not to be had for the asking. Exceptional circumstances must exist to warrant such an order.³¹ In *Moulded Components supra* it was held³² that in application proceedings “discovery is a very, very rare and unusual procedure” and it is therefore sound practice that it is only in exceptional circumstances that discovery should be ordered in motion proceedings. The court refused such relief in circumstances where the documents sought were cast in very wide terms, and the Rule 35(13) application effectively amounted to a fishing expedition.³³

86. The applicants argue that courts are accordingly reluctant to order discovery in motion proceedings in the early stages, especially before the respondent has delivered its opposing affidavit. Discovery will only be ordered in terms of Rule 35(13) where there are reasonable grounds for doubting the correctness of the allegations made on behalf of an applicant.³⁴

³⁰ [2021] ZAWCHC 12 (19 January 2021) at para [30].

³¹ See, for example, *Saunders Valve Company Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 149; *STT Sales (Pty) Ltd v Fourie and others* 2010 (6) SA 272 (GSJ) at para [15].

³² At 470D-H.

³³ At 470H. See also *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and others* 1999 (3) SA 500 (C) at 513G-I.

³⁴ See *Saunders Valve supra* at 149B-E; *The MV Urgup supra* at 514A; *East Cross Sea Transport Inc v Elgin Brown & Hamer (Pty) Ltd* 1992 (1) SA 102 (D) at 109C-E.

87. The respondents point out, however, that they are subject to precisely the same prejudice as that regarded as decisive in *Saunders Valve*.³⁵

“Because of the fact that motion proceedings have been instituted, the respondent is called upon now, not only to plead to the claim as set out in the founding affidavits and the notice of motion, but also to place before the Court its evidence. In my opinion, having regard to the circumstances to which I have referred, the respondent would be prejudiced if discovery were not to be made at this stage and so give the respondent the opportunity of deciding what evidence should be placed before the Court in answer to the matters upon which the onus will ultimately rest upon the applicant. It follows too, in my judgment, that it would be unfairly prejudicial to the respondent if it were called upon to file answering affidavits prior to such discovery having been made by the applicant. I would add too that this is obviously a matter where technical evidence may well be vital. The evidence which the respondent wishes to obtain will, no doubt, include matters of a technical nature which will of necessity relate to documents which should properly be discovered by the applicant.”

88. The respondents criticize the applicants’ unqualified statement, with reference to *Saunders Valve*, that our courts are reluctant to order discovery in motion proceedings in the early stages, especially before the respondent has delivered its opposing affidavit. In *Saunders Valve* the interlocutory applicant was in fact granted an extension of time to deliver an answering affidavit, and a discovery order was made with immediate effect.³⁶

89. The context in which exceptional circumstances can be found to exist was referred to in *STT Sales (Pty) Ltd v Fourie and others*,³⁷ where the Court stated:

³⁵ At 149F-H.

³⁶ At 150 F-1.

³⁷ 2010 (6) SA 272 (GSJ) at 276B-G.

"Rule 35 of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the Supreme Court of South Africa (the rules) provides in rule 35(13) that the provisions of the rule relating to discovery apply mutatis mutandis to applications. Only in exceptional circumstances is an order made directing discovery in application proceedings. See Saunders Valve Co Ltd v Insamcor (Pty) Ltd 1985 (1) SA 146 (T) at 149F-I; Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd 2003 (6) SA 190 (SE) at 196A -B.

In the above two cases discovery was allowed prior to the finalisation of the delivery of affidavits. The exceptional circumstances in each case were that the respondent was prejudiced, in that it required discovery of documents in order to enable it to file its answer. Only if the applicant, who had chosen motion proceedings as the method by which it would proceed against the respondent in each case, was directed to make discovery of the documents, would the respondents' prejudice be alleviated. Discovery was ordered prior to the equivalent of close of proceedings in a trial." [Emphasis added.]

90. In deciding whether exceptional circumstances exist and whether to order discovery a court exercises a discretion in the strict sense. This means that this Court may adopt any one of a range of options about which there may well be a justifiable difference of opinion as to which one would be the most appropriate.³⁸ Factors that will be taken into account include the following:³⁹

90.1. Principles of fairness and equity: the court will be guided by constitutional values, though the open and transparent society created by the Constitution indicates a stricter approach, as litigants can exploit this in preparing for legal battle.

