THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1370/2019

In the matter between:

DEMOCRATIC ALLIANCE	**FIRST APPELLANT**
GLYNNIS BREYTENBACH	**SECOND APPELLANT**
WERNER HORN	**THIRD APPELLANT**

and

BUSISIWE MKHWEBANE	**FIRST RESPONDENT**
THE OFFICE OF THE PUBLIC PROTECTOR	**SECOND RESPONDENT**

Neutral citation: *Democratic Alliance and Others v Mkhwebane and Another* (1370/2019) [2021] ZASCA 18 (11 March 2021)

Coram: NAVSA ADP and DLODLO and NICHOLLS JJA and CARELSE and ROGERS AJJA

Heard: 24 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 March 2021.

Summary: Uniform Rule 35(12) – production of documents to which 'reference is made' in pleadings or affidavits – meaning of – includes reference in annexures – not reference to documents by inference – excludes supposition – document sought must be relevant in relation to issues that might arise – different from relevance to issues that are circumscribed after the close of pleadings or after all affidavits have been filed – onus discussed – document material to timeline in relation to defamatory statements relevant and compellable.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Papier J sitting as court of first instance):

1 The appeal is upheld, and the respondents are to pay the costs of appeal jointly and severally, the one paying the other to be absolved, including the costs of two counsel.

2 The order of the court below is set aside and substituted as follows:

'1. The applicants in the main application under case number 19668/17 are directed to produce for inspection and copying the first applicant's application for the post of Analyst: Domestic Branch: DBO1 in the State Security Agency, referred to in "PPSA5" by no later than 1st April 2021.

2. The respondents in the main application are to file their answering affidavit by no later than the 16th April 2021.

3. The respondents in this application are ordered to pay the applicants' costs, including the costs of two counsel where so employed, jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Navsa ADP (Dlodlo and Nicholls JJA and Carelse and Rogers AJJA concurring)

Background

[1] This is an appeal against an order of the Western Cape Division of the High Court, Cape Town, in terms of which an interlocutory application brought by the appellants in terms of rule 30A of the Uniform Rules, to compel the production of documents by the respondents requested under rule 35(12), was dismissed and they were ordered to pay the respondents' costs jointly and severally, the one paying the other to be absolved. Additionally, the high court ordered the appellants to file an answering affidavit in the main case within 15 days of the order. It is against those two orders that the present appeal, with the leave of the court below, is directed. In the main case the respondents are seeking, on motion, an order directing the appellants to retract defamatory remarks concerning the first respondent made at a press conference and to apologise publicly for their utterances. The detailed background appears hereafter.

[2] On 6 September 2016, the second appellant, Ms Glynnis Breytenbach, acting in her representative capacity as a member of the first appellant, the Democratic Alliance, a political party registered in terms of s 26 of the Electoral Act 73 of 1998 (the DA), conducted a press conference where she published the following media statement of and concerning the first respondent, Advocate Busisiwe Mkhwebane, the Public Protector in our country, appointed to that position in terms of s 184 of the Constitution read with s 1A of the Public Protector Act 23 of 1994:

'Ahead of the debate on the nomination of Adv Busisiwe Mkhwebane for the Public Protector, the DA has decided to not support this nomination. This is on the grounds that her appointment would be unreasonable as she was by no means the best candidate for such a position and was illogically preferred over other qualifying candidates.

Adv Mkhwebane may turn out to be a capable candidate for the position of the Public Protector and we wish her well if Parliament and the President confirm her nomination. However, we contend that her qualifications and experience make her unsuitable for this position.

It is upon this basis that the DA will not support her nomination by the Ad Hoc Committee for the Appointment of a new Public Protector for the following reasons:

She has little or no practical experience to justify such an appointment when compared with the experience of the other four candidates;

She was employed by Home Affairs as a Director (salary level approximately R1 million annually) immediately prior to this process being initiated;

She changed employment around June 2016, and went to State Security Agency (SSA) as an analyst.
When asked in the interview why she had changed jobs for what is ostensibly a demotion, her reply was that she "*was passionate about the Constitution"*. While this is noble value to hold; it alone does not make her eligible for the position or separate her from the other more qualified candidates; and

We have been advised that the time spent as an "immigration officer" in China is also suspicious, having been informed that this is simply coded language for being on the payroll of SSA.

In the absence of a logical explanation for what is seen as a demotion the ineluctable conclusion is unfortunately that Adv Mkhwebane is on the payroll of the SSA. This situation is even more problematic in the current climate in the country, where the justified view is held that President Jacob Zuma is abusing State departments, the SSA in particular, to hang on to power at all costs. We hold the view that the Public Protector cannot be seen as even remotely connected to the State Security Agency.

While this doesn't make Adv Mkhwebane the worst candidate, it does not make her the best either. Further to this, the secrecy around her work at the SSA makes it almost impossible to ascertain whether or not her role and conduct are beyond reproach and befitting the office of the Public Protector who is constitutionally mandated to be "*a fit and proper person to hold such office*."

