35 Discovery, Inspection and Production of Documents

(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

(2) The party required to make discovery shall within 20 days or within the time stated in any order of a judge make discovery of such documents on affidavit in accordance with Form 11 of the First Schedule, specifying separately—

(a) such documents and tape recordings in the possession of a party or such party's agent other than the documents and tape recordings mentioned in paragraph *(b)*;

(b) such documents and tape recordings in respect of which such party has a valid objection to produce;

(c) such documents and tape recordings which a party or such party's agent had, but no longer has possession of at the date of the affidavit.

A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

(3) If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.

(4) A document or tape recording not disclosed as aforesaid may not, save with the leave of the court granted on such terms as it may deem appropriate, be used for any purpose at the trial by the party who was obliged but failed to disclose it, provided that any other party may use such document or tape recording.

(5)*(a)* Where the Fund, as defined in the Road Accident Fund Act, 1996 (Act No. 56 of 1996), as amended, is a party to any action by virtue of the provisions of the said Act, any party to the action may obtain discovery in the manner provided in paragraph *(d)* of this subrule against the driver or owner or short term insurer of the vehicle or employer of the driver of the vehicle, referred to in the said Act.

(b) The provisions of paragraph *(a)* shall apply *mutatis mutandis* to the driver or owner or short term insurer of the vehicle or employer of the driver of a vehicle referred to in section 21 of the said Act.

(c) Where the plaintiff sues as a cessionary, the defendant shall *mutatis mutandis* have the same rights under this rule against the cedent.

(d) The party requiring discovery in terms of paragraph *(a)*, *(b)* or *(c)* shall do so by notice in accordance with Form 12 of the First Schedule.

(6) Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver within five days, to the party requesting discovery, a notice in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of such party's attorney or, if such party is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise.

(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.

(8) Any party to an action may after the close of pleadings give notice to any other party to specify in writing particulars of dates and parties of or to any document or tape recording intended to be used at the trial of the action on behalf of the party to whom notice is given. The party receiving such notice shall not less than 15 days before the date of trial deliver a notice—

(a) specifying the dates of and parties to and the general nature of any such document or tape recording which is in such party's possession; or

(b) specifying such particulars as the party may have to identify any such document or tape recording not in such party's possession, at the same time furnishing the name and address of the person in whose possession such document or tape recording is.

(9) Any party proposing to prove documents or tape recordings at a trial may give notice to any other party requiring him within ten days after the receipt of such notice to admit that those documents or tape recordings were properly executed and are what they purported to be. If the party receiving the said notice does not within the said period so admit, then as against such party the party giving the notice shall be entitled to produce the documents or tape recordings specified at the trial without proof other than proof (if it is disputed) that the documents or

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tape recordings are the documents or tape recordings referred to in the notice and that the notice was duly given. If the party receiving the notice states that the documents or tape recordings are not admitted as aforesaid, they shall be proved by the party giving the notice before being entitled to use them at the trial, but the party not admitting them may be ordered to pay the costs of their proof.

(10) Any party may give to any other party who has made discovery of a document or tape recording notice to produce at the hearing the original of such document or tape recording, not being a privileged document or tape recording, in such party's possession. Such notice shall be given not less than five days before the hearing but may, if the court so allows, be given during the course of the hearing. If any such notice is so given, the party giving the same may require the party to whom notice is given to produce the said document or tape recording in court and shall be entitled, without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given.

(11) The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in such party's power or control relating to any matter in question in such proceeding as the court may deem appropriate, and the court may deal with such documents or tape recordings, when produced, as it deems appropriate.

(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

(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.

(13) The provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications.

(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to —

(a) make available for inspection within five days a clearly specified document or tape recording in such party's possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof; or

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(b) 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

(c) 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.

(15) For purposes of rules 35 and 38 —

(a) a document includes any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002); and

(b) a tape recording includes a sound track, film, magnetic tape, record or other material on which visual images, sound or other information can be recorded or any other form of recording.

[Rule 35 substituted by GN R1157 of 30 October 2020.]

Commentary

Forms. Discovery — form of affidavit, 11; Notice in terms of rule 35(5), 12; Discovery — Notice to procedure, 13; Discovery — Notice to inspect documents, 14; Discovery — Notice to produce documents in pleadings, etc, 15.

General. The object of discovery was stated in *Durbach v Fairway Hotel Ltd* [1] to be 'to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated.'

> 'Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be, and often is a devastating tool.' [2]

The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries the duty to put those documents in proper order for both the benefit of his adversary and the court in anticipation

of the trial action. [3] Discovery assists the parties and the court in discovering the truth and, by doing so, helps towards a just determination of the case. It also saves costs. [4]

> '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.' [5]

The employment of discovery should be confined to cases where parties are properly before the court and are litigating 'at full stretch'. [6] The 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 established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established. [7] Discovery is not intended to be used as a sniping weapon in preliminary skirmishes. [8]

Discovery under rule 35 is a procedure whereby a party to an action can:

(a) require his opponent to specify on oath the documents and tape recordings in his possession or under his control which relate to the action (subrule (1)); and

(b) inspect and copy such documents and tape recordings (subrule (6)).

In *Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd* [9] the High Court developed the common law in terms of its inherent jurisdiction under s 173 of the Constitution and granted an order that third parties provide the applicant with information that could assist it in identifying the perpetrators of a robbery at its premises to enable it to institute an action against them. The preconditions for such an order, subject to the court's overall discretion, were held to be the following: [10]

(a) a wrong must have been committed;

(b) the order was needed to enable an action to be brought against the wrongdoers;

(c) the third party against whom the order was sought must be mixed up in the wrongdoing so as to have facilitated it; and must be able or likely to be able to provide the information.

Pre-action discovery under s 50 of the Promotion of Access to Information Act 2 of 2000 ('PAIA') is only available where the requester has shown that the records are required for the exercise or protection of any rights, i e has shown the 'element of need' or 'substantial advantage' of access to the requested information at the pre-action stage. [11] In short, a requester must show that the requested record is reasonably required for the exercise or protection of a right. It is not sufficient for the requester merely to show that the requested record would be of some assistance to it. [12] Substantial advantage consists, for example, in the fact that the

information would be decisive of the dispute between the parties, [13] i e that it would bring a sharp end to the dispute. [14] An applicant under PAIA is not entitled, as a matter of course, to all information that might assist him in evaluating his prospects against the only potential defendant. [15] PAIA is not intended to have any impact on the discovery procedure in civil cases. [16] Once court proceedings commence, the rules of discovery take over and the provisions of PAIA no longer apply between the parties. [17]

Pre-action discovery in terms of PAIA 'must remain the exception rather than the rule'. [18] It was held that discovery of documents held by the State or any of its organs at any level of government may be obtained under s 23 of the Constitution of the Republic of South Africa Act 200 of 1993. [19] It must, however, be stressed that the right entrenched in that section, and in s 32 of the present Constitution, [20] is not one to discovery in litigation, but a much wider right of access to 'all information' held by the State in so far as such information is required for the protection of a person's rights. [21]

It has been held [22] that a party who engages the State as referred to in s 32 of the Constitution of the Republic of South Africa, 1996, has the right to utilize s 32(1) and/or rule 35 in order to obtain access to documentation in the possession of the State. If he elects to rely on rule 35 and is not satisfied with the discovery that is made, he must discharge the onus as it applies in civil procedure. [23]

Subrule (1): 'Any party . . . may require any other party.' This subrule is permissive in so far as it does not oblige a party to compel his opponent to give discovery. However, discovery is a procedure designed for the benefit of the parties and failure to take advantage of the procedure may result in a disorderly presentation of the case in court. In such a case, the court may show its disapproval of a party's failure to apply for discovery by an adverse order as to costs. [24]

The subrule provides that 'any party' may deliver a notice to 'any other party' to make discovery on oath. It is clear that a plaintiff and a defendant can *inter se* demand discovery, and also that a plaintiff can require discovery from a co-plaintiff, and a defendant from a co-defendant.

'All documents and tape recordings.' In terms of rule 35(15)*(a)* a document 'includes any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act, 2002'. Save for the

aforesaid, the word 'documents' is not defined in the rules. Consequently, it must bear its ordinary meaning, namely 'a piece

of written, printed or electronic matter that provides information or evidence or that serves as an official record'. [25]

In terms of rule 35(15)*(b)* a tape recording 'includes a sound track, film, magnetic tape, record or other material on which visual images, sound or other information can be recorded or any other form of recording'.

'Relating to any matter in question.' This subrule requires a party to make discovery of 'all documents . . . relating to any matter in question in such action'. A long line of decisions, however, has established that in High Court practice there is only an obligation to make discovery of documents which *may* — not which *must* — either directly or indirectly enable the party requiring the affidavit of discovery either to advance his own case or to damage the case of his adversary. Documents and tape recordings which tend to advance only the case of the party making the discovery need not be disclosed, [26] provided that such a party does not intend using the document or tape recording at the trial. [27]

The test as to what is discoverable is, in its essence, relevance. Relevance is a matter for the court to decide, having regard to the issues between the parties. [28] It does not depend upon the subjective views of the legal representative of the party making discovery. [29] See further the notes to subrule (3) s v 'Which may be relevant to any matter in question' below.

'In the possession or control of.' A party is not required to specify books, documents and tape recordings which are in the possession of his witnesses, if he is not in control thereof. Documents and tape recordings which are in the hands of a party's attorney should be specified. Even if 'party' in this context does not by definition include his attorney, the document or tape recording is under the *control* of the party himself.

There is no procedure other than that provided for under subrule (5) whereby a third party, not one of the litigants, can be compelled to disclose documents and tape recordings, however relevant, before the trial. All that the third party can be required to do, by subpoena *duces tecum* under rule 38, is to bring the documents and tape recordings to the trial.

'Save with the leave of a judge, be given before the close of pleadings.' In terms of the definition of 'judge' in rule 1 the word 'judge' in this subrule means a judge sitting otherwise than in open court, i e a judge in chambers. An order contemplated in this subrule will only be made where there are exceptional circumstances which require discovery to be made before the close of pleadings in order to ensure the proper prosecution of the action. [30]

In *Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd* [31] the High Court developed the common law in terms of its inherent jurisdiction under s 173 of the Constitution and granted an order that third parties provide the applicant with information that could assist it in identifying the perpetrators of a robbery at its premises to enable it to institute an action against them. The preconditions for such an order, subject to the court's overall discretion, were held to be the following: [32]

(a) a wrong must have been committed;

(b) the order was needed to enable an action to be brought against the wrongdoers;

(c) the third party against whom the order was sought must be mixed up in the wrongdoing so as to have facilitated it; and must be able or likely to be able to provide the information.

Subrule (2): 'The party required to make discovery shall.' Unless there are very special circumstances and the attorney is in a position of his own knowledge to make a comprehensive affidavit, he cannot do this on behalf of his client. [33] If this is done the circumstances on which it is sought to justify such action should be set out in the affidavit. [34] It has been recognized that it does not follow from the fact that the party litigant has himself signed the affidavit that he must personally have made the search and decided upon the relevance of every document or tape recording, and that he might not be acting on legal advice or the information of his employees. [35] Indeed, attorneys are responsible for the technical side of litigation and it is an attorney's duty to ensure that his client appreciates fully the significance and importance of a discovery affidavit before it is drawn up. [36]

'On affidavit.' If the affidavit has been made by a director or other officer of a company, the affidavit must state in terms that the *company* has not in the possession, custody or power of its attorney or other agent or any other person on the company's behalf, any document and tape recording relating to the action. [37]

In an action against a Minister in his capacity as such, a discovery affidavit deposed to by the deputy-director (i e a high-ranking official) of the department concerned is adequate. [38]

In proceedings for the setting aside of dispositions, instituted in terms of s 32(1)*(b)* of the Insolvency Act 24 of 1936 by a creditor of a company in liquidation in the name of the liquidators of the company, the creditor of the company is not entitled to make discovery in terms of this subrule. It is only the liquidators who can do so. The liquidators are the plaintiffs because they are the only parties entitled to embark upon such litigation. The fact that a creditor funds and directs the litigation does not render the liquidators mere nominal plaintiffs. [39]

'In accordance with Form 11 . . . specifying separately.' The provisions of this subrule are peremptory and the discovery affidavit must be in accordance with Form 11 of the First Schedule to the rules. [40] This requires the documents and tape recordings to be listed in two schedules, the first being in respect of those still in the possession or power of the deponent, and the second in respect of those no longer in his possession or power. The first of these schedules is again to be divided into two parts: the first part being in respect of which no claim for privilege or other objection to produce is made, and the second in respect of which such an objection attaches. These requirements are listed, in somewhat different order, in paragraphs *(a)*, *(b)* and *(c)* of the subrule. The affidavit should further set out that the party making it has never had in his possession or under his control any document and tape recording of the class mentioned in the rule, other than those specified in the schedule. [41]

Subrule (2)*(b)*: 'A valid objection to produce.' The final sentence of this subrule lists certain documents and tape recordings which need not be included in the discovery affidavit. The list is not exhaustive and a party is entitled to object to the discovery of other documents and tape recordings if valid grounds for doing so exist. In discovery proceedings a litigant may refuse to disclose a document and tape recording if he would be able to claim privilege for its contents on any grounds. There are, however, other and wider grounds upon which the discovery of documents and tape recordings may be refused, so that the fact that a document or tape recording is 'privileged' from disclosure in discovery proceedings does not necessarily mean that its contents will be protected from disclosure in evidence. [42] Privilege is usually treated as a matter falling within the law of evidence rather than procedure; [43] the reader should refer to works on evidence for fuller discussion. [44] Here a brief statement of the main rules would be sufficient.

Privilege. It has been said that privilege is a personal right to refuse to disclose, and, in the case of professional privilege, to permit certain others to disclose, admissible evidence. [45] In discovery proceedings a litigant may refuse to disclose a document (and a tape recording) if he would be able to claim privilege for its contents on any grounds.