90.2. Whether the applicant for discovery is the applicant or the respondent in

³⁸ *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kayalami) (Pty) Ltd* 2013 (4) SA 539 (SCA) at para [19].

³⁹ *African Bank Ltd v Buffalo City Municipality* 2006 (2) SA 130 (CKH) at para [8].

the main application. In the present matter the respondents in the main application seek discovery.

90.3. Whether the application is made at an early or late stage of the proceedings.

90.4. The nature of the matter and the evidence that has been adduced. Discovery could be unnecessary where evidence has been adduced.

90.5. The extent of the discovery sought. A request for general discovery may indicate a fishing expedition, whereas requests for specific discovery might indicate a genuine need.

91. I proceed to discuss these factors in the context of the present matter.

The nature of the matter and whether evidence has been adduced

92. It is common cause that extensive evidence was led in the arbitration proceedings, and voluminous discovery had been made prior to the leading of evidence. The respondents nevertheless submit that this is an exceptional case which justifies the application of the discovery procedures in Rule 35.

93. As set out earlier, the main application seeks declaratory relief in terms of which the alleged purported rescission by the first respondent of a Rule 34 settlement agreement reached in this Court, and the related arbitration that followed is declared to be invalid. Contempt relief is also sought against the first respondent. The relief, sought on motion, is wide-ranging:

93.1. an order declaring invalid the respondents' rescission, on the basis of fraud, of settlement and arbitration agreements;

93.2. an order limiting the legal remedies available to the respondents;

93.3. an order that is in effect an anti-dissipation order;

93.4. orders directing that anticipated disputes of fact be submitted to oral evidence. Notably, the relief sought by the applicants in prayer 8 of the notice of motion in the main application is an order:

"8. Directing:

8.1. First Respondent (should a material dispute of fact not capable of resolution on the papers arise in regard to affidavits filed by him in opposing the relief sought) to submit to cross-examination on such issues as may be in dispute in terms of Rule 6(5)(g), on such terms as may be agreed between the parties or, absent agreement, as may be directed by the above Honourable Court;

Alternatively to paragraph 8.1 above

8.2. An order directing that material disputes of fact on the papers in regard to the relief sought be referred for oral evidence upon such terms as may be agreed between the parties or, absent agreement, determined by the above Honourable Court;

Alternatively to paragraph 8.2 above

8.3. An order referring the matter to trial."

94. The crux of the respondents' case is the following.

95. The relief sought in the main application is final. It is founded on supposed refutations of allegations of fraud and perjury. The obvious implication of the applicants' contentions is that the allegations of fraud and perjury are themselves deliberately false, and therefore fraudulent and perjurious. Thus, although the application is presented as a negation of the respondent's allegations, on analysis it positively asserts fraud on the part of the respondents.

96. It is settled law that issues of fraud should not be litigated on motion.⁴⁰ It was pointed out in *NDPP v Zuma*⁴¹ that motion proceedings were designed to resolve legal issues, not factual disputes. The founding papers in the main application run into many pages of detailed evidence and argument. Significantly, they foreshadow many substantial and material disputes of fact (the respondents refer to 11 examples).⁴²

97. The applicants' choice to proceed on motion is thus highly unusual and can rightly be characterised as "exceptional" or "extraordinary": *"The phrase 'exceptional circumstances' is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as 'ordinary' in one case may be treated as 'exceptional' in another."*⁴³

The stage at which discovery is sought

98. In the present matter, the Rule 35(13) application was launched after discovery had been made in the arbitration proceedings, and after evidence had been led there. The Rule 35(13) application was, of course, brought in the course of new proceedings instituted against the respondents, namely the main application. One cannot disregard the background from which the main application arose.

99. The applicants submit, as to the relevance of the stage which the proceedings have reached, it was held in *STT Sales (Pty) Ltd v Fourie and others*⁴⁴ that the *"right to discovery is an easily abused right and must be properly protected to ensure that it*

⁴⁰ See, for example, *Prinsloo NO v Goldex 15*, 2014 (5) SA 297 (SCA) at paras [18] and [19]; *Pepkor v AJVH Holdings 2021* (5) SA 115 (SCA) at para [39].