Additionally, Adv Mkhwebane could not confirm that she had "*acquired any combination of experience … for a cumulative period of at least 10 years*" as is demanded by the Constitution.

Other issues that gave rise to concern and moved us to be unwilling to support her nomination are the following:

Both Judge Weiner and Prof Majola were stronger candidates, in terms of experience and in terms of the quality of their interviews;

Prof Majola as a candidate brings the bonus of his involvement in the Special Tribunal in Rwanda over the last seven years, he, unlike Adv Mkhwebane, has been at a certain distance from Government in South Africa.

Adv Mkhwebane, on the other hand, has always been employed in and around government and has already indicated that she wants to have a more "*friendly relationship with government"*;
Much was made of the fact that she was a senior investigator at the office of the Public Protector previously, but in our view, the fact that she served during the tenure of Lawrence Mushwana, when the office showed little to no appetite to vociferously investigate government corruption.

<u>As such, with the ever present danger of state capture by the President, and the fact that all independent institutions with an investigative capacity have already been captured leaving only the Office of the Public Protector and Judiciary relatively untouched, it is of enormous importance to ensure that the appointment of the new Public Protector is beyond any suspicion.</u>

Given the overall performance of the candidates at the interviews and a comparison of their qualifications and experience, the single-minded support for Adv Mkhwebane is unreasonable in our view.

We hold the view that Judge Sharise Weiner had the best interview, but that Professor Majola is the best candidate. We would be very comfortable nominating him for the post.

To replace the fearless Adv Madonsela with a candidate who hasn't shown the necessary potential to pursue government corruption would be undermining our hard-won constitutional imperatives.

The DA believes in the Rule of Law and stopping corruption. To this end we have worked tirelessly during this process to appoint the new Public Protector, to ensure that the right woman

or man is appointed to serve the interests of the people instead of the narrow interests of a political cabal set on advancing their own self-interested agenda.

We simply cannot risk these principles with the nomination of Adv Mkhwebane.'
(Emphasis supplied by Ms Mkhwebane in her founding affidavit.)

[3] At the press conference referred to in the preceding paragraph the third appellant, Mr Werner Horn, also a member of the DA, made the following statement, which allegedly was widely disseminated, including through a national television broadcaster:

'We were reliably informed that she indeed during her 10 years as an immigration officer in China, was already on the payroll of the State Security Agency. I think, mindful of the fact that by nature if you are indeed a spy it is of a secret nature.'
(Emphasis supplied by Ms Mkhwebane in her founding affidavit.)

[4] The second respondent is the office of the Public Protector, established in terms of s 181(1)*(a)* of the Constitution and designated as a juristic person in terms of s 5(1) of the Public Protector Act. The respondents' complaint is that the statements made by the appellants of and concerning Ms Mkhwebane were defamatory, impinged on her integrity and reputation, and had no foundation in fact. Ms Mkhwebane complained that the statements were intended and understood by members of the public to convey:

'29.1 I was a spy of the State Security Agency at the time of my nomination and would remain such subsequent to my appointment at the office of the Public Protector;

29.2 That I was on the payroll of the State Security Agency while I was employed as an immigration officer in China.

29.3 I am to be treated with suspicion as I continue to be on a payroll of the State Security Agency, and not independent as I am intricately connected to the State President who is allegedly abusing the State Security Agency.

29.4 That my appointment will lead to the state capture of the office of the public protector by the State President;

29.5 That I am not honest and have no integrity in that whilst I was deployed by the Department of Home Affairs to China, I was also on the payroll of the State Security Agency.

29.6 That I have no integrity and honesty as it is expected from an Advocate and a person applying for the Public Protector's post, as I did not fully disclose material information about my past employment by the State Security Agency while in China to the Committee, the National Assembly and the State President.

29.7 That I acted dishonestly by failing to disclose to my employer that I received remuneration from other state departments while in gainful employment of the Department of Home Affairs.

29.8 That the information that I was a "spy" comes from reliable sources and therefore it is unquestionable.'

[5] Ms Mkhwebane was adamant that she had been deployed by the Department of Home Affairs on 7 September 2009 to the Beijing Foreign Office in connection with Home Affairs related matters, which term came to an end on 31 May 2014 and was during that time not employed by nor connected to the State Security Agency (the SSA), which is a government department with overall responsibility for civilian intelligence operations, in any way. The following is a pertinent part of her founding affidavit in support of the main application:

'. . . I confirm I was deployed by the Department of Home Affairs in Beijing, China, as Councillor: Immigration and Civic Services. I further confirm that whilst in Beijing, China, I was not on the payroll of State Security Agency nor ever being in the payroll of State Security Agency whatsoever. I attach in support hereto a confirmatory affidavit of Mr Arthur Fraser, the Director General of State Security Agency as annexure **"PPSA 4"**.

On 11th May 2016, I was appointed by State Security Agency, as an Analyst: Domestic Branch, at P3 level. A copy of the Appointment letter is attached hereto as annexure **"PPSA 5"**. The P3 position and salary level occupied by me at the time of my employment in the State Security Agency was the equivalent of a Chief Director position and therefore higher than the position of Director.'