(a) The privilege against self-incrimination

Having regard to the constitutional right against self-incriminating evidence entrenched in s 35(3)*(j)* of the Constitution, it is a valid objection to an application to compel discovery of relevant documents, that the party from whom discovery is sought honestly believes that the material sought to be discovered may incriminate him in parallel criminal proceedings arising from the same facts. [46] A party is not obliged to discover a document which will tend to incriminate him or expose him to the risk of any kind of penalty or forfeiture. [47] If the document tends merely to establish a debt or to expose the party to a civil action, discovery cannot be resisted. [48] If the party or witness bona fide [49] swears that he believes that discovery or disclosure would tend to incriminate him, and if the court is satisfied that such discovery or disclosure would have this tendency, privilege will be allowed; and the exact form of words used by the party in averring his apprehension is immaterial. [50] The refusal may be made even if the persons in a position to prosecute or sue the party have intimated that they do not intend to do so. [51]

(b) Marital privilege

In terms of s 10 of the Civil Proceedings Evidence Act 25 of 1965 no spouse can be compelled to disclose any communication made to him during the marriage. In discovery proceedings a claim for privilege may accordingly be founded upon the fact that a document is a communication from a party's spouse. The privilege may be claimed only by the spouse to whom the communication is made, [52] and a third party cannot refuse to disclose such a communication. [53] The privilege may be claimed by persons whose marriages have been 'dissolved or annulled by a competent court'. [54] The privilege cannot therefore be claimed by a surviving spouse whose marriage has been dissolved by death or by a spouse whose marriage has been dissolved extra-judicially. [55] The privilege is further extended by s 12 of the Civil Proceedings Evidence Act 25 of 1965, which allows a husband or wife to refuse to answer a question (and *a fortiori* to disclose a document) in any circumstances in which his or her spouse would be entitled to claim privilege. Under this section a spouse may refuse to disclose a communication which he had made to the other spouse during the marriage, as well as a communication which the other spouse had made to his or her legal representative. [56]

(c) Statements without prejudice

Communications made without prejudice are usually said to be privileged from disclosure. [57] The rationale of the rule is public policy: parties to disputes are encouraged to avoid litigation by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in ensuing litigation. [58]

Both the person making the statement without 'prejudice' and the person to whom the statement is addressed are entitled to the privilege. [59] Thus, the maker of the statement can prevent the disclosure by his opponent of an admission made 'without prejudice', [60] but the maker of the statement can in turn be prevented from relying upon an offer made without prejudice as a tender entitling him to subsequent costs. [61] If, however, the without prejudice offer, in cases not covered by the rules, is made subject to the qualification 'except in relation to costs' (or words to that effect), there is no reason why a litigant should not be permitted to rely on such offer in support of a particular costs order once judgment has been granted. Such offers are generally known as 'Calderbank offers'. [62] A plaintiff who has made such an offer is not entitled to costs on an attorney and client basis merely because he made a secret offer which was less than what the court awarded. The court must still consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer. Factors to be taken into account by the court are whether the defendant has engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff allowed the defendant a reasonable time to consider the offer; the extent of the difference between the amount of the offer and the amount of the award; and the nature of the proceedings and resources of the litigants. [63]

The words 'without prejudice' are usually employed to indicate that the maker of a statement or writer of a letter desires the communication to be protected by the privilege. The absence of these or similar words is, however, not conclusive. If the statement forms part of genuine negotiations for the compromise of a dispute, it will be privileged even if the words have not been used. [64] On the other hand, even if the words are used, the communication is not privileged if there was no dispute between the parties or if there was no genuine negotiation to effect a compromise. [65] The court may look at a document written without prejudice for the purpose of deciding the question of its admissibility. [66]

The privilege covers not only the particular letter or oral communication itself but also all subsequent parts of the correspondence or communication on both sides, notwithstanding that they are not said to be without prejudice. [67] The communication is privileged only if it forms an integral part of the negotiations then proceeding, but need not be relevant to the case then proceeding. [68] If negotiations for a settlement in an action for compensation related solely to the amount, an admission of liability by the defendant was held not to be subject to privilege because the parties had not intended the negotiations to be influenced by the issue of liability. [69]

If negotiations conducted without prejudice result in a settlement, the terms of the settlement can be proved by evidence about the negotiations leading up to the settlement. [70]

(d) Legal professional privilege [71]

A communication made in professional confidence to counsel, attorneys, and their clerks (i e professional assistants acting under the control and direction of the principal), [72] or to any intermediate agent of these, or to an interpreter at an interview, [73] is privileged permanently

and may not be disclosed without the permission of the client — his being the privilege and his the right to waive it. This privilege extends to all communications between the client and his legal adviser for the purpose of obtaining legal advice. [74] A

communication with a lawyer unconnected with the giving of legal advice is not privileged merely because it was made in confidence. [75] An attorney's fee notes do not per se fall within the privileged category of a document. [76] If the fee notes contain references to legal advice sought and given in the course of a narration of the services in respect of which the fees have been raised, without disclosing the substance of the legal advice, such references are not privileged. [77] If a fee note sets out the substance of the privileged communications in respect of the seeking or giving of legal advice, or contains sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the fee note as a whole, would be amenable to the privilege. In this regard the test is whether, upon an objective assessment, the references disclose the content, and not just the existence, of the privileged material. [78]

The privilege covers a party's legal adviser in his capacity as such, and not acting as a house-agent, [79] friend, [80] or business associate — a question of fact which must be judged in the light of all the circumstances. [81] The payment of a fee is an important, but not necessarily a conclusive, indication that the adviser was acting professionally. [82] Many qualified lawyers are today employed as full-time, salaried legal advisers by corporations and statutory bodies, and it has been held that privilege attaches to confidential communications between a salaried legal adviser and his 'client', i e his employer. [83]

If it is established that the communication was with the legal adviser in his professional capacity and that the communication related to the transaction upon which the client sought advice, the inference is that the communication was made in professional confidence. [84] The

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communication may, however, be of such a nature that this inference is rebutted. An instruction authorizing an attorney to negotiate and conclude a settlement is not privileged. [85] If a legal adviser has acted for both parties at the time when negotiations were openly being conducted in regard to a contract which is subsequently concluded, there is no ground for excluding the evidence of the legal adviser. [86] If the legal adviser is acting for both parties who are at arm's length, communications made to him by each are privileged and cannot be divulged to the other. [87]

The privilege is that of the client and not that of his legal adviser, [88] but his legal adviser is entitled, and in fact under a duty, to claim the privilege on his client's behalf. [89]

The person in whom the right vests may not be obliged to testify about the content of the privileged material. [90]

The privilege may be waived by the client either expressly or impliedly. [91] An implied waiver would be when the client himself discloses the privileged communication [92] with full knowledge of his rights and in a manner from which, objectively speaking, it can be inferred that he intended to abandon those rights. [93] In *Waterhouse v Shields* [94] the defendant pleaded that she had acted on legal advice. It was held that she had thereby waived her right to refuse to disclose the nature of that advice. Once a party has partially disclosed privileged material the question as to whether fairness requires disclosure of the remainder of the material is essentially one of fact to be decided in each case in the special circumstances of that case.

The privilege may also be waived impliedly, i e where the privilege-holder so conducts himself that, whatever his subjective intention might be, the inference must in fairness be drawn that he no longer relies on privilege. [95]

The rule is 'once privileged always privileged'. [96] The privilege attaching to a document will continue after the end of the litigation for which the document was brought into existence, and the client's successors in title may claim the privilege in a subsequent action on the same subject matter. [97]

If privileged communications have fallen into the hands of a third party, for example, where a privileged document has been intercepted or copied, such a third party cannot be prevented from disclosing their contents. [98] In *Williams v Shaw* [99] it was held that no privilege attaches to a letter which had been obtained illegally. It is uncertain whether the privilege attaching to a document is lost if a document is taken from the client or his legal representative under compulsion of a search warrant or some other legal compulsion. [100]

Where the communications pass not between the party and his lawyers but between the party and a non-professional agent or third party, they are not privileged unless made (i) for the purpose of litigation existing or contemplated, *and* (ii) in answer to inquiries made by the party as the agent for or at the request or suggestion of his legal adviser and, though there has been no such request, for the purpose of being laid before the legal adviser for the purpose of obtaining his advice or to enable him to conduct the action. [101] In *A Sweidan and King (Pty) Ltd v Zim Israel Navigation Co Ltd* [102] it was pointed out that a document will be privileged if 'a definite purpose', but not necessarily the sole or dominant purpose, for which the document was made was submission to a legal adviser as material upon which to enable him to advise. As a general rule there is no privilege covering communications relating to the matter in issue between a head office and a branch office; [103] or from an insurance assessor to his principals; [104] or from an

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insured person to the company (or its agent) insuring him; [105] or from an architect to his client; [106] or between an agent and his principal, [107] *unless* the above two requirements are fulfilled. [108]

A litigant is not obliged, either before or during a trial, to disclose any document which was brought into existence for the purpose of the litigation. The most important class of documents falling into this category are the statements of the litigant's witnesses. [109] These documents 'form part of the brief', are clearly brought into existence with a view to litigation, and they are therefore privileged from disclosure. [110] Communications between a party's legal adviser and expert witness, the instructions given to the expert witness and the interim reports compiled by the expert witness in the course of the formulation of his opinion fall under this privilege. [111] The privilege can be regarded as an extension of legal professional privilege, for it applies equally to a party conducting his own case. [112]

If privilege is claimed to parts of a document, it should be asserted by redacting the information so as to disclose those parts of the document that are not subject to the privilege and covering up those that are. [113]

(e) Disclosures injurious to public interest

It would appear that the provisions of the Constitution of the Republic of South Africa, 1996, govern claims of state privilege in objection to the disclosure of documents, i e that the disclosure of such documents would affect the security of the State. [114] The issue would therefore have to be decided by the court under the provisions of the Constitution of the Republic of South Africa, 1996, and national legislation enacted in pursuance thereof [115] rather than the common law. [116]

Objection to the disclosure of documents on a ground of public policy that does not affect the security of the State is governed by the common law. [117] The courts have a residual power

to reject an objection raised in proper form that the disclosure or production of a document would be injurious or prejudicial to the public interest. [118] The objection should be raised by the political head of the department concerned unless, in exceptional circumstances, that is not feasible. The objection will usually be raised by means of an affidavit, from which it must appear that the deponent has himself perused the relevant document, and the reasons for his decision must, in so far as public interest permits, be given with sufficient clarity to place the court in a position to judge whether it should exercise the residual power. [119]

The residual power must be exercised with strict circumspection ('nougesette omsigtigheid'). [120] The exercise of the power is not confined to cases in which the objection is frivolous or vexatious; the court will overrule the Minister 'waar hy buite twyfel oortuig is dat die beswaar onregverdigbaar is of op geen redelike gronde gehandhaaf kan word nie'. [121] If the reasons given by the Minister appear to be deficient, the court may call upon him for amplification or clarification, either by further affidavit or oral evidence. [122] The court may also inspect the documents in order to come to a decision. [123]

Statements of witnesses and communications between attorney and client and between attorney and advocate are listed in the subrule as categories of documents which must be omitted from the schedules. See further the notes s v 'Statements of witnesses taken for the purposes of the proceedings' and 'Communications between attorney and client and between attorney and advocate' below.

The discovery affidavit must indicate the existence of documents in respect of which objection to discovery is raised and the grounds on which the objection is based must be stated sufficiently clearly for the court, if necessary, to decide whether the documents are in fact privileged from production. [124] This does not mean that such a detailed description of the documents is required as will render the privilege nugatory. [125]

If only part of a document is privileged or irrelevant, and the party obliged to produce the document for use in court or for inspection by his adversary wishes to preserve that part as secret, the proper course is for him to cover over or otherwise conceal the portion in question from the adversary. [126] The procedure requires an affidavit justifying the blotted-out portion of the document as being privileged or irrelevant. [127]

The High Court has an inherent power itself to examine any document in respect of which privilege is claimed, 'privilege' in this context including such objections as irrelevancy. [128]

Subrule (2): 'Make discovery of such documents.' The contents of, for example, hospital records and medical notes constitute hearsay evidence, and it is well established that hearsay evidence is prima facie inadmissible. The discovery thereof by a party does not make them admissible as evidence against against another party, unless the documents could be admitted under one or other of the common-law exceptions to the hearsay rule. [129]

Subrule (2) — last paragraph: 'A document shall be deemed to be sufficiently specified.' Sufficient details of a document should be given so that it may be identified, and so that the other party can call for it, and the court may know whether the document in question has been produced. [130] In terms of this subrule a document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. [131]

'Statements of witnesses taken for the purposes of the proceedings.' This subrule gives effect to the general principle that a litigant is not obliged, either before or during a trial, to disclose any document which was obtained or brought into existence for the purpose of litigation which was pending or contemplated as likely at the time. [132] Documents which fall into this category must in terms of the subrule be omitted from the schedules by the party making discovery. The most important class of documents falling into this category are the statements of the litigant's witnesses. [133] These documents 'form part of the brief', are clearly brought into existence with a view to litigation and they are therefore privileged from disclosure. [134] The privilege can be regarded as an extension of legal professional privilege for it applies equally to a party conducting his own case. [135]

The privilege against disclosure of a witness statement does not extend to an accused's statement to the police. In civil litigation the existence of such a statement should be discovered as an unprivileged document. [136]

'Communications between attorney and client and between attorney and advocate.' This subrule gives effect to the general principle that a communication made in professional confidence to counsel, attorneys, and their clerks (i e professional assistants acting under the control and direction of the principal), or to any intermediate agent of these, or to an interpreter at an interview, is privileged permanently and may not be disclosed without the

permission of the client — his being the privilege and his the right to waive it. [137] See further the notes to this subrule s v 'Privilege' above.

Documents which fall into the category contemplated in the subrule must in terms thereof be omitted from the schedules by the party making discovery.

If the communications pass not between the party and his lawyers but between the party and a non-professional agent or third party they are not privileged unless made (i) for the purpose of litigation existing or contemplated, *and* (ii) in answer to inquiries made by the party as the agent for or at the request or suggestion of his legal adviser and, though there has been no such request, for the purpose of being laid before the legal adviser for the purpose of obtaining his advice or to enable him to conduct the action. [138] As a general rule there is no privilege covering communications, relating to the matter in issue, between a head office and a branch office; [139] or from an insurance assessor to his principals; [140] or from an insured person to the company (or its agent) insuring him; [141] or from an architect to his client; [142] or between an agent and his principal, [143] *unless* the above two requirements are fulfilled. [144] See further the notes to this subrule s v 'Privilege' above.

'Shall be omitted from the schedules.' The omission of documents of the nature specified in this subrule need not be justified in the discovery affidavit. Any party may proceed under subrule (3) if it is believed that the party making discovery has omitted from the schedules documents which should have been disclosed.

The list of documents which a party making discovery must omit from the schedules is not exhaustive in the sense that a party may have valid grounds for objecting to the discovery of other documents which do not fall into the categories listed. See the notes to this subrule s v 'A valid objection to produce' above.