⁴¹ 2009 (2) SA 277 (SCA) at para [26].

⁴² The case thus calls out for oral evidence: see *East Coast Sea Transport v Elgon Brown and Hamer* 1992 (1) SA 102 (D).

⁴³ *Liesching and others v S* 2019 (4) SA 219 (CC) at para [39].

⁴⁴ 2010 (6) SA 272 (GSJ) at paras [15]-[16].

is used in the context in which it was designed for use. The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish legal issues. Rather, it is a tool used to identify factual issues once legal issues are established. [Emphasis added.]

100. Thus, in general, to allow discovery in application proceedings at a stage before the battle lines are drawn, and the legal issues identified, would be to "invite chaos". The parties are likely to deliver further affidavits and embrace new issues, and will need to respond to each other, leading to an inevitable mutation of the evidence produced on motion.⁴⁵

101. The remarks in *STT Sales* were quoted with approval in *Investec Bank Ltd v Blumenthal NO and others*⁴⁶ where the Court held that those remarks were "... especially important because they address the forensic function of discovery, not merely considerations about the interests sought to be served by the invocation of one or another legal device". The Court quoted various cases indicating that applicants who were successful in invoking Rule 35(13) were those who had demonstrated "a clear prejudice" which would result without such relief.

102. The respondents criticize the applicants' reliance on *STT Sales v Fourie* in support of the dismissal of this application. That case is distinguishable from the present matter. It involved an applicant who wanted to apply for final relief and who asserted that if the respondent were obliged to make discovery its entitlement to the final relief would be evident.⁴⁷ The Court remarked that that would have been a wrong approach: "*It seems to me that it is improper to commence with the premise that an applicant, who has chosen a particular course which results in prejudice to him, is entitled to maintain that course and seek relief to alleviate the prejudice, notwithstanding general principles*

⁴⁵ *STT Sales supra* at para [17].

⁴⁶ [2012] ZAGPJHC 21 (5 March) at para [22].

⁴⁷ See paras [11] and [18] of the judgment.

prohibiting such a relief".⁴⁸

103. After opining that the applicant could have solved its own problems by proceeding by way of action, the Court held⁴⁹ that: "*The only 'exceptional circumstance' in the present matter is the applicant's determination to follow a course which causes it prejudice.*" The application was dismissed.

104. The respondents point out that *Investec Bank v Blumenthal* is equally inapplicable to the present matter. That case involved an application for sequestration in which the applicant sought an order under Rule 35(14) without there having been an application under Rule 35(13). The application was fatally irregular and fell to be dismissed for that reason.⁵⁰ The remainder of the judgment is *obiter*. Nevertheless, the Court remarked⁵¹ that Rule 35 (13) orders have rarely been granted at the behest of an applicant, and more usually to respondents requiring information properly to counter the allegations of the applicants. That is the position in which the respondents find themselves in the present matter.

The extent of the request, fairness and prejudice

105. In relation to the extent of the discovery sought, the notice of motion seeks an order that the applicants are directed to make discovery, in accordance with Rule 35, of documentation listed in an annexure to the founding affidavit. The annexure seeks the production of a vast array of documents, spanning over an extended time period from 2014 to (in some cases) the present. It calls, in short, for comprehensive discovery.

106. The applicants argue that the respondents do not set out the alleged prejudice that they will suffer should discovery be refused, although they do say that they will suffer prejudice. They also do not explain why they cannot, at the appropriate juncture, make application in terms of Rule 6(5)(g) for a referral to oral evidence if the

⁴⁸ At para [18].

⁴⁹ At para [19].

⁵⁰ See para [8].

⁵¹ At para [15].

facts on the affidavits, or the circumstances of the litigation, warrant such a referral. In fact, the relief claimed in the main application envisages that, should circumstances so require, a referral to oral evidence can be made.