[6] It is necessary to record that in the confirmatory affidavit from the Director General of the SSA, Mr Arthur Fraser, on which the respondents relied, he stated, *inter alia*, that he has read the founding affidavit by Ms Mkhwebane and 'confirm[s] the correctness of facts thereof in so far as they relate to her employment and remuneration at the State Security Agency'. He goes on to echo that she was never in the employ of the SSA 'in any manner' whilst deployed to the People's Republic of China by the Department of Home Affairs and that she was subsequently appointed as a member of the SSA on 11 May 2016 until she took up appointment as the Public Protector in October 2016.

[7] For present purposes it is necessary to have regard to annexure 'PPSA5', referred to in para 5 above. It bears the letterhead of the SSA, is addressed to Ms Mkhwebane, appears to be from the office of the General Manager, Human Resources at the SSA, and reads as follows:

'1. I have pleasure in informing you that your application for the abovementioned post has been approved.

2. Your remuneration package is structured as follows:

Occupational Band	: P3
Basic Annual Salary	: R601 770.00 pa
Service Allowance	: R 30 810.00 pa
Housing Allowance	: R 23 910.00 pa
Annual Bonus	: R 50 147.50 pa
Group Assurance of 60% (State Contribution)	: R21 159.95 pa
VSSM	: R246 342. pa
Pension (State Contribution)	R 96 283.20 pa
Total Package	**: R1 082 773.27 pa**
Package Range	R884 245.36 – R1 194. 12 57 pa

3. If the above offer is acceptable to you, you are requested to confirm this as per attached appendix A.

4. Further please note that your salary is a personal matter between yourself and the employer and is regarded as confidential.

5. If you do not accept the salary offer indicated above, please attach your current salary slip in your reply (Annexure A) so that this may be considered.

6. If your response is not received within 5 working days it would be assumed that you are no longer interested in the above-mentioned position.'

[8] Following on the defamatory statements referred to in paras 2 and 3 above being published and widely circulated in the media, Ms Mkhwebane's legal representatives wrote to the appellants, demanding a retraction. The appellants refused to accede to the demand, asserting that the statements complained of were true, in the public interest, and constituted fair comment. In her affidavit in the main application, Ms Mkhwebane referred to a media interview Ms Breytenbach, the second appellant, had with a news outlet on 2 February 2017, during which she allegedly stated that she was not bothered in the least by the threat of legal action because the statements complained of would not have been made if the appellants did not have proof to substantiate them.

[9] The appellants' refusal to accede to the demand for the retraction led to the main application by the respondents, launched in October 2017, in which the relief referred to in para 1 above was sought. Ms Mkhwebane eschewed any claim to monetary compensation, stating that her main objective was to vindicate her right to integrity and her right to her reputation as well as to ensure confidence in the office of the Public Protector.

[10] On 10 November 2017 the appellants filed a notice of intention to oppose the main application. On 1 December 2017, prior to filing their answering affidavit, the appellants filed a notice in terms of Uniform rule 35(12), seeking the production by the respondents of seven documents they considered they were, in terms of the subrule, entitled to.

[11] Rule 35(12) reads as follows:

'Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits *reference is made* to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or a transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.' (My emphasis).

[12] As recorded in the judgment of the court below, the respondents, although they had initially resisted providing any of the documents sought, produced five of the seven items required by the appellants. Many of the documents sought were, in any event, in the public domain. The refusal of the respondents to produce the remaining two items led to the interlocutory application in the court below during June 2018 in terms of rule 30A of the Uniform Rules[1]. It is those two items that were at the centre of the dispute in the court below and are the focus of this appeal.

[13] The two documents sought by the appellants are itemised in para 6 of the judgment of the court below:

'By agreement between the parties, this application was limited to the following two documents:

a. the first respondent's application for the post of Analyst; Domestic Branch; DB01 in the State Security Agency; and
b. the first respondent's confirmation of her acceptance of the offer as per appendix A.'

[14] The application by the appellants in the court below to compel production of the two items was premised on the assertions by Ms Mkhwebane, in paras 18 and 19 of her affidavit, reproduced in para 5 above, namely, those concerning the time during which she was employed by the Department of Home Affairs in China and the date on which she was appointed to her post as analyst in the State Security Agency and her attachment of annexure 'PPSA5' as her letter of appointment. The annexure, in turn,

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[1] Rule 30A reads as follows:
'(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems to meet.'

alludes, in its opening line, to her application for the position and required an acceptance form to be completed and returned. It is the first respondent's application that the appellants sought as well as an assumed completed acceptance form, presaged in the annexure.

[15] The appellants submitted that the documents were indeed referred to in Ms Mkhwebane's affidavit, within the contemplation of rule 35(12). In the court below it was accepted on behalf of the appellants that relevance was the touchstone for success in an application to compel the production of documents sought in terms of rule 35(12). They contended that the documents sought were directly relevant to the question of whether Ms Mkhwebane was a spy at the material times claimed in the statements complained of and were thus compellable.