Subrule (3): 'In addition to documents or tape recordings disclosed as aforesaid.' This subrule provides the procedure

for a party dissatisfied with the discovery of another party. [145] The intention of the subrule is to provide for a procedure to supplement discovery which has already taken place but which is alleged to be inadequate. [146] The subrule is not intended to 'afford a litigant a licence to fish in the hope of catching something useful'. [147] It requires the former party to give notice to the latter party to make the documents or tape recordings available for inspection in accordance with subrule (6).

If a direction is made in terms of subrule (13) that the provisions of rule 35 apply to applications, a party is unable to rely on subrule (3) without first invoking the provisions of subrule (1) and receiving a discovery affidavit in accordance with subrule (2). [148]

The courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action, (iv) from any admission made by the party making the discovery affidavit, or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents or tape recordings in his possession or power, or has misconceived the principles upon which the affidavit should be made. [149]

'Other documents . . . or tape recordings.' This subrule does not cover only objections relating to the failure to discover specific documents or tape recordings. Subrule (1) contemplates the discovery of all relevant documents (and tape recordings), including documents designated as part of a bundle of documents of a specified nature and consecutively numbered by the deponent. If such a bundle of documents exists but is not discovered, its production may be obtained under the subrule. [150]

This subrule, read in conjunction with subrules (1), (2), (4) and (6), would require of a party in custody of a large volume of documentation, to comply, at the very least, with the provision set out in the last paragraph of subrule (2). It would be incumbent upon a party in custody of the documents to arrange them in proper chronological order and thereafter duly initial and consecutively number them. Sufficient identificatory details of each document should be given to enable (i) the other party to call for it, and (ii) the court to know whether or not the document in question has been produced. [151]

'Which may be relevant to any matter in question.' Relevancy is determined from the pleadings and not extraneously therefrom. A party may only obtain inspection of documents and tape recordings relevant to the issues on the pleadings. [152] The requirement of relevance has been considered by the courts on various occasions. [153] The meaning of relevance is circumscribed by the requirement in both subrules (1) and (3) that the document or tape recording relates to or may be relevant to 'any matter in question'. The 'matter in question' is determined from the pleadings. [154] In determining the issues raised by the pleadings regard should not be had to requests for further particulars for purposes of trial and the further particulars furnished in response thereto. [155] Such particulars simply relate to the pleaded issues and do not raise further or new issues between the parties. [156]

'Give notice . . . requiring such party to make the same available for inspection.' If a party is dissatisfied with discovery that has been made he must first exhaust his remedy under this subrule. [157] If the defaulting party does not comply with the notice given to him under the subrule, the party requiring discovery is entitled to bring an application to court under the provisions of subrule (7). A notice in terms of subrule (3) is not limited to a specific document or tape recording. The notice may require production of any number of documents and/or tape recordings. It is important that a party who is dissatisfied with discovery should describe the documents and tape recordings required for inspection in such a manner that they were identifiable. Whilst a document need not be described specifically within the notice, it must be described with sufficient accuracy to enable it to be identified. This will occur where the document is described within a genus enabling it to be identified. [158] The non-specificity or unbridled breadth in which a request for further discovery is couched may serve as an indicator of an abuse of the procedure. [159]

If a party requires more time to respond to a request 'for further and better discovery', it is seeking an indulgence, and in the absence of an extension being agreed to by the other party, would be required to make application for an extension of time under rule 27(1). [160]

'State on oath . . . that such documents or tape recordings are not in his possession.' This subrule concerns documents and tape recordings not yet discovered and contemplates an affidavit other than and additional to one made under subrule (1). [161] The objections to an attorney deposing to a discovery affidavit under subrules (1) and (2) are equally valid to his making an affidavit under this subrule. [162]

Under the subrule a party is entitled to state in his affidavit that the documents or tape recordings referred to in the notice under the subrule are irrelevant to the issues in the action or that they are privileged from disclosure. [163] A party's assertion that the contents of a document or tape recording are not relevant is not necessarily conclusive. [164]

'Shall state their whereabouts, if known.' The rule requires a party to whom notice is given to answer on oath. This requires the deponent to provide the information enjoined by the rule knowing that he is dealing with a solemn execution of an important document. Consistent with answering in appreciation of the oath, the rule requires the whereabouts of requested documents to be disclosed only if known. There is no further requirement or obligation on a party to whom notice is given to explicitly state that it is not aware of the whereabouts of requested documents. To read this into the rule would be tantamount to amendment by interpretation. [165]

Subrule (4): 'A document or tape recording not disclosed.' This refers only to documents or tape recordings which are either in the possession or under the control of the party who is called upon to specify and disclose. [166]

'Save with the leave of the court.' It has been held that leave should not be lightly granted for the use of documents not properly discovered: leave should be granted only if there is no prejudice and the defaulting party has given adequate and satisfactory reasons for its failure to make discovery in compliance with the rules. [167]

'Granted on such terms as it may deem appropriate.' The terms will usually relate to postponement and the payment of wasted costs. [168] Postponements have been granted for failure to discover, [169] for late discovery [170] and for inadequate discovery. [171] A party who succeeds in obtaining a postponement is not entitled, by reason merely of inadequate discovery, to an order for costs. The order of costs depends upon the particular circumstances of each case which must be properly investigated in order to arrive at an appropriate order as to costs. [172] In several cases the defaulting party was ordered to pay the costs on the scale as between attorney and client. [173] On occasion the defaulting party was precluded from proceeding to trial in the matter until such wasted costs had been paid. [174]

'May not . . . be used for any purpose at the trial.' The penalty prescribed in this subrule (which obviously applies only to the party which failed to discover the document or tape recording in question) for failure to disclose a document or tape recording may not be sufficient to ensure that full disclosure is timeously made. Timeous discovery is essential for proper preparation for trial. The legal representative of the party to whom discovery is made must have the opportunity to read and consider the documents, to compare the documents discovered with those in his possession, to consult with his client and witnesses in connection with the discovered documents, to consider whether there are not further documents in existence which should have been disclosed and to deliberate whether the court should not be moved to order further and better discovery. [175] Moreover, a party may be quite content not to be able to use a certain document himself if he can prevent a disclosure thereof to his opponent for whose case it may be essential. [176] The aforesaid principles also apply to tape recordings.

Subrule (6): 'To make available for inspection any documents or tape recordings.' As a rule only the party and his attorney are entitled to inspect, but the courts have allowed an expert to do so on behalf of the party in a proper case. [177] Such a person will, however, not be allowed inspection where there is a reasonable objection to him personally. [178]

Although there is normally a full right of inspection and copying, the court has a discretion to impose appropriate limits when satisfied that there is a real danger that an unlawful appropriation of property will be made possible merely because there is litigation in progress and because litigants are entitled to see documents to which they would not otherwise have lawful access. [179]

'To take copies or transcriptions thereof.' The court expects practitioners to co-operate in making and exchanging copies of documents (and tape recordings) for each other. [180]

'Shall preclude such party from using it at the trial.' See the notes to subrule (4) s v 'May not . . . be used for any purpose at the trial' above.

Subrule (7): 'Fails to give discovery.' If a party who has been requested to make discovery in terms of subrule (1) fails to do so as provided for in subrule (2), the party who requested discovery to be made can proceed under this subrule. If a party is dissatisfied with discovery that has been made, the remedy provided for in subrule (3) must first be exhausted before proceeding under this subrule. [181]

The cases are not harmonious as to whether or not an application in terms of this subrule must be preceded by a notice in terms of rule 30A(1). On the one hand, it has been held that an application to compel may be made in terms of this subrule without the applicant first having to give notice in terms of rule 30A or to follow the provisions thereof. [182] On the other hand, it has been held that a notice in terms of rule 30A(1), or any other form of notice, has to be given by the party who requested discovery before such party can proceed with an application to compel under this subrule, failing which, in the absence of condonation being granted, the applicant in the application to compel is not entitled to the costs of the application. [183] It has also been observed that rules 30A and 35(7) are similar and that no condonation is necessary where a party applies rule 30A and not rule 35(7). [184] It is submitted that the general requirement of rule 30A(1) that an applicant for an order to compel compliance

with a request or notice given pursuant to the rules of court must notify the defaulting party that he intends after the lapse of ten days to apply for the order, does not override but gives way to the special provisions of this subrule relating to an application to compel discovery. It is sound practice for a party to call upon his opponent to remedy a default to comply with the request to make discovery or the notice in terms of subrule (6) and put him to terms before lodging the application under this subrule. [185] In practice the court usually orders that discovery be made or the documents/tape recordings referred to in a notice under subrule (6) be made available for inspection within a time fixed by it and grants leave, in the event of this not being done, to apply on the same papers for the appropriate further relief.

The party seeking further discovery in respect of a document the existence of which is in doubt ordinarily bears the onus of proving its existence before a court will grant an order compelling its discovery. [186]

'May order compliance with this rule.' Under this subrule the court has a discretion whether or not to enforce discovery or inspection. [187] It has been held [188] that the discretion is predicated on the documents, in respect of which discovery is sought, being relevant. In an appropriate case the court may, in the exercise of its discretion, order deferment of discovery of documents (or tape recordings) relative to a contingent issue. This will be done only in exceptional circumstances where the court will not oblige the defendant to contest the issue on which discovery is claimed until the defendant has succeeded on the primary issue. [189] The issue, however, is case-specific and involves considerations such as the prejudicial nature of the information if it is revealed to the applicant. [190]

Discovery works on the basis of honesty and good faith, which explains why, if a party alleges that the other party has been *mala fide* in failing to disclose any document that the opponent demands to have discovered, the onus is on the party demanding further discovery to establish such *mala fides* or to demonstrate that the party that has failed or refused to make the additional discovery is misguided as to the relevance of non-discovered material. [191] A court, in the exercise of its discretion, must remain alert to the potential abuse of the discovery process. This may arise if the procedure is utilized *in terrorem* to debilitate a respondent by requiring it to incur exorbitant expenses and to tie up large numbers of qualified staff and lawyers. [192] The greater use of electronic documentation, whether as a means of communication (such as e-mails) or as a means of storing information (such as on computer databases or central servers), exacerbates the risk of potential abuse. [193] In an appropriate

case an applicant could seek a referral of the dispute to oral evidence or to a separate trial. [194] Caution needs to be exercised before an issue relating to discovery is referred to the hearing of oral evidence. The court may wish to balance the expedition of allowing the existence or otherwise of the document (or tape recording) to be tested during the main trial against the prejudice of being unable to properly prepare for the trial itself. [195]

In ordering compliance with the rule the court may make an appropriate order as to costs, [196] including an order that the respondent pay the costs of the application on the basis as between attorney and client. [197] If the defaulting party is the plaintiff, he may be precluded from proceeding to trial in the matter until such wasted costs had been paid. [198] A party may be penalized by way of an adverse order as to costs for failing to bring a timeous application in terms of this subrule. [199]

'Failing such compliance, may dismiss the claim or strike out the defence.' In *MEC, Department of Public Works v Ikamva Architects* [200] the High Court granted the defendants a period of 10 days from date of service of the plaintiff's notice in terms of rule 35(3) to reply to the notice, failing which their defence would automatically be struck out. The plaintiff

subsequently obtained default judgment against the defendants and caused writs of execution to be issued. In an application to stay the writs brought by the defendants, the full court observed that: [201]

(a) The dismissal of a claim or the striking of a defence is a drastic remedy, and the power to grant such a remedy is discretionary, a discretion that must be exercised judicially.

(b) The interpretation and application of a court rule often requires a consideration of the provisions of the Constitution. Section 34 is relevant in this respect, providing that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. The striking-out of a plaintiff's claim or a defendant's defence has a far-reaching impact on this right. It has the potential to deprive a litigant of a fair trial, bringing an end to a claim or defence. In the case of a defendant, the usual effect of a striking-out is to prevent the presentation of a defence so that judgment will be entered for the plaintiff, subject to any further order of court.

(c) It must be accepted that the order to strike out the defence was erroneous on the basis that it followed a one- as opposed to two-stage procedure. Rule 35(7) does not contemplate the striking-out of a defence automatically but rather on application on the same papers, amplified if necessary.

(d) It is only when a court has had the opportunity to decide that grounds exist for the striking-out of a defence that an application for default judgment may be made.

(e) By following a one-step process, the court which made the order striking out the defence did not have the opportunity to consider whether it had been proved that the party concerned had failed to comply with the rule in question. There was then no option to remedy the breach by giving the party the opportunity to comply. The consequence was that the court did not have the opportunity to exercise its discretion in determining

what, if any, procedural consequence should follow because the party had failed to remedy the breach. This was a discretion to be exercised judicially on the facts before court and bearing in mind that striking-out should normally be a last resort, considering that it has the potential to deprive a litigant of an entrenched right to a fair trial. A virtue of the Uniform Rules of Court is that they provide for flexible remedies for breaches of the rules, giving the court the opportunity to make the sanction fit the breach. Importantly, the discretion should be exercised only after the defendant has been given an opportunity to be heard in compliance with the *audi alteram partem* rule.

(f) This did not happen in the present matter. The defence was struck out in the absence of the defendants and without —

(i) the applicant requesting the striking-out having placed any facts before the court justifying the granting of such a far-reaching order;

(ii) the defendants having first been placed in a position either to seek condonation for their failure to comply with the order to compel, or to convince the court not to strike out their defence and to make an alternative order that would ensure compliance with the order to compel discovery without the drastic step of striking out their defence;

(iii) the court having been placed in a position to exercise its discretion judicially, as envisaged by rule 35(7), and to make an informed decision.

(g) The order striking out the defendants' defence was therefore granted erroneously as envisaged in rule 42(1)*(a)*.

Subrule (8): 'Any document or tape recording intended to be used at the trial.' It is to be noted that while a party is in terms of subrule (1) and (2) only bound to make discovery of documents and tape recordings which are or have at any time been in the possession or control of such a party, this subrule goes further and requires such party to disclose all the documents and tape recordings which are intended to be used at the trial. [202] These may include documents and tape recordings in the possession of third parties in respect of which discovery need not be made. The subrule does not require a party to disclose privileged statements which such party proposes to use solely to damage the case of the other party in the event of the other party calling witnesses whose evidence conflicts with those documents. [203] The subrule also encompasses documents and tape recordings in the possession of the party giving the notice in terms of the subrule. [204]

No sanction is provided for failure to comply with the provisions of the subrule. A party may apply for condonation for failure to comply with the provisions of the subrule. [205] It has been suggested that the court can make any appropriate order to ensure that parties to the litigation are not prejudiced and that the hearing proceeds in an orderly manner. [206]

Subrule (9): 'To admit that . . . documents or tape recordings were properly executed.' An admission under this subrule does not amount to an admission of the contents of the document or tape recording. [207] In other words, the production of documents or tape recordings in terms of subrule (10), after these have been admitted in terms of this subrule, does not extend to the truthfulness of the contents of the documents or tape recordings. [208] The documents and tape recordings are not evidence that the content thereof is true, and the contents, unless admitted as true, remain hearsay evidence and inadmissible unless they qualify for admission under one of the exceptions to the hearsay rule. [209]

Subrule (10): 'To produce at the hearing.' The provisions of this subrule entitle a party to call upon its opponent to produce at the trial the originals of the documents and tape recordings which have been discovered. The provisions of the subrule do not extend to third parties; if books or documents in the hands of third parties are required, a subpoena *duces tecum* under rule 38 must be issued. See also the notes to subrule (9) s v 'To admit that . . . documents and tape recordings were properly executed' above.