107. The respondents contend in their heads of argument that they will be prejudiced in not being able to respond in the manner required in motion proceedings (as set out in *Wightman t/a JW Construction vs Headfour*⁵²) because they *"do not have all the documentation that they need and the Applicants have refused to provide the Respondents with documents relating to the matters in question"*.

108. The prejudice to the respondents could have been avoided had the applicants instituted action instead of motion proceedings. The choice of proceedings has deprived the respondents of their automatic right to demand discovery in terms of Rule 35.

109. In *Independent Newspapers (Pty) Ltd v Minister For Intelligence Services: In Re Masetlha v President of the Republic of South Africa and another*,⁵³ the Court stated: *"Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial."*

110. And in *African Bank Ltd v Buffalo City Municipality*⁵⁴ the Court stated:

⁵² 2008 (3) SA 371 (SCA) at para [13].

⁵³ 2008 (5) SA 31 (CC) at para [25].

⁵⁴ 2006 (2) SA 130 (CKH) at paras [14]-[18].

"[14] I do not understand the request of the first respondent to go beyond what it is entitled to in terms of Rule 35 of the Uniform Rules. In any event the applicant would be entitled to object to any documents that go beyond what is allowed by Rule 35

[15] It is also clear that the first respondent is not on a fishing expedition. Its request is not for a general discovery but is accompanied by an annexure of the documents sought to be discovered. The first respondent has confined itself to the documents mentioned in the annexure despite the fact that it would have been entitled to request general discovery

...

[17] In the circumstances fairness dictates that I should exercise my discretion in favour of the first respondent and allow it to demand discovery.

[18] I am of the view that in this case exceptional circumstances exist that I should direct that the ..applicant makes discovery of the documents listed in the annexure The applicant will, however, have the right to object to the discovery of any document to which, in terms of Rule 35(2)(b) of the Uniform Rules, it is entitled to raise a valid objection."

111. I agree with the submission made on the respondents' behalf that these considerations apply equally in this matter, and that fairness dictates that the Court should exercise its discretion in favour of the respondents and allow them to demand discovery of the documents specified in annexure PBD-1 to the notice of motion.

Constitutional values of openness and transparency

112. The respondents submit that an order in terms of Rule 35(13) would *"accord with the constitutional values of openness and transparency."*

113. It is of course so that constitutional values of openness and transparency must be given due weight. The applicants contend, however, that other constitutional values however are also implicated, particularly section 34 of the

Constitution pertaining to access to court and the rights of litigants, which include the expeditious finalisation of litigation, and fairness.⁵⁵ The principle of finality of arbitration awards is a cardinal principle in terms of both the common law and the Arbitration Act, which the courts are bound to support. A party who has entered into an arbitration agreement with the advantage of finality will not readily be absolved from that undertaking.⁵⁶

114. The scope of motion proceedings has been extended in recent times as they are generally less costly and more expeditious than a trial action. Motion proceedings may be employed in any situation, unless, for example, a statute requires otherwise, or where material disputes of fact are apparent from the outset. The type of claim is not the touchstone as to whether motion or action proceedings should be chosen.⁵⁷ Whether the choice of motion proceedings was appropriate is a matter for the court to decide based on whether "*broadly speaking ... [the proceedings involve] deciding real and substantial disputes of fact*".⁵⁸ The widespread use of application proceedings does not mean that a court should ignore the Uniform Rules in relation to applications and effectively conflate the provisions of the Rules in relation to trials, on the one hand, and applications, on the other. The rules have their place in the regulation of the orderly conduct of litigation in whatever format.

115. I agree, however, with the submission made by the respondents' counsel that the particular facts of the matter are important in this respect, even if, on the applicants' argument, the respondents will enjoy the benefit of the *Plascon Evans*

⁵⁵ *Van Zyl N.O. v Road Accident Fund* 2022 (3) SA 45 (CC) at para [20].

⁵⁶ *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd* 2013 (5) SA 84 (SCA) at para [15]; *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391F.

⁵⁷ *Ter Beek v United Resources CC* 1997 (3) SA 315 (C) at 329D-G.