[16] The respondents, in resisting the application to compel the production of the documents, adopted the position that Ms Mkhwebane's application for the post of Analyst at the State Security Agency was not referred to at all in her affidavit in the main application and was adamant that she had not referred to a completed letter of acceptance. Ms Mkhwebane insisted that the appellants were on a fishing expedition and that they were not entitled to the two items sought. The following passage of the response on her behalf to the appellants' notice in terms of rule 35(12) is instructive:

'The applicant *did not need to refe*r to the documents relating to her application and the applicants do not see the necessity of the application requested as it is not in dispute that the applicant worked at SSA as an Analyst'. (Emphasis added).

[17] I pause to note that it is uncontested that in heads of argument in the court below and in correspondence addressed to the appellants' attorney, it was communicated on behalf of Ms Mkhwebane that the documents sought in the application to compel were not in her possession but were in the hands of the SSA. She did not, however, at that stage, or even belatedly before us, place an affidavit to that effect on record. It is against the background set out above that the court below was called upon to decide the application in terms of rule 30A.

[18] In adjudicating the application to compel, the court below (Papier J), at the outset, held that neither of the documents sought were referred to or relied on by Ms Mkhwebane, as contemplated in rule 35(12). The court did, however, go on to state the following:

'They were both referred to in and are ancillary to annexure "PPSA5".'

[19] Papier J took the view that neither document was relied on in the main application and, in line with what was asserted on behalf of the respondents, he held that they need not have referred to them at all. The court had regard to *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 750D, in which the following appeared:

'An annexure to a pleading or an affidavit seems to me to be as much part of the pleading or affidavit as the body itself. Many references to documents in annexures to pleadings are probably irrelevant to the proceedings and would for that reason not have to be produced but it does not follow that the Rule does not apply to documents to which reference is made in annexures.'

Papier J considered that this *dictum* reaffirmed the relevance requirement, which he then proceeded to deal with.

[20] In considering the production of documents referred to in annexures that may be compelled in terms of rule 30A read with rule 35(12), the court below held that the production of such documents must be 'subject to some limitation', without which there would be absurd results and it would encourage fishing expeditions. In this regard Papier J found support for this view in the following *dictum* in *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) at 773H-774I, cited with approval in *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C), at 337E-338D:

'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 issue between the parties would obviously by necessary implication be excluded from the operation of the Rule. . . .

. . . [T]he 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 . . . That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. Similarly, a privileged document will not be subject to production. A document which is irrelevant will also 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.' (Citations omitted.)

[21] Papier J also had regard to *Protea Insurance Co Ltd and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 (C), at 248G, where a litigant had referred to and placed reliance on tape recordings, without describing them as such by name. In that case the court held that they had been 'referred to' within the meaning of the rule 35(12). The court below also referred to the decision in *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C), at 476, where it was held, at para 18, that where there was a reference by a litigant to a bank account 'without more', it does not follow that it constituted a reference, for the purposes of rule 35(12), to documentation relating to such bank account.

[22] After an examination of the authorities referred to above the court below concluded as follows:

'[44] The answers to these questions are self-evident, as expressed in my views above. The respondent did not refer to the requested documents in her founding affidavit, which documents are, in my view, irrelevant to the proceedings at this stage. Even if the documents were relevant, the sanction for the respondent is encompassed in the relevant rule, and that is, the first

respondent would not be able to use the documents, without leave of the court, in terms of rule 35(12).

[45] In light of the authorities considered above, I am of the view that the reference made to documents in an annexure to the first respondent's founding affidavit, did not constitute "reference" as envisaged for purposes of Rule 35(12). I am also not persuaded of the relevance of the requested documents, especially in the context of the first respondent's claim that she does not rely on the documents referred to in an annexure to her founding affidavit, which she claimed to be irrelevant to her claim, and the applicants' claim that such allegations would not have been made, "*if they did not have evidence*", and that the publication of the statement "*was true and in the public interest*".

[46] To the extent that the applicants alleged that the first respondent was and is a spy, is *[sic]* not at all borne out by the letter of appointment. Nor can the respondent's acceptance of the letter of appointment cast any light on the allegations allegedly made by the applicants. Both these ancillary documents are, in the context of this specific matter, and in my view, entirely irrelevant.'

The present appeal is directed against these conclusions and the resultant order. I turn to consider whether they were well-founded.

[23] Rule 35(12) is part of a set of rules regulating discovery, inspection and production of documents in relation to litigation. The object of discovery is described in *Durbach v Fairway Hotel* 1949 (3) 1081 (SR) at 1083 as follows:

'The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available.'

In *Erasmus Superior Court Practice*[2] the following, with reference to case law, is stated:

'"Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth . . . Properly employed where its use is called for, it can be, and often is a devastating tool . . .

. . .

But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased."'[3]

[2] Originally by DE van Loggerenberg and E Bertelsman *Erasmus Superior Court Practice* Vol 2 at D1-458 (Juta electronic version, RS 13, 2020).

This case is about whether rule 35(12) has properly been called in aid by the appellants.