'Without calling any witness.' The subrule provides an exception to the general requirement that a document can only be admitted in evidence by a witness who is in a position to identify the document. [210]

'Shall be receivable in evidence.' The admissibility of the content of the document remains subject to the applicable rules of the law of evidence. [211]

Subrule (11): 'The court may . . . order the production of . . . such documents or tape recordings.' The court has a discretion under this subrule [212] but it would be an improper exercise of such a discretion to order discovery in order to determine an issue such as whether or not there is an action properly before the court. [213]

'Relating to any matter in question in such proceedings.' The phraseology is similar to that of subrule (1), and a court ordering the production of documents and tape recordings relating to any matter in question in the proceedings is bound by the constraints governing that subrule. See the notes to subrule (1) s v 'Relating to any matter in question' above.

Subrule (12): General. This subrule stands apart from rule 39(13) (and the other subrules of rule 35) in that no court order is required for its invocation in application proceedings. Thus, the subrule may be invoked, by any of the parties at any stage of application proceedings, with the object of compelling the production of the documents or tape recordings sought by such

party in terms of rule 30A. [214]

Subrule (12)*(a)*: 'Reference is made to any document or tape recording.' The underlying purpose for production of documents for inspection and copying or transcribing as part of the broader discovery mechanism is to assist the parties and the court in discovering the truth and to promote a just and expeditious determination of the case. [215] This subrule authorizes the production of documents and tape recordings which are referred to in general terms in a party's pleadings or affidavits: the terms of the subrule do not require a detailed or descriptive reference to such documents or tape recordings. [216] Reference by mere deduction or inference does not, however, constitute a 'reference' as contemplated in the subrule. [217] The

entitlement to see a document or tape recording arises as soon as reference is made thereto in a pleading or affidavit and a party cannot ordinarily 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. [218] The subrule is, however, not a procedural mechanism to delay the resolution of the merits of a dispute. The purpose of the subrule is to facilitate the ventilation of disputes; it is not meant to be an end in itself. [219]

It is submitted that the subrule includes documents directly or indirectly referred to in an affidavit or its annexures, provided such documents are relevant. In *Democratic Alliance v Mkhwebane* [220] the Supreme Court of Appeal (*per* Navsa JA) summarized the position as follows: [221]

> '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.'

The rights under the subrule may be exercised before the respondent or defendant has disclosed his defence or even before knowing what his defence, if any, is going to be. He is entitled to have the documents or tape recordings produced for the specific purpose of considering his position. [222] He is not required to depose to or deliver opposing affidavits (or a plea) before having been afforded an opportunity of inspecting and copying the documents or tape recordings referred to in the subrule. [223] There is nothing in the language of this subrule

(or rule 30A) to suggest that once a demand has been made for the production of the documents to which the rule 35(12) notice relates, the party seeking such documents is excused from complying with the timeframes prescribed in terms of the rules for the delivery of pleadings or affidavits, as the case may be. [224] In *Potpale Investments (Pty) Ltd v Mkize*, [225] a case where a notice in terms of rule 35(14) was delivered during a period of bar to deliver a plea, Gorven J observed that the delivery of a notice in terms of rule 35(12) or (14) did not suspend the period for the delivery of a further pleading or affidavit, as the case may be. [226] In *Democratic Alliance v Mkhwebane* [227] the Supreme Court of Appeal held [228] that there was much to commend the reasoning and the approach in the *Potpale* case, which case was, however, distinguished on the facts. In *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [229] the Supreme Court of Appeal, with reference to the *Potpale* case, stated: [230]

> 'Whilst there is much to be said for the view expressed by the learned Judge, sight should however not be lost of the fact that it is open to the court, in the exercise of its discretion, to extend the time periods prescribed in terms of the rules whenever a proper case therefor has been made out by the party seeking such indulgence.'

As pointed out above, in the *Potpale* case a period of bar to deliver a plea was already running at the time that the notice in terms of rule 35(14) was delivered. The case should, therefore, be read in the light of the aforesaid. Furthermore, the reference to rule 35(12) and its effect seems to have been made *obiter* in the light of the fact that Gorven J was actually dealing with a case concerning rule 35(14). It is submitted that if a notice in terms of rule 35(14) is delivered, followed by an application to compel compliance with the notice, before a notice of bar is delivered, the notice of bar would be an irregular step. In such event the time period for the delivery of a plea is suspended pending the determination of the application to compel the production of the documents and/or tape recordings referred to in the notice under rule 35(14). See further, in this regard, the notes to rule 35(14) s v 'A clearly specified document or tape recording which is relevant to a reasonably anticipated issue' below.

In *Distell Ltd v Naidoo* [231] Henriques J held [232] that a notice in terms of rule 35(12) which was delivered after the expiry of the time period within which an answering affidavit had to be delivered, did not suspend such time period.

An application for summary judgment cannot be deferred by delivery of a notice in terms of this subrule. [233]

Subrule (12)*(a)*(i): 'Produce such document or tape recording.' The subrule entitles a litigant to see the whole of a document or a tape recording and not just the portion of it upon which the other party has chosen to rely. [234]

A 'proved claim' in the form of an affidavit as contemplated in s 44(4) of the Insolvency Act 24 of 1936, referred to in a founding affidavit in an application for the winding-up of a company, is a 'document' as intended in rule 35(12). [235]

A photograph is a 'document' within the meaning of the subrule. [236]

If a document or tape recording is not referred to in a pleading or an affidavit but in a document annexed to it, the document or tape recording thus referred to falls within the ambit of the subrule. [237] The subrule also applies in respect of documents and tape recordings referred to in a party's affidavit but which are not in that party's possession. If such a party is unable to produce the document or tape recording not in his possession, the court will not make an order against him in terms of the subrule. [238] The subrule further applies to documents referred to in an answering affidavit in summary judgment proceedings. [239]

The court has an inherent power to order a party to produce for inspection documents not referred to in that party's

pleading or affidavits, and also to order a party to produce for inspection items of machinery, i e objects which are not documents. [240] Such inherent power will not, however, be exercised as a matter of course, and only when the court can be satisfied that justice cannot otherwise be properly done. [241]

The fact that other evidence may exist upon which the party may prefer to rely in advancing his case is quite irrelevant to any enquiry under the rule.

Subrule (12)*(b)*: 'Any party failing to comply with the notice.' The sanction in the subrule is of a negative nature and comes into operation automatically upon non-compliance with the provisions of the subrule. [242] The provisions of rule 30A apply to a failure to comply with a notice under this subrule despite the fact that the subrule itself provides a sanction for non-compliance. [243] Rule 30A provides for a positive form of relief which aims at compelling compliance with the notice or request, and at striking out the claim or defence, as the case may be, where compliance cannot be enforced. [244]

The cases dealing with compliance are not harmonious, as pointed out by the Supreme Court of Appeal in *Centre for Child Law v Hoërskool, Fochville*. [245] In that case a provincial department of education decided that a school should admit certain children. The school and its governing body ('the school') instituted proceedings to review the decision. The Centre for Child Law ('the CCL') applied to intervene. It represented the children who had been admitted. In its affidavit it summarized the experiences of the children and it stated that the summary was sourced from questionnaires completed by the children.

The school gave notice that it would oppose the CCL's application to intervene, but before filing an answering affidavit, gave the CCL a rule 35(12) notice to produce the questionnaires for inspection. The CCL refused, asserting that the questionnaires were attorney-client communications and privileged. The court *a quo* eventually ordered the CCL to comply with the school's rule 35(12) notice by delivering up for inspection and copying the original questionnaires. [246] In framing the proper approach to an application under rule 30A to compel the production of documents under subrule (12), and overruling the decision of the court *a quo*, the Supreme Court of Appeal stated: [247]

'[16] Uniform Rule 30A reads:

> "(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 meet."

Under rule 30A a party making a request, or giving a notice, to which there is no response by the other party, may through a further notice to the other party warn that after the lapse of 10 days application will be made for an order that the notice or request be complied with, or that the claim or defence be struck out, as the case may be. Failing compliance within the 10 days mentioned, application may then be made to court and the court may make an appropriate order. That, as Botha J described it in *Coucourakis* (at 459H), is a "positive form of relief".

[17] In general terms, the rules exist to regulate the practice and procedure of the courts. Their object is to secure the "inexpensive and expeditious completion of litigation before the courts" and they are not an end in and of themselves. Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules. Here, having given notice in terms of rule 35(12) that has not been complied with, it was for the School to give notice in terms of rule 30A that it intended, after the lapse of 10 days, applying for an order that its rule 35(12) notice be complied with. That the School did not do. Nor did it apply to court in terms of rule 30A to compel production of the documents sought. That, in and of itself, may have been fatal to the application (see *Universal City Studios v Movie Time* 1983 (4) SA 736 (D)). In *Universal City Studios* Booysen J was urged, despite the fact that the procedure laid down in rule 30(5) (the predecessor to rule 30A) had not been followed, to nevertheless order compliance with the rule 35(12) notice. He declined, stating that —

> "a party who deliberately chooses not to claim relief of a particular nature, should in general, even if it were competent, not be granted such relief under the general prayer of alternative relief."

Whether Booysen J was correct in his approach to the matter hardly need detain us. For the real complaint in this case is that, however the application was presented, the learned judge in the court a quo failed to appreciate that he was, in truth, considering an application in terms of rule 30A. In compelling production of the questionnaires, Sutherland J "sum[med] up the law" thus:

> "[25.1] There is clear authority that confidentiality does not trump the rule.
>
> [25.2] There is some authority for the proposition that rule 35(12) must be literally interpreted, and irrelevant and privileged documents must be disclosed. I am in firm disagreement with such a view.
>
> [25.3] There is some authority, which is nevertheless obiter, to support the idea that an irrelevant or privileged document, if referred to in a pleading or affidavit, cannot be subjected to compulsory disclosure in terms of rule 35(12). I am in firm agreement with this view.
>
> [25.4] Therefore, I hold that, upon a proper interpretation of rule 35(12), a party called upon to comply with rule 35(12) is excused from so doing, if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but cannot refuse on the grounds of confidentiality."

[18] *Universal City Studios* held (at 748A) that —

> "[this] being an application, I would say that the *onus* is to be discharged on the usual basis, i e 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."

In *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) Friedman J disagreed with this dictum. He took the view that the rule should be interpreted as follows:

> "*(P)rima facie* there is an obligation on a party who refers to a document . . . 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 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 (774G)."

Friedman J's approach found favour with Thring J in *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C). 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. 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] In striking the appropriate balance in a case of this nature adequate weight must be accorded to the interests of the children.

. . .

[26] Accordingly, as I have endeavoured to show, in every weighing of rights and interests and any value judgment relating to whether the questionnaires should be produced, the best interests of the children would have to be the paramount consideration. Thus, even if the questionnaires were not protected by privilege or if the privilege had been waived, it may not have been appropriate for the court a quo to have ordered their disclosure on the basis that it would not have been in the children's best interests to do so. The CCL explained why the children specifically requested that their confidentiality be protected. The court a quo took the view that the CCL could not refuse to produce the questionnaires on the grounds of confidentiality. But as Moseneke DCJ pointed out in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) (2008 (8) BCLR 771; [2008] ZACC 6) para 27:

> "Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others (Crown Cork*):
>
> > [A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part."

[27] The concern expressed in this case is that the children may suffer prejudice should they be identified as the makers of some of the statements in the questionnaires. At the very least, the children appear to believe that they will. There is nothing to suggest that their perception in that regard is not genuinely held. In those circumstances there is much to be said for the argument that disclosure of the questionnaires would not be in their best interests. That is not to suggest, to employ the language of Sutherland J, that the best interest principle operates as a trump, because, as the Constitutional Court pointed out in *S v M* (above [24]) para 26, "the fact that the best interests of the child are paramount does not mean that they are absolute". It is thus but a starting point for any balancing of rights. Of course in appropriate circumstances and as part of that balancing act a court could endeavour to impose suitable conditions relative to the production and inspection.

[28] Here the School has failed to show why their interests should outweigh those of the children. On that score, in his replying affidavit, Mr Erasmus stated:

> "32.5 The intervening party's statement that the applicants will not be placed in a better position to answer the allegations should they be given access to the questionnaires, is denied. This is for the applicants to decide after disclosure of the documents, not for the intervening party to decide in order to evade disclosure."

Tellingly, he does not inform the court why the School could not oppose the intervention application without the benefit of the questionnaires. Ms Du Toit's affidavit captures the lived experiences of the children. It bears noting that no relief was sought against the School in respect of the incidents complained of. The School thus did not require to know the precise details of each incident in order to respond to the CCL's application to intervene. In the event, there was no justifiable basis for holding that the interests of the School in investigating the identities of the children in order to answer the allegations outweighed the interests of the children in not having their identities disclosed, especially in the light of the fact that the children had disclosed the information (which they otherwise may not have done) on condition of, and in the expectation of, their identities not being disclosed.

[29] It seems clear that the litigation concerns the children. It also seems clear that the children wish to participate in it at least to the extent that their views and perceptions of the School are considered. The question is whether the use of a summary of their sentiments in an overarching affidavit by Ms Du Toit, without supporting affidavits by them and disclosure of their individual questionnaires, is an appropriate way for them to do so. The School could point to no prejudice to it. It further cannot be said that, if the CCL is joined in the application, this is not an appropriate way for the children to participate in the litigation. The court below held that the hearsay nature of the evidence adduced by the CCL required the disclosure of the questionnaires. The CCL adduced the evidence in hearsay form so as to protect the identities of the children, conscious that the admissibility and weight of the evidence would be considered in due course on the basis that it is hearsay evidence. The questions of admissibility and weight of the evidence were thus not issues to be determined in this application. The School obviously retained the right to oppose the admission of the hearsay evidence and to argue that it should be accorded little weight, if admitted. But those are matters that would obviously have had to be canvassed and ultimately decided in either the intervention or main application in due course.