⁵⁸ *Ismail v Durban City Council* 1973 (2) SA 362 (N) at 373F-375A; and see Cilliers *et al* *Herbstein & van Winsen's The Civil Practice of the High Courts of South Africa* (5ed) p 292.

rule⁵⁹ in the main application. The matter is now outside the realm of the arbitration proceedings. It appears to me that material aspects of the main application are inevitably headed towards the leading of oral evidence, or referral to trial. The applicants foresaw this at the time of the institution of the main application. Discovery will inevitably be required, irrespective of which documents may already be in the respondents' possession as a result of the arbitration proceedings.

Conclusion on the Rule 35(13) application

116. In all of these circumstances I agree with the respondents that the nature of the main application constitutes an exceptional case for the purposes of discovery at this stage.

Costs

117. I see no reason to deviate from the general rule that costs should follow the result in the application under Rule 35(13).

118. The respondents' request in terms of Rule 35(12) was reduced substantially in the course of the proceedings. The applicants had to deliver a voluminous answer to the Rule 35(12) notice, which called for much information that had already previously been provided, and a substantial concession occurred after the delivery of the answering affidavit. In the premises I think that it is fair that each party should pay its own costs in respect of the application under Rule 30A.

Order

119. The following order is granted:

119.1. **The application in terms of Rule 30A succeeds and the**

⁵⁹ *Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-G.

applicants are directed to provide the documents described in Item 1 and Item 14 of the respondents' notice in terms of Rule 35(12) dated 24 August 2021.

119.2. The documents are to be provided by no later than 17:00 on Monday, 19 June 2023, or within such extended period as the parties may agree upon, or as may be directed by court order.

119.3. Failing compliance by the applicants as directed above, the respondents may approach this Court on the same papers, duly supplemented, for an order dismissing or striking out the applicants' claim in Part B of the notice of motion in the main application.

119.4. In relation to Item 1,

119.4.1. The "books" or lists of clients for Mr Basson, Mr Kruger, Mr Nimmo and Mr Neethling are to be extracted as they existed from time to time from 1 January 2016 up to 18 December 2019.

119.4.2. The relevant information may be provided to the respondents in electronic format.

119.4.3. The information provided in terms of paragraph 119.4.1 above shall, subject only to any further agreement between the applicants and the respondents regulating access, or any further order of this Court, only be accessed by the respondents' legal representatives, and only after the respondents have provided a letter undertaking that the information so delivered will be (1) kept confidential; and (2) used only for the purposes of the litigation under case number 13001/2021.

119.4.4. The parties shall each bear their own costs of the Rule 30A application.

119.4.5. It is directed, in terms of Rule 35(13), that the provisions of Rule

35 shall apply in the main application to the extent set out below.

119.4.6. **The applicants are directed to discover and make available for inspection and copying, in accordance with Rule 35, the documents listed in annexure PBD-1 to the founding affidavit in the application under Rule 35(13), by no later than 17:00 on Monday, 19 June 2023 or within such extended period as the parties may agree upon, or as may be directed by court order.**

119.4.7. **The provisions of Rule 35 shall apply to the extent necessary to give effect to the terms of paragraph 119.4.6.**

119.4.8. **The applicants shall pay the costs of the application in terms of Rule 35(13), jointly and severally, the one paying, the other to be absolved, including the costs of two counsel where employed.**

119.5. **The respondents are to deliver answering affidavits to the main application by no later than Monday, 31 July 2023.**

119.6. **The time periods provided for in the Uniform Rules of Court will regulate the delivery of further affidavits and heads of argument.**

119.7. **The following proceedings shall be enrolled for simultaneous hearing on the semi-urgent roll on Tuesday, 24 October 2023 or such other date as the parties may agree upon, subject to leave having been obtained from the Acting Judge President:**

119.7.1. **The proceedings brought by the first respondent (there as applicant) under case number 4780/2020;**

119.7.2. **The proceedings brought by the applicants under Part B of case number 1300/2021; and**

119.7.3. **The proceedings brought under case number 7505/2022.**

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicants: S. C. Kirk-Cohen SC (with him M. Greig),
Instructed by Webber Wentzel Attorneys

For the first to third respondents: W. Duminy SC (with him J. van Dorsten),
Instructed by DGF Attorneys