[24] Rules 35(1), 35(2) and 35(3) read with 35(11) apply to discovery in conventional terms, namely, after the close of pleadings or the filing of affidavits. Rule 35(12) is different. It is, as the cases demonstrate, more often than not resorted to in order to compel the production of documents or tape recordings before the close of pleadings or the filing of affidavits, although its field of operation is not restricted thereto. Its provisions are set out in para 11 above, but I shall, for the sake of convenience, restate it here:

'Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits *reference* is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or a transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.' (My emphasis).

[25] In *Erasmus v Slomowitz (2)* 1938 TPD 243, at 244, the purpose of rule 35(12) was said to be that a party is entitled to the production of documents referred to in an opponent's pleadings or affidavits to enable him to consider his position. See also *Gehle v McLoughlin* 1986 (4) SA 543 (W) at 546D. In *Unilever* at 336H-I the following, with reference to *Slomowitz*, appears:

'[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 rights 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".'

See also *Protea Assurance Co Ltd and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 (C) at 249 B-D.

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[3] See *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.

[26] The language of rule 35(12) is very wide.[4] It does not have the requirement in rules 35(1) or 35(11), that the document or tape recording has to be one 'relating to any matter in question', nor the requirement in rule 35(3), that the document or tape recording must be 'relevant to any matter in question'[5]. Interestingly, in *Gehle*, the court had regard to the Afrikaans text of rule 35(12), which it described as being different[6], and which it considered to be wider in ambit than the English text, especially insofar as it related to whether associated proceedings, such as summary judgment proceedings, fell within its ambit.[7] Compellability and whether and how relevance is to be tested under rule 35(12), as distinct from the other rules and compellability in relation to them, is explored further hereunder.

[27] Literally, rule 35(12) appears to indicate that where there is a mere reference to a document or tape recording in an opponent's pleadings or affidavits a defendant or respondent is entitled to call for its production and may compel compliance. That is not how our courts approach an application to compel the production of documents sought in terms of rule 35(12). The first step in the adjudication process is to consider whether 'reference' is made to a document or tape recording.

[28] In *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) at 475J the court referred, with approval, at para 14, to the following passage in *Slomowitz* at 244 where the following appears:

'An essential is, of course, a reference by the opponent, in his pleading or affidavit, to the documents whereof 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 which possess merely evidentiary value.'

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[4] See *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) at 773I and *Unilever v plc and Another v Polagric* 2001 (2) SA 329 (C) at 337B.
[5] *Unilever* at 337B-C.
[6] The relevant part of the Afrikaans text reads as follows: ''n Party tot 'n geding kan te eniger tyd voor die verhoor 'n kennisgewing . . . aan 'n ander party aflewer, in wie se pleitsukke of beëdigde verklarings na 'n stuk verwys word om dit ter insae voor te lê, en om hom toe te laat om 'n afskrif daarvan te maak.'
[7] See *Gehle v McLoughlin* 1986 (4) SA 543 (W) at 544I-J, 545C and 546D-E.

See also *Harms Civil Procedure in the Superior Courts* at B23.2.[8] It appears to me to be clear that direct or indirect reference to a document will suffice, subject to what is stated later about relevance.[9] What will not pass muster is where there is no direct, indirect or descriptive reference but where it is sought through a process of extended reasoning or inference to deduce that the document may or does exist.[10] Supposition is not enough.

[29] In *Magnum Aviation Operations v Chairman, National Transport Commission* 1984 (2) SA 398 (W) there had been a reference by the deponent on behalf of an applicant in the main application to its financial statements, which had not been attached. It was, however, implied that the National Transport Commission in deciding to rationalise an air transport license had erred by not having regard to it. The court, at the behest of a respondent in the main application, in an application to compel production, ordered the financial statements to be produced, to enable that respondent to consider its position, before filing an answering affidavit in the main application. The court, in doing so, said the following in relation to rule 35(12):

'In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document, you must produce it. Even more it is so in this case where the implication in paras 19.4 and 19.6 is that, if the NTC had called for and looked at the financial statements of Operations, it might well have come to a different conclusion.'[11]

[30] In *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C), Friedman J, as did courts before him,[12] recognized that rule 35(12) was cast in wide terms. He contrasted that subrule, as did prior decisions, with rule 35(1), which deals with discovery in the conventional sense, usually after the close of pleadings, in relation to an action, in terms of which a party is obliged to make discovery of documents which are or have been in his or her possession 'relating to any matter in question'. Thus, the control for requiring discovery in terms of rule 35(1) is that the document must relate to any matter in

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[8] D Harms *Civil Procedure in the Superior Courts* (electronic version, 2020, SI-50).
[9] See *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) para 15.
[10] Ibid.
[11] *Magnum Aviation Operations v Chairman, National Transport Commission* 1984 (2) SA 398 (W) at 400C.
[12] See *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 461B-D and *Gehle v McLoughlin* 1986 (4) SA 543 (W) at 546D-E.

question. That would translate into any matter in question, as circumscribed by the pleadings. So too, with rule 35(11), where during proceedings, necessarily after pleadings have closed, a court may order the production of a tape recording or document in the power or control of a party, which relates to any matter in question. Friedman J, though, at 774F, stated the following in fairly emphatic terms:

'As Rule 35(12) can be applied at any time, ie 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 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, ie subrules (1), (3) and (11) and the fact that a notice under Rule 35(12) may be served at any time, ie not necessarily 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).'[13]

[31] *Gorfinkel* had regard to *Universal City Studios*, which was cited and discussed by the court below. In *Unilever*[14], as indicated above, the court took the view that the reference on which the request for documents or a tape recording was based had to be a reference relevant to issues between the parties. In *Universal City Studios* an example of how a lack of relevance would operate to control the wide language of rule 35(12) and justify a denial of an order compelling production was given by Booysen J:

'So, for example, if a wife seeking an interdict to prevent a husband from assaulting her were to allege that he assaulted her shortly after she had read the evening newspaper, there being no relevance alleged of the paper, one could hardly imagine that her husband, the respondent, would be entitled to production of that newspaper.'

[13] Subrule 3 is related to subrules 2 and 11, ie in relation to discovery in the conventional sense after the close of pleadings and the filing of affidavits.
[14] See para 20 above.

[32] In dealing with relevance in relation to rule 35(12), Friedman J, in *Gorfinkel*, after considering *Universal City Studios* and other cases referred to above, said the following at 774A-C:

'With regard to relevance they 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 will the fact that a document is not subject to discovery under Rule 35(1) 35 (3) or 35(11) render it immune from production in terms of Rule 35(12)?'

[33] Friedman J began to answer that question as follows:

'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 inquiry which may have either of these consequences. Documents which tend merely to advance the case of the party making discovery need not be disclosed.'[15]

The court in *Gorfinkel* went on to conclude that where there is reference by a party to a document in a pleading or affidavit there is prima facie an obligation on that party to produce it for inspection if called upon to do so, subject to certain limitations, namely if the document is not in that party's possession and he or she cannot produce it, or where the document is privileged or where it is irrelevant.

[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

[15] At 774D-774E.

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.

[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.

[36] What about the compellability of documents that are not specifically mentioned in affidavits, but which are referred to in annexures to the affidavits? In *Universal City Studios v Movie Time* 1983 (4) 736 (D), Booysen J, in dealing with the submission that the agreements sought had not been referred to in the affidavits but mentioned in a document which had been annexed to the affidavits, said the following:

'It seems to me that this would be giving too narrow an interpretation to Rule 35(12). An annexure to a pleading or an affidavit seems to me to be as much part of the pleading or affidavit as the body itself. Many references to documents in annexures to pleadings are probably irrelevant to the proceedings and would for that reason not have to be produced but it does not follow that the Rule does not apply to documents to which reference is made in annexures.'

See also *Protea Assurance* at 248J, *Erasmus Superior Court Practice*[16]*,* D Harms *Civil Procedure in the Superior Courts*[17] *and* Herbstein and Van Winsen *Civil Practice of the*

[16] DE van Loggerenberg and E Bertelsman *Erasmus Superior Court Practice* Vol 2 at D1-458 (Juta electronic version, 2020).
[17] D Harms *Civil Procedure in the Superior Courts* (electronic version, 2020, SI-50) at B23.2.

High Courts and the Superior Courts of South Africa 5 ed (Juta 2009) at 788. This interpretation accords with the purpose of the rule, as outlined above, and its application in this manner has for more than three decades not been called into question in any of the judgments of the high court or by commentators. I agree with the submission on behalf of the appellants that this accords with the objects of discovery and is consonant with Constitutional values of transparency and accountability. An affidavit usually states the purpose of the document that is annexed, or it can be gleaned or deduced, as could the deponent's knowledge of documents which are referred to in the annexures.

[37] Recently, however, in *Contango Trading SA and Others v Central Energy Fund SOC Ltd and Others* [2019] ZASCA 191; 2020 (3) SA 58 (SCA) at para 6, Cachalia JA stated that a reference has to be a reference in pleadings and affidavits and not in annexures. The statement appears near the commencement of the judgment, before the law in relation to production in terms of rule 35(12) was discussed. The statement was clearly *obiter*, without reference to what is stated on this aspect by the cases and commentators referred to above. The ratio of that case in respect of one set of 'documents' sought, the existence of which was in any event denied, is contained in para 27, where the following appears:

'However, for a request to fall within the ambit of the sub-rule there must be a reference to a specific document, not to a general category of documents, which is in effect what Contango's and Natixis' request for discovery of the legal review is. An order of that kind would perforce include within its scope irrelevant documents and confidential communications that the respondents are properly entitled to withhold. In other words, it would have to include every bit of paper generated during the process. That is not what the subrule envisages. It would amount to early discovery and rule 35(12) is not directed at that purpose. So, despite my reservations about the manner in which the respondents dealt with the demand for the production of the legal review, I conclude that the reference to the legal review in the affidavit was not a reference to a document as contemplated in rule 35(12). The court a quo therefore correctly refused to order its production.'

See also para 35. In relation to a second set of documents, production was not ordered because the documents of Contango were privileged.