[30] It follows, for the reasons given, that the Uniform Rule 30A application ought not to have succeeded before the court below. Accordingly, the appeal must succeed. As to costs: CCL, commendably, did not seek costs either in this court or the one below. In the result, the appeal succeeds and the order of the court below is set aside and replaced with:

> "The application is dismissed."'

Subrule (13): 'Shall *mutatis mutandis* apply, in so far as the court may direct, to applications.' This subrule clearly and unequivocally states that, although the provisions of rule 35 relating to discovery apply to applications, such application is subject to the proviso that the court direct that it be so. [248] Such direction is an essential prerequisite for a notice in terms

of subrule (1) as well as for an application to compel compliance with a notice in terms of subrule (1). [249] The subrule does not apply to rule 39(12), which regulates the production of documents. [250]

Though the provisions of rule 35 relating to discovery apply to applications [251] in so far as the court may direct, [252] discovery is rare and unusual in application proceedings and should be ordered by the court only in exceptional circumstances. [253] In *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* [254] it was held that the fact that a permanent interdict was being sought on motion constituted exceptional circumstances justifying an order obliging the applicant to make discovery prior to the filing of replying affidavits by the respondent.

The notion of exceptional circumstances does not exist in a vacuum: it is to be gauged within the broader context of the values of fairness, equity, openness and transparency. [255] The factors to be taken into consideration include that the claim was for a substantial amount of money, the nature of the defendant's defence, the relevance of the documentation requested, whether the application was a fishing expedition, the timing of the application, that there was a reasonable apprehension that not all the documentation was before the court for the just and fair resolution of the dispute. [256] The essential criterion is whether discovery of the documents sought would be material to the proper conduct and fair determination of the case. [257] In addition, the court will take into account the caution sounded in *The MV Urgub: Owners of the MV Urgub v Western Bulk Carriers (Australia) (Pty) Ltd* [258] that discovery is not intended to be used as a sniping weapon

in preliminary skirmishes. [259]

In *STT Sales (Pty) Ltd v Fourie* [260] the court endorsed the principle that an order directing discovery will only in exceptional circumstances be made in motion proceedings and held that

such an order will, as a general rule, only be made after the legal issues have been established, i e once all the affidavits have been filed.

Subrule (14): 'For purposes of pleading.' This subrule was designed for the situation where a party to an action requires, for the purposes of pleading, the production of a specific document or tape recording of which he has knowledge and which he can describe precisely. The test is whether the document or tape recording in question is essential, not merely useful, in order to enable a party to plead. [261]

Subrule (14)*(a)*: 'A clearly specified document or tape recording . . . which is relevant to a reasonably anticipated issue.' This subrule does not provide a mechanism whereby a party, by making use of generic terms, can cast a net with which to fish for vaguely known documents. [262] In this respect the subrule differs markedly from subrule (12) and its ambit is much narrower than that of subrule (12). [263] See further the notes to this subrule s v 'For purposes of pleading' above.

If a notice in terms of this subrule is delivered during a period of bar to deliver a plea, the time period for the delivery of the plea is not suspended pending the production of the documents or tape recordings referred to in the subrule. See, in this regard, the notes to subrule (12)*(a)* s v 'Reference is made to any document or tape recording' above. The time period for the delivery of a plea is, however, suspended if a notice in terms of this subrule is delivered, followed by an application to compel compliance with the notice, before a notice of bar is delivered. If a notice of bar is delivered under such circumstances, it would be an irregular step. [264]

An application for summary judgment cannot be deferred by delivery of a notice in terms of this subrule. [265]

In an application by a defendant in convention for an order compelling discovery of documents to place it in a position to decide whether it wished to institute a claim in reconvention, the court held [266] that the legislature could never have envisaged that, once appearance to defend has been entered to a claim in convention, it would give a plaintiff in reconvention *carte blanche* to ask for the production of documents to establish whether he has a legal or factual foundation to formulate a claim in reconvention.

In *Nova Property Group Holdings Ltd v Cobbett* [267] Moneyweb (Pty) Ltd and Mr JP Cobbett, a financial journalist, attempted to exercise their rights in terms of s 26 of the Companies Act 71 of 2008 to access the securities registers of the Nova Group of Companies in order for Mr Cobbett to write articles for Moneyweb in regard to the Sharemax Group of Companies' controversial property-syndication investment scheme. When the requests were met with

refusals, Moneyweb launched an application in the Gauteng Division of the High Court to compel the Nova Group of Companies to provide access to it for inspection and making copies of the securities registers within five days of the date of the order ('the main application'). Instead of filing an answering affidavit, the Group of Companies issued notices in terms of rule 35(12) and (11)–(14) in which they sought documents referred to in Moneyweb's founding affidavit. Dissatisfied with the response to the notices, the Group of Companies launched an application to compel compliance with the notices. The application revealed that the Group of Companies ostensibly sought these documents for purposes of interrogating the 'real motives' of Moneyweb, as they believed that Moneyweb was acting in furtherance of a 'sinister agenda' directed against them, including certain members of its executive, and that Moneyweb had embarked upon a vendetta for the sole purpose of discrediting them and undermining their integrity. The Group of Companies contended that the documents sought would enable them to prove that Moneyweb intended to publish articles in the media not for any journalistic motive, but rather in furtherance of the 'sinister agenda' referred to above. They asserted, in this regard, that the documents sought were relevant to the anticipated issues in the main application, as they would provide them with a defence to that application. Tuchten J granted the rule 35(12) application but dismissed the Companies' rule 35(14) application. In dismissing the Companies' appeal against the dismissal of the latter application, the Supreme Court of Appeal held [268] that Moneyweb's 'motive' for seeking access to the securities registers was irrelevant and that the Group of Companies had failed to demonstrate that the documents sought in their rule 35(14) were 'relevant to a reasonably anticipated issue in the main application'.

In *Makate v Joosub NO* [269] the applicant in a review application brought an interlocutory application for an order, amongst others, directing the respondents to file various documents in terms of rule 35(14). The court held [270] that in principle the provisions of rule 35(13) and (14) found application and ordered the second respondent to provide the applicant's attorneys with certain relevant documents within 21 days of date of the order.

Subrule (15)*(a)*: 'A document includes.' Prior to the insertion of this subrule it was held [271] that 'an edocument, i e 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' and that, even if it were not so, it would be open to utilize the provisions of rule 35(7) in order to ensure that 'the discovery process achieves its objective in the electronic age'.

'Any written, printed or electronic matter.' It is submitted that these words refer to a document in its ordinary meaning, namely 'a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record'. [272]

'Data and data messages as defined in the Electronic Communications and Transactions Act, 2002.' In terms of s 1 of the Electronic Communications and Transaction Act 25 of 2002 'data' means 'electronic representations of information in any form' and 'data message' mean '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'.

Subrule (15)*(b)*: 'A tape recording includes.' The definition of 'tape recording' is wide enough to encompass all the different kinds of material on which visual images, sound and other information can be recorded and stored, [273] and also covers any other form of recording.

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1 1949 (3) SA 1081 (SR) at 1083. See also, for example, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) at 41F–42C; *Replication Technology Group v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) at 535C–I; *Bosasa Operations (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) at 578B–D; *Bridon International GmbH v International Trade Administration Commission* 2013 (3) SA 197 (SCA) at 209I–210E; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 563H–564E and the authorities there referred to; *Erasmus NO v The MEC for Health, NC Province* (unreported, NCK case no 1342/2014 dated 8 January 2021) at paragraph [43]; *Louw v Grobler* (unreported, FB case no 3074/2016 dated 28 September 2021) at paragraph [10]. In *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 (CA) the English Court of Appeal (in paragraph 54) adopted an observation of Millet J in *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 that, *inter alia,* '[t]he object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court . . .'.
The aforesaid English cases were referred to in *Owners of MV Banglar Mookh v Transnet Ltd: MV Banglar Mookh* 2012 (4) SA 300 (SCA) at 322A–D.
In *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) Binns-Ward J described the purpose of discovery as follows (at paragraph [14]):
'The purpose of discovery, or "disclosure" as it is called in the English civil procedure, is to assist in the ascertainment and proof of the facts that are relevant to the determination of the issues that are in dispute in the action, and also in the clarification or settlement of issues in the case so as to narrow the scope of disputatious matter and facilitate the more efficient conduct of the trial.'

2 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513G–H; *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA) at paragraph [23].

3 *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194I.

4 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 445–6; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 162E–F; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 563F–G; *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraph [25].

5 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513H–I.

6 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513I.

7 *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276C–D.

8 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513I. See also *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276B.

9 2019 (1) SA 257 (GJ).

10 At 261G–I.

11 *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at 492A; *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 445I–446A; *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 473G–H. See also 2006 (July) *De Rebus* 37.

12 *Loubser (Snr) NO v Vodacom (Pty) Ltd* (unreported, WCC case no 11890/2022 dated 9 February 2024) at paragraphs [16]–[19].

13 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 455H; *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 433H–I; *Company Secretary, ArcelorMittal South Africa Ltd v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) at paragraph [50].

14 *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 433I.

15 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 446C–D.

16 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 445A.

17 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 445A. See also *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2012 (2) SA 269 (SCA) at 272G–273A, 273C–275E and 275I; *Loubser (Snr) NO v Vodacom (Pty) Ltd* (unreported, WCC case no 11890/2022 dated 9 February 2024) at paragraph [19]; and see the notes to rule 38 s v 'General' below.

18 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 445I–446A; *Loubser (Snr) NO v Vodacom (Pty) Ltd* (unreported, WCC case no 11890/2022 dated 9 February 2024) at paragraph [19].

19 *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 226G–H.

20 The Constitution of the Republic of South Africa, 1996.

21 *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 642E–F; *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) (a case where a defence of legal professional discovery to the s 23 application was rejected by Cameron J).

22 *Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank* 1999 (2) SA 782 (W).

23 *Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank* 1999 (2) SA 782 (W).

24 *Pelidis v Ndhlamuti* 1969 (3) SA 563 (R).

25 *Concise Oxford English Dictionary* 10 ed. Cf *Le Roux v Viana NO* 2008 (2) SA 173 (SCA) at 175E–G where the word 'documents' was attributed this meaning in the context of s 69(3) of the Insolvency Act 24 of 1936.

26 See *Bilborough v Mutual Life Insurance Co of New York* 1906 TH 53; *Robinson v Farrar* 1907 TS 740; *Power v Wilson* 1909 TH 254; *Freeman v Freeman* 1921 WLD 1; *Maxwell v Rosenberg* 1927 WLD 1; *Northern Assurance Co Ltd v Rosenthal* 1927 WLD 209; *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W); *Lenz Township Co (Pty) Ltd v Munnick* 1959 (2) SA 567 (T); *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T); *Ferreira v Endley* 1966 (3) SA 618 (E) at 622A; *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 362B–E; *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A; *Carpede v Choene NO* 1986 (3) SA 445 (O) at 452; *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1991 (4) SA 214 (Tk) at 216D; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 316E–G; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564F–G; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B; *Erasmus NO v The MEC for Health, NC Province* (unreported, NCK case no 1342/2014 dated 8 January 2021) at paragraph [45].

27 *Carpede v Choene NO* 1986 (3) SA 445 (O) at 456B.

28 The ambit of discovery flows from the pleadings in which the parties have delineated the matters in question between them (*Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 297 (T) at 311A; *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194A; *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 34A–B; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 165D–G; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564I–565C; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 15B; *ST v CT* 2018 (5) SA 479 (SCA) at 488B; *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [13]; *Louw v Grobler* (unreported, FB case no 3074/2016 dated 28 September 2021) at paragraphs [11]–[12]; *Lutzen v Knysna Municipality* (unreported, WCC case no 695/2020 dated 8 May 2023) at paragraph [35]).

29 *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) at 404H–I; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 165C–D; *ST v CT* 2018 (5) SA 479 (SCA) at 488B.

30 See *Wiese v Mostert* (1893) 10 SC 137; *Ehlers v Malmesbury Board of Executors* (1909) 26 SC 406; *Teperson v Hoffman* (1910) 20 CTR 88; *Cremhold's Estate v Cohen Bros* 1923 OPD 125; *Unterhalter v Minkowitz* 1951 (2) SA 125 (W). See also, by way of analogy, *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T).

31 2019 (1) SA 257 (GJ).

32 At 261G–I.

33 *Robinson v Farrar* 1907 TS 740; *Union Business & Estate Agency v Weiss* 1925 TPD 577 at 582; *Freedman v Bauer and Black* 1941 WLD 161; *Gerry v Gerry* 1958 (1) SA 295 (W); *Ocean Accident & Guarantee Corp Ltd v Potgieter* 1961 (2) SA 783 (O); *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

34 *Robinson v Farrar* 1907 TS 740; *Union Business & Estate Agency v Weiss* 1925 TPD 577 at 582; *Freedman v Bauer and Black* 1941 WLD 161; *Gerry v Gerry* 1958 (1) SA 295 (W); *Ocean Accident & Guarantee Corp Ltd v Potgieter* 1961 (2) SA 783 (O); *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

35 *Chester & Gibb v Big Ben GM Co* (1887) 4 HCG 374; *Strasburger v Combrinck & Co* 1913 CPD 776.

36 See *Natal Vermiculite (Pty) Ltd v Clark* 1957 (2) SA 431 (N). The importance of discovery affidavits is stressed also in *Ferreira v Endley* 1966 (3) SA 618 (E) at 621C; *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974 (2) SA 324 (NC) at 327H–328B and *Replication Technology Group v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) at 535G–536B.

37 *Maxwell v Rosenberg* 1927 WLD 1; *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E).

38 *Jacobs v Minister van Landbou* 1975 (1) SA 946 (T).

39 *Reynolds and Others NNO v Standard Bank of South Africa Ltd* 2011 (3) SA 660 (W) at 662F–G and 663C–F.

40 See *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974 (2) SA 324 (NC) and *Carpede v Choene NO* 1986 (3) SA 445 (O) at 453G.

41 *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116; *Maxwell v Rosenberg* 1927 WLD 1. Paragraph (7) of Form 11 gives

effect to these decisions.

42 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (2)* 1953 (3) SA 879 (W). 'Privilege' within the realm of discovery is considered in great detail by the House of Lords in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 (HL).

43 See the remarks of Jansen JA in *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 962.

44 For full discussion of privilege within the law of evidence, see Zeffertt *Evidence* 621–782; Schmidt *Bewysreg* 551–87; Van Niekerk, Van der Merwe & Van Wyk *Privilegies passim*; Schmidt & Zeffertt *LAWSA* vol IX paragraphs 482–96.

