

# DISPUTE RESOLUTION ALERT

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### Limitation to objections to produce documentation in terms of Rule 35(12)

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Rule 35(12) is somewhat different to the remaining discovery provisions of Rule 35 of the Uniform Rules of Court. This is as a result of Rule 35(12)'s wording not specifying whether the documents sought under it must relate to the matter in question. *Prima facie*, the only prerequisite to this rule is that reference must be made to the documentation sought in the opposing party's pleadings and which has not been attached to such pleading.

More specifically, Rule 35(12) reads as follows:

35(12(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*

35(12)(b) *Any party failing to comply with the notice ... shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."*  
[emphasis added]

In accordance with the wording of Rule 35(12), mere reference to any document appears to trigger a litigating party's right to request such documents or recordings to be produced for inspection, copying or transcription. As such, there is little limitation on such a request for documentation in line with the founding principles of discovery, namely that a party has a right to request documentation which are relevant to the matter at hand.

Despite Rule 35(12) providing an option for a party to file a notice of objection to provide such requested documentation, the rule is silent to the grounds available to the party refusing to provide same.

The question regarding the principles of Rule 35(12) was recently dealt with in the matter of *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (Case no 219/2021) [2022] ZASCA 24. In this case, certain documents were sought by Caxton (as referenced in Novus' answering affidavit in the main application) and Novus' failure to provide such documentation precipitated an interlocutory

application whereby Caxton attempted to compel the production, inspection and copying of the requested documentation.

Novus' reasons for its refusal to provide the requested documentation included, *inter alia*, the following:

- according to Novus, an essential feature of discovery "*is that the person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues discovered. It is not a tool designed to put a party in a position to draw battle lines and establish the legal issues*";
- the requested documents were irrelevant to the issues in the main application; and
- certain of the documents requested were privileged and/or confidential.

On appeal, the court dealt with Novus' arguments as outlined below.

### REFERENCE

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As a starting point, the court approached Rule 35(12) by confirming that the word “reference” contains two fundamental components, these being:

- the document or recording requested must have been referred in a party’s pleadings or affidavits in general terms (a mere reference by deduction or interfere not holding weight); and
- a party requesting the document cannot ordinarily be required to answer to the pleading or affidavit “before they are given an opportunity to inspect and copy, or transcribe the document or tape recording mentioned in the adversary’s pleadings or affidavits”.

The court further canvassed the objective of Rule 35 (12) as explained in the matter of *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C).

“[A] defendant or respondent does not

*have to wait until the pleadings have been closed or his opposing affidavits have been delivered before exercising his right under Rule 35(12): he may do so at any time before the hearing of the matter. It follows that he may do so before disclosing what his defence is, or even before he knows what his defence, if any, is going to be. He is entitled to have the documents produced “for the specific purpose of considering his position.”*

### RELEVANCE

The court confirmed that the relevance of a document or recording is determined by whether such document “might have evidentiary value” or “might assist” the party that seeks such document or recording to be produced insofar as it relates to any “aspects or issues that might arise in light of the facts stated in the pleadings or affidavits”

In its judgment, the court relied

on Friedman J’s consideration of relevance in respect of Rule 35(12) in the matter of *Gorfinkel v Gross, Hendler & Frank* [1987] (3) SA 766 (C). Here it was held that “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)”. In confirmation of Friedman J’s sentiments, the court in this case found that the scope of Rule 35(12) is wide enough to cover every situation where the party calling for production of a document requires same “for purposes of assessing his or her position”.

As such, in respect of the principle of relevance, the court found that in considering an application to compel production of documents pursuant to a Rule 35(12) notice, the court needs to utilise its discretion in a narrow sense. As such, giving effect to the sentiments that “once you make

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*reference to the document, you must produce it*". This has the effect of limiting a party's scope to refuse the production of such documentation.

As such, on a strict reading of Rule 35(12), the requested documentation which Novus had claimed to be irrelevant was ordered to be produced to Caxton.

### PRIVILEGE

Novus contended that a certain report (referred to in its answering affidavit in the main application and subsequently requested in terms of Rule 35(12)) was privileged and was thus protected from disclosure.

In this respect, it was found that it was incumbent on Novus to establish that the communication was:

- made for the purpose of being placed before its legal advisor with the view to providing legal advice; and
- made for the purpose of either pending litigation or litigation that was contemplated as likely at the time.

On review of the facts of the matter, the court found that such report was not privileged and was therefore to be produced by Novus.

### CONFIDENTIALITY

In addition to the aforementioned grounds, Novus claimed that certain documentation ought not to be produced due to the fact that it contained sensitive commercial information.

In contemplation of the confidentiality of the documentation, the court, while stating that *"the disclosure of sensitive commercial information by way of discovery is not novel"*, concluded that *"a court will strive to strike a fine balance between the competing interests of the litigants"*.

In this respect, a court will not adopt a predisposition in favour of or against permitting the production of the documentation in question.

In order to implement such balance, the court canvassed the imposition of a confidentiality regime, rather than a steadfast refusal to produce such documentation as had been adopted by Novus.

### CONCLUSION

On review of the Caxton case, it is clear that a party refusing to produce documentation in terms of Rule 35(12) has a limited scope within which to do so. This is due to the fact that Rule 35(12) has a broader application than the remainder of Rule 35, specifically regarding the relevance of documents or recordings that have been referenced in a pleading or affidavit.

As a result, a litigant should be circumspect when referring to documentation or recordings in pleadings and affidavits as *"once you make reference to the document, you must produce it"*.

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