[38] I now turn to deal briefly with the question of onus in relation to an application to compel the production of documents in terms of rule 35(12). In *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; 2016 (2) SA 121 (SCA) this court pronounced on the provisions of rule 35(12). It dealt with the question of onus in relation to applications to compel the production of documents sought in terms thereof. First, at para 18, it had regard to the following *dictum* in *Universal City Studios*:

'[this] being an application, I would say that the onus is to be discharged on the usual basis, ie that the applicant bears the overall *onus* of satisfying the Court that the respondent is obliged to produce the document . . . Where the respondent files an opposing affidavit . . . and either denies relevance or avers that he is on ground of privilege not obliged to produce a document . . . the applicant would, in order to succeed, have to satisfy the court on a balance of probabilities that the document is indeed relevant or not privileged.'[18]

[39] Ponnan JA in *Hoërskool Fochville,* at para 18, then went on to consider the opposing view in *Gorfinkel* (at 774G), where the following was said:

'As it would not necessarily be within the knowledge of the person serving the notice whether the document falls within the limitations 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.'

This approach was favoured in *Unilever*.

[40] *Hoërskool Fochville* went on to say the following:

'For my part I entertain serious reservations as to whether an application such as this should be approached on the basis of an *onus*. Approaching the matter on the basis of an *onus* may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term *onus* is not to be confused with the burden to adduce evidence (for example, that a document is privileged or irrelevant or does not exist). In my view, the court has a general discretion in terms of which it is required to try 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.

[18] *Universal* at 748A.

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.'[19]
I support this approach. The court will have before it the pleading or affidavit in question, the assertions by the party seeking production as to why it is required and why it falls within the ambit of the rule and the countervailing view of the party resisting production. The basis for requiring the document, at the very least, has to be provided. The court will then, based on all the material before it, exercise its discretion in the manner set out in *Hoërskool Fochville*, in the abovementioned paragraph.

[41] To sum up: 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. In the present case we are dealing with defamatory statements and defences such as truth and public interest or fair comment that might be raised. The question to be addressed is whether the documents sought might have evidentiary value and might assist the appellants in their defence to the relief claimed in the main case. Supposition or speculation about the existence of documents or tape recordings to compel production will not suffice. In exercising its discretion, the court will approach the matter on the basis set out in the preceding paragraph. The wording of rule 35(12) is clear in relation to its application. Where there has been reference to a document within the meaning of that expression in an affidavit, and it is relevant, it must be produced. There is thus no need to consider the submission on behalf of the respondents in relation to discovery generally, namely, that a court will only order discovery in application proceedings in exceptional circumstances.

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[19] *Hoërskool Fochville* para 18.

[42] In the present case it is clear that the timeline in relation to the period of employment of Ms Mkhwebane by the SSA, or her connection to it, is material to each party's case. Precisely when she took up her employment or whether she had any connection to the SSA while employed by the Department of Home Affairs, especially when she was deployed by the latter to China, is essential in relation to the issues that suggest themselves at this stage. That much is clear from the statements complained of and her own affidavit in the main case, in terms of which she complained about the statements by the appellants and what they were intended to convey. The importance of the timeline in relation to her employment by or connection to the SSA is given impetus by what she sets out in paras 18 and 19, which appears in para 5 above. Annexure 'PPSA5' was clearly intended by her to show that her letter of appointment supports her denial of the statements made by the appellants and to prove that her appointment by and her connection with the SSA only commenced well after her return from China. It was material to her claim for a retraction.

[43] 'PPSA5', in the context of paras 18 and 19 of Ms Mkhwebane's affidavit, appears to have been intended to convey that an application for a position as Analyst at the SSA was made some time after her return from Beijing to South Africa to continue as Director: Refugee Affairs at the Department of Home Affairs. It can safely be said that Ms Mkhwebane relied on the letter of appointment and its material terms in relation to when her employment and connection to the SSA commenced. That application for the post is referred to at the commencement of 'PPSA5'. There could hardly have been an appointment to the SSA without such an application. That annexure follows on 'PPSA2' and 'PPSA3', which are Ms Mkhwebane's letter of acceptance of her appointment as Director Refugee Affairs within the Department of Home Affairs addressed to Mr A Fraser, the then Deputy Director-General in May 2005, and a notification by the Director Foreign Office, dated 12 May 2014, confirming her repatriation, respectively. To my mind there is, within the meaning of that expression in rule 35(12), a clear 'reference' to Ms Mkhwebane's application for appointment as an Analyst in annexure 'PPSA5', which it will be recalled contained her occupational band,

and the terms of her remuneration. Moreover, Mr Fraser, the Director-General of the SSA, who is able to speak authoritatively about when and how she was employed by the SSA in his confirmatory affidavit, states that he read her affidavit and confirms the facts insofar as they relate to her 'employment and remuneration' with the SSA.