45 Hoffmann & Zeffertt *Evidence* 235; Zeffertt *Evidence* 621. Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 6 define privilege as ''n bevoegdheid of verpligting wat 'n gedingsparty of getuie regtens toekom of opgelê word om te weier om onder bepaalde omstandighede sekere getuienis te lewer, of om te verhoed dat iemand anders dit lewer'.

46 *MTN (Pty) Ltd v Madzonga* 2023 (5) SA 548 (GJ) at paragraphs [18]–[27]. The questions whether the objection would still be good if there were no criminal proceedings pending, or if there were, they had nothing to do with the civil action in which discovery is sought, were left open by the court (at paragraph [27]).

47 Zeffertt *Evidence* 627. In *MTN (Pty) Ltd v Madzonga* 2023 (5) SA 548 (GJ) it was found, on the basis that the respondents in the application to compel discovery were 'accused persons' (their trial was pending), that there was no need for the court to 'consider the difficult question of whether, as *Erasmus* appears to suggest, the right of self-incrimination applies, even where a person who has not been "accused" of anything is called upon to discover in civil proceedings'.

48 See s 14 of the Civil Proceedings Evidence Act 25 of 1965; but see *MTN (Pty) Ltd v Madzonga* 2023 (5) SA 548 (GJ) at paragraph [25] where it was held that s 14 has nothing to say about the discovery process; it merely prevents a witness in a civil action from refusing to answer a question where the answer might expose the witness to civil liability and reaffirms the right not to be compelled to give self-incriminating evidence in the context of a civil trial. *Sed quaere*.

49 *Ex parte Reynolds* (1882) 20 ChD 294.

50 *Lamb v Munster* (1882) 10 QBD 110.

51 *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613; *Sitwell v Sun Engraving Co Ltd* [1937] 4 All ER 366 (CA).

52 Zeffertt *Evidence* 780 points out that if, for example, a wife is a competent witness and is willing to disclose a communication made to her by her husband during the marriage, there is nothing he can do to stop her.

53 In *Rumping v Director of Public Prosecutions* [1964] AC 814, [1962] 3 All ER 256 a letter written by an accused to his wife and containing a confession was not posted and fell into the hands of the police. It was held that the letter is not privileged. See also *R v Nelson* 1936 SR 121.

54 Section 10(2) of the Civil Proceedings Evidence Act 25 of 1965.

55 Zeffertt *Evidence* 781.

56 Zeffertt *Evidence* 780.

57 Hoffmann & Zeffertt *Evidence* 196 point out that 'this involves a rather different use of the word "privilege" from its usual meaning in the law of evidence — the right of a witness to refuse to disclose admissible evidence; but in connection with statements without prejudice it means the right of a party to make statements that cannot be proved against him'. See also Zeffertt *Evidence* 769–779; *LAWSA* vol IX paragraph 481; Van Niekerk, Van der Merwe & Van Wyk *Privilegie* 200–1; the remarks of Trollip JA in *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 846D–E; *Van der Westhuizen v Akarana Homeowners Association* 2024 (1) SA 301 (WCC) at paragraph [15].

58 *Kapeller v Rondalia Versekeringskorporasie van SA Bpk* 1964 (4) SA 722 (T) at 728; *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677; *Tshabalala v President Versekeringsmaatskappy Bpk* 1987 (4) SA 72 (T) at 76; *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 352 (WCC) at 492F–G; *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 62E–F. The rule is subject to certain exceptions, which are summarized in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 352 (WCC) at 492I–494B. In this case it was held (at 487C, 489A–C, 501D–E and 501F–G) that the introduction into evidence, for the limited purpose of establishing an interruption of prescription in terms of s 14 of the Prescription Act 68 of 1969, of a letter acknowledging liability which was written without prejudice, is not recognized as an exception to the rule. This decision was reversed on appeal in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 66I–67C and the exception to the rule was held to be well founded. The exception is not absolute and will depend on the facts of each case (*KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 67A). The parties may oust it in their discussions (*KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 67A). See also Herbert J D Robertson 'A "without prejudice" letter breathes new life into prescribed matter' 2018 (June) *De Rebus* 24–5.

59 *De Beers Consolidated Mines Ltd v Ettling* 1906 TS 418 at 420–1.

60 See, for example, *Pillay v New Zealand Insurance Co Ltd* 1957 (1) SA 17 (N).

61 *Magxoka v Skilingo* 1914 CPD 386; *Ovenstone Farmers (Pty) Ltd v Villiersdorp Moskonfyt en Vrugte Koöperasie Bpk* 1975 (2) SA 278 (C); *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) at 624; *Tshabalala v President Versekeringsmaatskappy Bpk* 1987 (4) SA 72 (T) at 76; *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 148E–F.

62 *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 144F–G and 149A–B.

63 *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 149B–E.

64 *Millward v Glaser* 1950 (3) SA 547 (W) at 554; *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914; *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N) at 275B; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) at 65B–C; *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90I–91A; *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 352 (WCC) at 491I–492A, reversed on appeal, but not on this point, in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA); *Van der Westhuizen v Akarana Homeowners Association* 2024 (1) SA 301 (WCC) at paragraphs [15] and [28].

65 *Merry v Machin* (1926) 47 NLR 236; *Brauer v Markow* 1946 TPD 344 at 350; *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N) at 275B; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) at 65B–C; and see *Ullman Bros Ltd v Kroonstad Produce Co* 1923 AD 449 at 454.

66 *Brauer v Markow* 1946 TPD 344 at 348; *Pillay v New Zealand Insurance Co Ltd* 1957 (1) SA 17 (N) at 19.

67 *Coetzee v Union Government* 1946 TPD 1; *Hoffend v Elgeti* 1949 (3) SA 91 (A) at 108; *Wemyss v Stuart* 1961 (3) SA 889 (D).

68 *Patlansky v Patlansky (2)* 1917 WLD 10; *Wemyss v Stuart* 1961 (3) SA 889 (D).

69 *Kapeller v Rondalia Versekeringskorporasie van SA Bpk* 1964 (4) SA 722 (T); *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 678–80. In *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) it was held that an offer expressly made 'with prejudice' did not gainsay an intention to tender an amount in settlement of the claim without acknowledging liability. The offer had been made with the object of being used against the plaintiff should he eventually recover less than the amount offered.

70 *Adkins and Hunter v Crosbie's Executors* 1916 EDL 357 at 361; *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914.

71 Legal professional privilege is considered in detail by Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 28–123 and in Zeffertt *Evidence* 679–728. The theoretical foundations of the privilege are explored by Paizes (1989) 106 *SALJ* 109–46. In this respect the judgment of Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) is of 'seminal significance' (see Hoffmann & Zeffertt *Evidence* 247). See also *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1993 (3) SA 953 (T) at 958H–961G; *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 (3) SA 231 (W) at 235H–I; *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 552E–553F; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 576F–582D; *Astral Operations Ltd v Minister for Local Development, Western Cape* 2019 (3) SA 189 (WCC) at 191F–194E; Zeffertt *Evidence* 693–695; Kristen Wagner and Claire Brett 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' 2016 (September) *De Rebus* 22–4. In *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 78E–F the Constitutional Court stated the following:

'The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation.'

The requirements referred to are set out as follows (at 78H–I):

' . . . the legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.'

See also D Eloff 'Legal professional privilege and Internet hacking' 2017 (November) *De Rebus* 17–18.

Legal professional privilege extends to common/joint-interest privilege, which entails the preservation of legal professional privilege where a third party, recipient or creator of a communication has a common interest in the subject of the privilege with the primary holder. The key principle is that privilege is not lost where there is limited disclosure for a particular purpose or to parties with a common/joint interest. The sharing of privileged communications with a third-party funder or insurer is a clear example of common/joint-interest privilege. All have a shared interest in the outcome of the litigation and all have a common interest in ensuring the confidentiality of their communications (*Anglo*

American South Africa Limited v Kabwe and 12 Others 2022 JDR 2294 (GJ) at paragraph [32]; *White Oak Trade & Specialty Finance Cayman LLC v Santam Structured Insurance Limited* (unreported, GJ case no 13311/2020 dated 22 February 2023) at paragraph [12]).

72 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (3)* 1953 (4) SA 251 (W) at 253.

73 *S v Moseli (2)* 1969 (1) SA 650 (O) at 652.

74 *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494 at 500 and 506; *Savides v Varsamopoulos* 1942 WLD 49; *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 70; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) at 640–1; *Mohamed v President of the Republic of South Africa* 2001 (2) SA 1145 (C) at 1154E; and see *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* 2021 (3) SA 246 (CC) at paragraphs [115]–[119].

75 *Minter v Priest* [1930] AC 558 at 568; *S v Kearney* 1964 (2) SA 495 (A) at 500; *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O) at 121. In *R v Davies* 1956 (3) SA 52 (A) documents were brought into existence before litigation was contemplated and before any decision was taken to obtain legal advice. The fact that the documents were subsequently handed to an attorney did not render them privileged.

76 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 567B–C.

77 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 567F–568B.

78 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 570D–F and 571B.

79 *Minter v Priest* [1930] AC 558.

80 *R v Fouche* 1953 (1) SA 440 (W); the decision is considered in some detail by Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 54–60.

81 See *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O).

82 *R v Fouche* 1953 (1) SA 440 (W).

83 *Van der Heever v Die Meester* 1997 (3) SA 93 (T) at 101J–102E; *Mohamed v President of the Republic of South Africa* 2001 (2) SA 1145 (C) at 1152E–1156J; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 566C–567A. See also *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (2)* [1972] 2 QB 102 (CA), [1972] 2 All ER 353 (CA).

84 *R v Fouche* 1953 (1) SA 440 (W).

85 *Giovagnoli v Di Meo* 1960 (3) SA 393 (N) at 399; and see *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 (2) SA 408 (C); *Conlon v Conlons Ltd* [1952] 2 All ER 462 (CA).

86 *Middeldorf v Zipper NO* 1947 (1) SA 545 (SR); *Kelly v Pickering (1)* 1980 (2) SA 753 (R) at 757.

87 *Harris v Harris* [1931] P 10.

88 *S v Moseli (2)* 1969 (1) SA 650 (O) at 652–3; *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1996 (1) SA 785 (A) at 793H–J; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1058A–C.

89 *Schlosberg v Attorney-General,Transvaal* 1936 WLD 59; *Ditz v Attorney-General* 1936 NPD 345; *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O) at 119; *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1996 (1) SA 785 (A) at 793H–J; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1058A–C; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A–B.

90 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (2)* 1953 (3) SA 879 (W) at 883; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A.

91 *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) at 645; *AA Mutual Insurance Association Ltd v Blom* 1979 (1) SA 491 (E) at 497; *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd (2)* 1983 (2) SA 626 (W) at 628; *S v Nhlapo* 1988 (3) SA 481 (T); *Harksen v Attorney-General, Cape* 1999 (1) SA 718 (C) at 732E–733H.

92 See *Watts v Goodman* 1929 WLD 199; *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *AA Mutual Insurance Association v Blom* 1979 (1) SA 491 (E).

93 See, for example, *Laws v Rutherfurd* 1924 AD 261 at 263; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704F–H; *Harksen v Attorney-General, Cape* 1999 (1) SA 718 (C) at 732H.

94 1924 CPD 155.

95 *Attorney General, Northern Territory v Maurice* (1986) 161 CLR 475 (HCA) at 481; *Goldberg v Ng* [1996] 185 CLR 83 (HCA); *Peacock v SA Eagle Insurance Co Ltd* 1991 (1) SA 589 (C) at 591–2; *Harksen v Attorney-General, Cape* 1999 (1) SA 718 (C) at 732I–733D and 733J; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 582E–583G. See also *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 560A–C.

96 *Estate Bliden v Sarif* 1933 CPD 271; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) at 646.

97 *Calcraft v Guest* [1898] 1 QB 759; *Jacobs v Minister van Landbou* 1975 (1) SA 946 (T) at 954.

98 *Calcraft v Guest* [1898] 1 QB 759; *Hurley and Seymour v Muller & Co* (1924) 45 NLR 121. See, however, *S v Mushimba* 1977 (2) SA 829 (A), in which an unusual breach of privilege occurred: from the date upon which the instructions had been received to the end of the case a member of the staff of the firm of attorneys who defended the accused at the trial had given copies of statements by the accused and defence witnesses and other confidential and privileged documents to the Security Branch of the police. This information was passed to the State counsel, who was unaware of the irregularities that had occurred. The Appellate Division held that legal professional privilege had simply been eliminated, that the complete elimination of privilege constituted a gross irregularity, and that a failure of justice had occurred.

99 (1884) 4 EDC 105.

100 The different views taken in *Andresen v Minister of Justice* 1954 (2) SA 473 (W), *H Heiman, Maasdorp & Barker v Secretary for Inland Revenue* 1968 (4) SA 160 (W), *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) and *Cheadle, Thompson & Haysom v Minister of Law and Order* 1986 (2) SA 279 (W) are considered by Paizes in (1989) 106 *SALJ* 109 at 137–40. Hoffmann & Zeffertt *Evidence* 257 submit that, in view of the recognition by the Appellate Division in *S v Safatsa* 1988 (1) SA 868 (A) at 885–6 that 'the privilege goes beyond communications made for the purpose of litigation, and that it is a doctrine fundamental to the proper functioning of our legal system and no mere rule of evidence', the confidentiality of all documents that have been communicated to legal advisers for the purpose of obtaining legal advice is protected from seizure by the authorities. See also *Sasol III (Edms) Bpk v Minister van Wet en Orde* 1991 (3) SA 766 (T) at 785–6; *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1996 (1) SA 785 (A) at 793D–E; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A; Zeffertt *Evidence* 695–698.

101 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W).

102 1986 (1) SA 515 (D) at 519.

103 *Rainsford v African Banking Corp Ltd* 1912 CPD 729; *Caldwell v Western Assurance Co* 1916 WLD 111.

104 *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494.

105 *Solomon & Co v North British and Mercantile Insurance Co* (1900) 14 EDC 165. Statements made after accidents by motorists to their insurance companies are not privileged unless the company has considered the particular case and reached the conclusion that litigation was likely or probable (*Saven v AA Mutual Insurance Association Co Ltd* 1952 (1) SA 110 (C); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W); *Boyce v Ocean Accident & Guarantee Corporation Ltd* 1966 (1) SA 544 (SR)). In *Dingana v Bay Passenger Transport* 1971 (1) SA 540 (E) the test is formulated rather differently (see *Bagwandeen v City of Pietermaritzburg* 1977 (3) SA 727 (N) at 732). A statement or admission made to a third party by the driver of the insured vehicle is inadmissible as evidence against the authorized insurance company (*Union and SWA Insurance Co Ltd v Quntana NO* 1977 (4) SA 410 (A)).