[44] Ms Mkhwebane's application for appointment is relevant in that it is bound to contain details of her employment history, including those relative to the time when she was deployed to China. As stated above, the timeline is critical. In my view that document should be produced by Ms Mkhwebane. The court below erred in concluding that there was no reference to the application for appointment to the post of Analyst and that it was irrelevant. It misapplied the cases referred to. It does not behove the respondents to say that Ms Mkhwebane need not have referred to her application for the post of Analyst. She did refer to it and relied on it in the principal case. It was lost on her and her legal representatives that she appears by that statement to have admitted a reference to the document sought.

[45] At this stage there is no affidavit before us informing us that she is not in possession of the document. Such an affidavit if it had been lodged may have been dispositive, in favour of the respondents. The court below rightly had no regard to the statements in the heads of argument or from the bar on this aspect.

[46] I am rather less sanguine about the letter of acceptance mentioned in 'PPSA5'. First, we do not know whether it came into being. The acceptance was in contemplation and the form yet to be completed. We are in the dark as to its completion and thus its existence. We are left to supposition. In this regard communications from the bar, either in this court or in the court below, were unhelpful and rightly not considered by the court below. I am unpersuaded that there is a reference within the meaning of rule 35(12) to the document sought to be produced. Counsel on behalf of the appellants, although persisting in seeking the production of this document, was constrained to agree that their case was stronger in relation to Ms Mkhwebane's application for the post of Analyst at the SSA.

[47] Lastly, there is the question of the order of the court below placing the appellants on terms to file their answering affidavits. Papier J had regard to submissions on behalf of the respondents that there was an inordinate delay on the part of the appellants in filing their answering affidavits. The court thus made the order referred to at the beginning of this judgment. In *Potpale Investments v Mkhize* 2016 (5) SA 96 (KZN) Gorven J was called upon to consider whether a notice in terms of rule 35(12) suspended the time limits in relation to the filing of further pleadings or in relation to any other rule. He had regard to *Protea Assurance Society* at 249B-D where the court said that a litigant cannot be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleadings or affidavits. He considered *Unilever* at 336C-I to the same effect. He also considered DE van Loggerenberg and E Bertelsman *Erasmus Superior Court Practice* Vol 2 at D1-478 (Juta electronic version, RS 13, 2020) where, in commenting on these cases, it was said that the time periods for the delivery of a plea or opposing affidavits are suspended. *Potpale*, at para 18, stated that one cannot anywhere in the rules find wording to that effect. In the view of Gorven J a party confronted with time limits within which to plead or file affidavits could plead, or file opposing affidavits, and then compel the documents and, if thereafter so advised, amend or supplement what he has already filed. Or such party could apply to court to extend the time limits pending the production of the documents sought. Papier J did not deal with this aspect and issued the order to file its answering affidavit on the basis of what he considered was an inordinate delay on the part of the appellants.

[48] There is much to commend the reasoning and the approach in *Potpale.* However, in this case, it was accepted on behalf of the appellants that if we were to order the production of one or both of the documents sought, the order issued by the court below in relation to the filing of an answering affidavit could remain in place. It is in everyone's interest, including that of the Office of the Public Protector, that this litigation be expedited and finalised. In light of the appellants' acceptance as noted above, there is no need for a final word in relation to *Potpale*. In any event, the practice in the court

below, where a respondent fails to file an answering affidavit, is that an applicant can apply through the chamber book for an order requiring the respondent to file such an affidavit within five days, failing which the applicant can set the matter down on the unopposed roll.[20] If that course had been followed at the outset, the appellants in this case would have been put to a choice, namely whether to file an answering affidavit without the document sought or to seek an extension of time, pending the finalisation of an application to compel production of the document, or it could have contended that *Potpale* should not be followed. In light of the appellants' acceptance that the order of the court below on this aspect remain in place there is no need to dwell on it any further.

[49] Considering that the appellants ought to have succeeded in the court below in relation to at least one of the documents sought they are entitled to have costs in that court awarded in their favour. In light of the conclusions set out above the following order is made:

1 The appeal is upheld, and the respondents are to pay the costs of appeal jointly and severally, the one paying the other to be absolved, including the costs of two counsel.

2 The order of the court below is set aside and substituted as follows:

'1. The applicants in the main application under case number 19668/17 are directed to produce for inspection and copying the first applicant's application for the post of Analyst: Domestic Branch: DBO1 in the State Security Agency, referred to in "PPSA5" by no later than 1st April 2021.

2. The respondents in the main application are to file their answering affidavit by no later than the 16th April 2021.

3. The respondents in this application are ordered to pay the applicants' costs, including the costs of two counsel where so employed, jointly and severally, the one paying the other to be absolved.'

[20] Practice Note 37 of the Western Cape Consolidated Practice Notes – the practice note does not contain the five-day limit but is usually ordered.

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M S NAVSA

ACTING DEPUTY PRESIDENT

Appearances:

For appellants:	S Budlender SC, with him J Bleazard
Instructed by:	Minde Schapiro & Smith Inc, Cape Town
	Symington & De Kok, Bloemfontein
For respondents:	M Mphaga SC, with him S Jozana
Instructed by:	Boqwana Burns c/o Mfazi Kose Inc, Cape Town
	Mphafi Khang, Bloemfontein