106 *Moffat v SA Breweries Ltd* 1912 WLD 104.

107 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T).

108 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 68–70.

109 See Zeffertt *Evidence* 732–746; Schmidt *Bewysreg* 562–5.

110 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (3)* 1953 (4) SA 251 (W) at 253–4; *R v Steyn* 1954 (1) SA 324 (A); *S v Alexander* 1965 (2) SA 796 (A) at 812; *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *Msimang v Durban City Council* 1972 (4) SA 333 (D) at 337; *Mlamla v Marine and Trade Insurance Co* 1978 (1) SA 401 (E); *S v B* 1980 (2) SA 946 (A) at 952; *Bowes v Friedlander NO* 1982 (2) SA 504 (C); *Van den Berg v Streeklanddros, Vanderbijlpark* 1985 (3) SA 960 (T). See also *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A.

111 *Mason v Mason NO* (unreported, ECPE case no 2353/2016 dated 23 November 2021) at paragraph [11].

112 *R v Steyn* 1954 (1) SA 324 (A) at 332.

113 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 570E–F.

114 See Zeffertt *Evidence* 889–910.

115 Section 32(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right of access to: *(a)* any information held by the state and *(b)* any information that is held by another person and that is required for the exercise or protection of any rights. Section 32(2) provides that national legislation must be enacted to give effect to this right, etc. See in this regard the Promotion of Access to Information Act 2 of 2000 which came into operation on 9 March 2001.

116 See Zeffertt *Evidence* 889–890.

117 See Zeffertt *Evidence* 889.

118 *Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 259; and see *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874. On the rationale of public interest as a ground for non-disclosure of documents or information, see *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 (HL).

119 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260C–D; *Geldenhuys v Pretorius* 1971 (2) SA 277 (O).

120 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 259.

121 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *Geldenhuys v Pretorius* 1971 (2) SA 277 (O) at 282.

122 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 262.

123 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260. In *Minister van Polisie v Marais* 1970 (2) SA 467 (C) the unusual procedure was followed, with the consent of the parties, of allowing the court access to the document as *evidence* in the proceedings without incorporating it in the record of the proceedings.

124 *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116 at 120; *Ferreira v Endley* 1966 (3) SA 618 (E) at 620H–621A; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 261B; *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 362H.

125 *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116 at 120.

126 See *Tanganyika Diamonds Ltd v Mwanza Development Syndicate* 1927 WLD 10 at 12–13; *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W) at 678E–G; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 468B; *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 749C.

127 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 468B.

128 *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T) at 574G.

129 *Rautini v Passenger Rail Agency of South Africa* (unreported, SCA case no 853/2020 dated 8 November 2021) at paragraph [11].

130 *Wainwright & Co v Hassen Mohamed's Trustee* (1908) 29 NLR 619; *Strasburger v Combrinck & Co* 1913 CPD 776; *Estate Michel v Cullen* 1924 WLD 290 at 296; *Leo v Barclays Bank* 1931 TPD 153 at 159.

131 This provision of the subrule supersedes the decisions in *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116 and *BST Kombuise (Edms) Bpk v Abrams* 1978 (4) SA 182 (T).

132 As to the general principle, see *Competition Commission v Arcelormittal South Africa Ltd* 2013 (5) SA 538 (SCA) at 545F–I. See further Zeffertt *Evidence* 732–746; Schmidt *Bewysreg* 562–5.

133 See Zeffertt *Evidence* 732–746; Schmidt *Bewysreg* 562–5.

134 *R v Steyn* 1954 (1) SA 324 (A); *S v Alexander* 1965 (2) SA 796 (A) at 812; *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *Msimang v Durban City Council* 1972 (4) SA 333 (D) at 337; *Mlamla v Marine and Trade Insurance Co* 1978 (1) SA 401 (E); *S v B* 1980 (2) SA 946 (A) at 952; *Bowes v Friedlander NO* 1982 (2) SA 504 (C); *Van den Berg v Streeklanddros, Vanderbijlpark* 1985 (3) SA 960 (T).

135 *R v Steyn* 1954 (1) SA 324 (A) at 332.

136 *Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 387A–C. On the unfairness which may in civil litigation arise from the privilege attaching to the contents of a police docket, see *Mazele's* case *(supra)* at 389F–390G and *Zweni v Minister of Law and Order (1)* 1991 (4) SA 166 (W) at 169I–170C. In *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) it was held in an appeal against a decision of a magistrate, that cases dealing with the disclosure of police dockets in civil cases where the criminal prosecution has ended are no longer binding or applicable in view of the provisions of s 33(1) and (2) of the Constitution of the Republic of South Africa Act 200 of 1993. See also *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W).

137 Legal professional privilege is considered in detail by Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 28–123 and in Zeffertt *Evidence* at 679–728. The theoretical foundations of the privilege are explored by Paizes (1989) 106 *SALJ* 109–46. In this respect the judgment of Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) is of 'seminal significance'. See also *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1993 (3) SA 953 (T) at 958H–961G; *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 (3) SA 231 (W) at 235H–I; Zeffertt *Evidence* 693–695. In *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) the Constitutional Court stated (at 78E–F) the following:
'The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation.'
The requirements referred to are set out as follows (at 78H–I):
'. . . the legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.'

138 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W); *A Sweidan and King (Pty) Ltd v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D). Thus, in patent litigation the communications between a party and his patent agents arising out of the filing and prosecution of his patent application is not necessarily privileged (see *M J Snyman v Alert-O-Drive (Pty) Ltd* 1981 BP 213).

139 *Rainsford v African Banking Corp Ltd* 1912 CPD 729; *Caldwell v Western Assurance Co* 1916 WLD 111.

140 *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494.

141 *Solomon & Co v North British and Mercantile Insurance Co* (1900) 14 EDC 165. Statements made after accidents by motorists to their insurance companies are not privileged, unless the company has considered the particular case and reached the conclusion that litigation was likely or probable (*Saven v AA Mutual Insurance Association Co Ltd* 1952 (1) SA 110 (C); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W); *Boyce v Ocean Accident & Guarantee Corporation Ltd* 1966 (1) SA 544 (SR)). In *Dingana v Bay Passenger Transport* 1971 (1) SA 540 (E) the test is formulated rather differently (see *Bagwandeen v City of Pietermaritzburg* 1977 (3) SA 727 (N) at 732). A statement or admission made to a third party by the driver of the insured vehicle is inadmissible as evidence against the authorized insurance company (*Union and SWA Insurance Co Ltd v Quntana NO* 1977 (4) SA 410 (A)).

142 *Moffat v SA Breweries Ltd* 1912 WLD 104.

143 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T).

144 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 68–70.

145 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 320–321F; *Louw v Grobler* (unreported, FB case no 3074/2016 dated 28 September 2021) at paragraph [17].

146 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515D.

147 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515D; *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [16].

148 *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T).

149 *Federal Wine & Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749H. See also *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W) at 675H–676B; *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 70; *Marais v Lombard* 1958 (4) SA 224 (E) at 227; *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T) at 572; *Goodman v Druker* 1961 (4) SA 131 (W); *Sandy's Construction Co v Pillai* 1965 (1) SA 427 (N) at 430E; *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 597E–G; *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560G; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 320F–H; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 565C–F; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197C–G; *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [18]; *Erasmus NO v The MEC for Health, NC Province* (unreported, NCK case no 1342/2014 dated 8 January 2021) at paragraph [46]; *Louw v Grobler* (unreported, FB case no 3074/2016 dated 28 September 2021) at paragraphs [13]–[15]; *Isaacs v Mangera Attorneys* (unreported, GJ case no 2021/51099 dated 12 July 2023) at paragraph 22.

150 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560C. The remark in *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) at 67H that the subrule envisages a demand for the production of 'specific documents' for inspection must be read subject to this qualification.

151 *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194C–E.

152 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 311A; *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194A; *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 34A–B; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 165D–G; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564J–565A; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B; *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [13]; *Erasmus NO v The MEC for Health, NC Province* (unreported, NCK case no 1342/2014 dated 8 January 2021) at paragraphs [47]–[58]; *Louw v Grobler* (unreported, FB case no 3074/2016 dated 28 September 2021) at paragraph [12]. See also *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B.

153 The test for relevance, as laid down by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1982) 11 QBD 55 has often been applied (see, for example, *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515D; *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [16]; *Stapelberg Vervoer CC t/a Mill Trans v Nordicbau Master Builder & Renovator CC* (unreported, ECGq case no 601/2017 dated 1 November 2022) at paragraph [12]). In *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A the full court accepted the following *dicta* with approval:
'It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.'
See also *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 596J; *Carpede v Choene NO* 1986 (3) SA 445 (O) at 452C–J; *Louw v Grobler* (unreported, FB case no 3074/2016 dated 28 September 2021) at paragraph [12]; *Isaacs v Mangera Attorneys* (unreported, GJ case no 2021/51099 dated 12 July 2023) at paragraph 25; *Bosasa Operations (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) at 579I–580B. In the latter case it was decided that under rule 35(2)*(b)* a journalist and a newspaper could validly object to revealing a source's identity.

154 *Schlesinger v Donaldson* 1929 WLD 54 at 57; *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E); *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385A–C; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 316J–317A; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564J–565A. See also *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B.

155 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T).

156 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 317C–E. See also *De Polo v Dreyer* 1991 (2) SA 164 (W) at 174H–J; *Tweefontein United Collieries Ltd v Lockers Engineers SA (Pty) Ltd* 1964 (1) SA 186 (W).

157 See *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 363; *Chauvier v Selero* 1980 BP 222.

158 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323B–C.

159 *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [17] and the cases there referred to.

160 *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 34C–E.

161 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 559C.

162 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 558G–559D. See also *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) where an affidavit by a director of a company which was the agent of the litigant was found not to be in compliance with the subrule.

163 *Chauvier v Selero* 1980 BP 222 at 232A.

164 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560G; and see *Greenberg v Pearson* 1994 (3) SA 264 (W).

165 *Lot 38 Bizana Properties CC v Tiador 119 CC (in liquidation)* (unreported, ECMk case no 2278/2022 dated 10 January 2024) at paragraphs [12]–[13].

166 In *Ottawa (Rhodesia) (Pvt) Ltd v Highams Rhodesia (1969) (Pvt) Ltd* 1975 (3) SA 77 (R) plaintiff's counsel was placed in an ethical dilemma by the defendant's failure to discover documents which exposed the plaintiff's main witness as a liar and effectively demolished the plaintiff's case. Goldin J held that in the circumstances plaintiff's counsel had rightly not invoked the Rhodesian equivalent of this rule, for although the rule entitled him to object to the use of the documents, to do so would have amounted to a deception of the court.

167 *Mlamla v Marine and Trade Insurance Co* 1978 (1) SA 401 (E).

168 See, for example, *Durban City Council v Minister of Justice* 1966 (3) SA 529 (D).

169 *Burger v Kotze* 1970 (4) SA 302 (W).

170 *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Ferreira v Endley* 1966 (3) SA 618 (E); *Prinsloo v Saaiman* 1984 (2) SA 56 (O); *Webster v Webster* 1992 (3) SA 729 (E).

171 See the authorities referred to in the preceding footnote, and also *Sandy's Construction Co v Pillai* 1965 (1) SA 427 (N); *Durban City Council v Minister of Justice* 1966 (3) SA 529 (D); *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E); *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974 (2) SA 324 (NC); *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W).

172 *Venter v Du Plessis* 1980 (3) SA 151 (T); and see the citations in this judgment (at 153 and 154) of passages from the unreported judgment of Boshoff JP in the case of *Marks v Benson* of 13 March 1979. See also *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61H and *Webster v Webster* 1992 (3) SA 729 (E) at 734F–H.

173 See *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Ferreira v Endley* 1966 (3) SA 618 (E); *Associated Musical Distributors (Pty) Ltd v Big Time Cycle House* 1982 (1) SA 616 (O).

174 For example, in *Ferreira v Endley* 1966 (3) SA 618 (E).

175 *Maeder v Carnes* 1944 (1) PH F18 (WLD); *Industrial Machinery Supplies (Pty) Ltd v Fourie* 1961 (1) SA 163 (O) at 166G; *Ferreira v Endley* 1966 (3) SA 618 (E) at 621; *BST Kombuise (Edms) Bpk v Abrams* 1978 (4) SA 182 (T) at 184D–E; *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61A–D.

176 See, for example, *Board v Thomas Hedley & Co Ltd* [1951] 2 All ER 431 (CA).

177 *Supervisors of Bethelsdorp Institute v Port Elizabeth Salt Pan Co* 1918 EDL 261; *Mackenzie v Furman and Pratt* 1918 WLD 62; *Cohen and Tyfield v Hull Chemical Works* 1929 CPD 9. See also *Kope v Bourke's Luck Syndicate Ltd (in liquidation)* 1925 WLD 40; *Jacobsohn v Simon and Pienaar* 1937 (2) PH A47; *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W).

178 *Supervisors of Bethelsdorp Institute v Port Elizabeth Salt Pan Co* 1918 EDL 261; *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W); *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 469A.

179 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 469A; *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W) at 1100B; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) at 42D–G. See also *Replication Technology Group v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) at 536A–538C. In this case Malan J, after a comprehensive analysis of the law, both local and foreign, held that the use of arbitration documents to found a cause of action for contempt of court against another arbitrating party was reasonably necessary, and in the interests of justice, and that the leave of the court was not required before disclosure of the documents could be made (at 548D–549A).

180 *Khunou v M Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W) at 362F.

181 See *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 363; *Chauvier v Selero* 1980 BP 222 at 229A; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 563E–F.

182 *ABSA Bank Ltd v The Farm Klippan 490 CC* 2000 (2) SA 211 (W) at 215A–B.

183 *GN obo KN v MEC, Department of Health, Eastern Cape Province* 2024 (1) SA 258 (ECM) at paragraphs [25]–[30].

184 In *Lot 38 Bizana Properties CC v Tiador 119 CC (in liquidation)* (unreported, ECMk case no 2278/2022 dated 10 January 2024) at paragraph [6]).

185 *GN obo KN v MEC, Department of Health, Eastern Cape Province* 2024 (1) SA 258 (ECM) at paragraph [29].

186 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 320B; *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [18].

187 *Rainsford v African Banking Corp Ltd* 1912 CPD 729 at 738; *Bothma v Protea Furnishers (Pty) Ltd* 1970 (3) SA 180 (O); *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 594H–595E; *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 93C–H; *Baard v Allem* (unreported, GJ case no A5005/2021 dated 14 October 2021 — a decision of the full court) at paragraph [17] and the cases there referred to.

188 *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 93E–H; *Baard v Allem* (unreported, GJ case no A5005/2021 dated 14 October 2021 — a decision of the full court) at paragraph [17] and the cases there referred to; *Isaacs v Mangera Attorneys* (unreported, GJ case no 2021/51099 dated 12 July 2023) at paragraphs 23–26.

189 *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 595D–E; *Lutzen v Knysna*

Municipality (unreported, WCC case no 695/2020 dated 8 May 2023) at paragraph [32].

190 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 199E–200E; *Lutzen v Knysna Municipality* (unreported, WCC case no 695/2020 dated 8 May 2023) at paragraph [32].

191 *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 16 November 2020) at paragraph [15].

192 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 200E–F.

193 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 200F–I.

194 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 311A; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 202D–E; and see *Pheiffer v About IT Pretoria (Pty) Ltd* (unreported, GP case no 65188/2014 dated 4 October 2021) at paragraph [26].

195 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 202E–F.

196 See *Venter v Du Plessis* 1980 (3) SA 151 (T); *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61H; *Webster v Webster* 1992 (3) SA 729 (E) at 734F–H.

197 See *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Ferreira v Endley* 1966 (3) SA 618 (E); *Associated Musical Distributors (Pty) Ltd v Big Time Cycle House* 1982 (1) SA 616 (O).

198 See *Ferreira v Endley* 1966 (3) SA 618 (E).

199 *Webster v Webster* 1992 (3) SA 729 (E) at 734F–H.

200 2022 (6) SA 275 (ECB).

201 At paragraphs [18]–[21].

202 *Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 389B.

203 *Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 389C.

204 *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd (1)* 1983 (2) SA 621 (T).

205 *Shrosbree NO v Klerck NO* 2000 (4) SA 457 (SE).

206 See the remarks of Goldstein J in *Zweni v Minister of Law and Order (1)* 1991 (4) SA 166 (W) at 170B. It would seem that the unfairness arising in civil litigation from the privilege which attaches to police dockets cannot be resolved by the provisions of the subrule (*Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 390F–G). However, in *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) it was held that cases dealing with the disclosure of police dockets in civil cases where the criminal prosecution has ended are no longer binding or applicable in view of the provisions of ss 33(1) and (2) of the Constitution of Republic of South Africa Act 200 of 1993.

207 *Selero (Pty) Ltd v Chauvier* 1982 (2) SA 208 (T) at 216.

208 *Absa Bank Bpk v ONS Beleggings BK* 2000 (4) SA 27 (SCA) at 32F–I; *Visser v 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA) at 80H; *Dlamini v Configen Close Corporations t/a Zero Tolerance Security* (unreported, FB case no 5711/2019 dated 30 November 2023) at paragraphs [42]–[43].

209 *Visser v 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA) at 80H–81A.

210 *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C) at 551G–552B; *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) at 358H–359B. See also *Shezi v Ethekwini Municipality* (unreported, KZD case no 7762/2015 dated 11 October 2017) at paragraph [20].

211 *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C) at 552A; *Selero (Pty) Ltd v Chauvier* 1982 (2) SA 208 (T) at 216G. In the *Knouwds* case (*supra*) it was, however, pointed out (at 552B–G) that there is an exception in the case of a statement made by a third party, where there existed a privity or identity of interest between the person making the statement and the party that was the subject of the statement. See also *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) at 359A–B.

212 For a case where the court, in application proceedings, declined to exercise its discretion in favour of an applicant under this subrule, see *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016).

213 *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D).

214 *Minister of Public Works v NMPS Construction CC* 2023 (6) SA 314 (ECB) at paragraphs [18], [19], [21]–[23] and [33]–[39]; and see *Gold Leaf Tobacco Corporation (Pty) Ltd v Sasfin Bank Ltd* (unreported, GJ case no 2022/21063 dated 13 November 2023) at paragraphs 14–19, not following *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) in which it was held that a party may not invoke rule 35(12) unless it has sought and obtained the direction of the court in terms of rule 35(13) (at paragraph [7]).

215 *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraphs [25] and [30].

216 *Erasmus v Slomowitz (2)* 1938 TPD 242 at 244; *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648A–D. See also *Plastic Manufacturers Association of South Africa v Montecatini Edison* 1972 BP 233 at 242; *Plastic Manufacturers Association of South Africa v Montecatini Edison SpA* 1973 BP 410 at 414; *Adcock Ingram (Chemists) Ltd (now Adcock Ingram Ltd) v American Cyanamid Co* 1977 BP 172; *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 248H; *Penta Communication Services (Pty) Ltd v King* 2007 (3) SA 471 (C) at 476A–B; *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 518G–519F; *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 246I–J; *Contango Trading SA v Central Energy Fund SOC Ltd* 2020 (3) SA 58 (SCA) at paragraph [9]; *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) at paragraph [11]; *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraph [16].

217 *Penta Communication Services (Pty) Ltd v King* 2007 (3) SA 471 (C) at 436B–C; *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 246I–J; *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraph [23]; *Contango Trading SA v Central Energy Fund SOC Ltd* 2020 (3) SA 58 (SCA) at paragraph [9]; *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA) at paragraph [28]; *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraph [16].

218 *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 249B; *Waldeck NO v The Land and Agricultural Development Bank of South Africa* (unreported, MM case no 4013/18 dated 14 October 2019) at paragraphs [41]–[42]; *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraph [17].

219 *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraphs [12] and [14].

220 2021 (3) SA 403 (SCA); and see *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraphs [13], [26]–[29], [31]–[32], [35] and [47]–[48].

221 At paragraph [41].

222 *Unilever v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 336G–J, cited with approval in *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraphs [25] and [49].

223 *Unilever v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 336C–I and the cases there referred to.

224 *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraph [85].

225 2016 (5) SA 96 (KZP).

226 At paragraph [18]; and see *Industrial Development Corporation of South Africa v Reddy* (unreported, GJ case no 5159/2021 dated 2 September 2022) at paragraphs [15]–[16].

227 2021 (3) SA 403 (SCA).

228 At paragraph [48].

229 [2022] 2 All SA 299 (SCA).

230 At paragraph [85].

231 Unreported, KZP case no 2557/2016 dated 4 December 2019.

232 At paragraph [68].

233 *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 519F; *Absa Bank Ltd v Expectra 423 (Pty) Ltd* 2017 (1) SA 81 (WCC) at 85G–88C.

234 *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 249B.

235 *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 247E–H and 248D–F.

236 *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 250G.

237 *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 750D; *Advanced Technologies & Engineering Co (Pty) Ltd (In Business Rescue)* (unreported, GP case no 72522/11 dated 23 February 2012) at paragraph 22; *Mutch Building Materials CC v Hanekom* (unreported, GJ case no 2013/45313 dated 6 October 2014) at paragraph [5]; *Waldeck NO v The Land and Agricultural Development Bank of South Africa* (unreported, MM case no 4013/18 dated 14 October 2019) at paragraph [40]. In *Contango Trading SA v Central Energy Fund SOC Ltd* 2020 (3) SA 58 (SCA) it was, however, stated in an *obiter dictum* (at paragraph [6]) that rule 35(12) does not apply to documents referred to in an annexure to a pleading or affidavit.

238 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 461B–E.

239 *Gehle v McLoughlin* 1986 (4) SA 543 (W).

240 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 461F–H; *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) at paragraph [12].

241 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 462H–463B.

242 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459G; *Centre for Child Law v Hoërskool, Fochville* 2016 (2) SA 121 (SCA) at 131B–C.

243 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459F–460H; *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 746A; *Machingawuta v Mogale Alloys (Pty) Ltd* 2012 (4) SA 113 (GSJ) at 115F–116A.

244 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459H; *Centre for Child Law v Hoërskool, Fochville* 2016 (2) SA 121 (SCA) at 131C–G. See also Mzuvukile Sirenya and Carl van Rooyen 'Rule 35(12) of the Uniform Rules: be wary' 2017 (January/February) *De Rebus* 22.

245 2016 (2) SA 121 (SCA).

246 The judgment is reported *sub nomine Governing Body, Hoërskool Fochville v Centre for Child Law* 2014 (6) SA 561 (GJ).

247 At 131D–133E and 139C–141D (footnotes omitted); *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) at paragraphs [13], [26]–[29], [31]–[32], [35] and [52]–[63]. In *Astral Operations Ltd v Minister for Local Development, Western Cape* 2019 (3) SA 189 (WCC) it was undisputed that a litigant is entitled to decline to produce a document demanded in terms of subrule (12) if it is privileged (at 191D). The respondents claimed 'legal advice privilege' and/or 'litigation privilege' in respect of a certain memorandum which was disclosed by junior counsel for one of them to the attorney acting for one of the applicants. The memorandum set out counsel's advice on the development in a pending review application after receipt of the applicant's supplementary replying papers and counsel's recommendations as to how the respondents should deal with the resultant situation. It was found that the respondents had not waived privilege and that considerations of fairness did not require the disclosure of the memorandum (at 199I–202B).

248 *Loretz v Mackenzie* 1999 (2) SA 72 (T) at 74G; *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) at 611G; *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) at paragraphs [9] and [13].

249 *Loretz v Mackenzie* 1999 (2) SA 72 (T) at 75A–B; *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) at 611G; *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) at paragraphs [8], [9] and [13].

250 *Minister of Public Works v NMPS Construction* CC 2023 (6) SA 314 (ECB) at paragraphs [21] and [33]–[39]; *Gold Leaf Tobacco Corporation (Pty) Ltd v Sasfin Bank Ltd* (unreported, GJ case no 2022/21063 dated 13 November 2023) at paragraphs 14–19, not following *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) in which it was held that a party may not invoke rule 35(12) unless it has sought and obtained the direction of the court in terms of rule 35(13) (at paragraph [7]).

251 See the definition of 'application' in rule 1 above.

252 *Pieters v Administrateur, Suidwes-Afrika* 1972 (2) SA 220 (SWA) at 228B–D; *MV Rizcun Trader (2): Manley Appledore Shipping Ltd v Owner of the MV Rizcun Trader* 1999 (3) SA 956 (C) at 961G. See also *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) at 48G–I; *Machingawuta v Mogale Alloys (Pty) Ltd* 2012 (4) SA 113 (GSJ) at 115F–116A; *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraph [10]; *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) at paragraph [7].

253 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 470D; *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 149; *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ) at 242F–H; *Lewis Group Ltd v Woollam* [2017] All SA 231 (WCC) at paragraph [4]; *Fourie NO v Bosch* (unreported, GP case no 56027/2020 dated 27 August 2021) at paragraph [7]; *Bennett Attorneys Inc v Pro-Prop Construction & Civils (Pty) Ltd* (unreported, GJ case no 2021/37739 dated 11 April 2022) at paragraph 12; *Liebman v David N.O.* (unreported, GP case no 62628/2021 dated 21 February 2023) at paragraphs [10]–[14].

254 1985 (1) SA 146 (T).

255 *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) at 196A–B; *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ) at 243C; *Liebman v David N.O.* (unreported, GP case no 62628/2021 dated 21 February 2023) at paragraphs [12]–[13].

256 *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) at 196–7.

257 *Lewis Group Ltd v Woollam* [2017] All SA 231 (WCC) at paragraph [4].

258 1999 (3) SA 500 (C) at 513I.

259 *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ) at 243C–E; *Makate v Joosub NO* (unreported, GP case no 57882/19 dated 30 June 2020) at paragraph [56].

260 2010 (6) SA 272 (GSJ) at 276D–277E. See also *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraph [10].

261 *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F; *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I; and see *Standard Bank of South Africa Limited v Pretorius* (unreported, FB case no 5268/2019 dated 23 February 2023) at paragraph [8]. This paragraph was referred to with approval in *Bennett Attorneys Inc v Pro-Prop Construction & Civils (Pty) Ltd* (unreported, GJ case no 2021/37739 dated 11 April 2022) at paragraph 13.

262 *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648F; *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I; *Quayside Fish Supplies CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) at 534E–G; *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 518G–519F.

263 *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648E; *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I. This sentence and the preceding one were referred to with approval in *Bennett Attorneys Inc v Pro-Prop Construction & Civils (Pty) Ltd* (unreported, GJ case no 2021/37739 dated 11 April 2022) at paragraph 14.

264 *Sanniegraan CC v Minister of Police* (unreported, NWM case no 680/18 dated 3 May 2019).

265 *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 519F; *Absa Bank Ltd v Expectra 423 (Pty) Ltd* 2017 (1) SA 81 (WCC) at 85G–88C.

266 *Quayside Fish Supplies CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) at 534G–H; and see *Standard Bank of South Africa Limited v Pretorius* (unreported, FB case no 5268/2019 dated 23 February 2023) at paragraph [10].

267 2016 (4) SA 317 (SCA).

268 At 322H–I and 340E.

269 Unreported, GP case no 57882/19 dated 30 June 2020.

270 At paragraph [61].

271 In *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 202I–204B. It has been held in England that a computer database which forms part of the business records of a company is, in so far as it contains information capable of being retrieved and converted into readable form, a 'document' for the purposes of Order 24 of the Rules of the Supreme Court and therefore susceptible to discovery (*Derby & Co Ltd v Weldon (No 9)* [1991] All ER 901 (Ch)). Joe van Dorsten 'Discovery of electronic documents and attorneys' obligations' 2012 (November) *De Rebus* 34–6 correctly contended that, when compared with foreign developments, it could be seen that the wording of rule 35 pertaining to the discovery of documents and tape recordings did not adequately provide for discovery of information created, stored and retrieved primarily in electronic form, and that the rule had to be appropriately amended. The insertion of subrule (15)*(a)* with effect from 1 December 2020 seemingly brought the position in line with foreign developments.

272 *Concise Oxford English Dictionary* 10 ed. Cf *Le Roux v Viana NO* 2008 (2) SA 173 (SCA) at 175E–G where the word 'documents' was attributed this meaning in the context of s 69(3) of the Insolvency Act 24 of 1936.

273 Tapes on which a company backed up its electronic information were found to be discoverable in *Metropolitan Health Corporate (Pty) Ltd v Neil Harvey and Associates (Pty) Ltd* (unreported, WCC case no 10264/10 dated 19 August 2011).