THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 219/2021

In the matter between:

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED **APPELLANT**

and

NOVUS HOLDINGS LIMITED **RESPONDENT**

Neutral citation: *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (Case no 219/2021) [2022] ZASCA 24 (09 March 2022)

Coram: PETSE AP and MOLEMELA, PLASKET and HUGHES JJA and UNTERHALTER AJA

Heard: 09 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 09 March 2022.

Summary: Practice and procedure – Uniform Rules – rule 35(12) – production of documents mentioned in or referred to in the other party's affidavit –

obligation on such party to produce documents sought by opponent – no obligation to produce documents sought if such documents irrelevant or not material or protected by privilege or no longer in the possession of the party required to produce the documents concerned.

ORDER

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

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and in its place is substituted the following order:

'2.1 The respondent is directed to produce for inspection and copying the documents specified below within 30 (thirty) days of the date of this order pursuant to the appellant's notice in terms of rule 35(12) delivered on 11 August 2020.

2.2.1 Judge Harms' "report" prepared pursuant to s 165(4) of the Companies Act 71 of 2008 and submitted to Novus' Board on 28 May 2020 referred to in paragraphs 21 to 28 of the respondent's answering affidavit in the main application under case no 8908/2020 (the main application).

2.2.2 The "predecessors" to the "Commission Agreement", referred to in paragraph 27 of the answering affidavit in the main application.

2.2.3 The "documentation at Novus' disposal" to which Judge Harms was "given full access" referred to in paragraph 28 of the answering affidavit in the main application.

2.2.4 All "reports to the Department of Basic Education (DBE)" referred to in paragraph 195.2 of the answering affidavit in the main application.

2.2.5 All "invoices together with all supporting documents" submitted to the DBE, as referred to in paragraph 197 of the answering affidavit in the main application.

2.2.6 All "reports" submitted to the DBE by Lebone, as referred to in paragraph 198 of the answering affidavit in the main application, but only to the extent that they may be different to the reports referred to in paragraph 2.2.4 above.

2.2.7 All "annual inflation adjustments" and supporting "documentary evidence" submitted by Lebone to the DBE, referred to in paragraphs 199 and 200, respectively, of the answering affidavit in the main application.

2.2.8 All "invoices" submitted by Lebone to Novus for the "printing of 50% of all the required covers, tear-outs, and stickers", referred to in paragraph 201 of the answering affidavit in the main application.

2.2.9 "The contract with the DBE" that "Novus had to comply with", as referred to in paragraph 225.1 of the answering affidavit in the main application, and "the contract" that the "DBE made payment of invoices in accordance with", referred to in paragraph 244 of the answering affidavit in the main application (and each "contract", to the extent that paragraph 225.1 and paragraph 244 may refer to two separate contracts).

2.2.10 The "meticulously completed Proof of Deliveries (POD's)" that were "collated and submitted with the invoice to the DBE", referred to in paragraph 225.1 of the answering affidavit in the main application.

2.2.11 The "other impugned agreements" and "the impugned agreements" that were "negotiated and concluded" at the time that none of Novus's current directors served as directors, as referred to in paragraphs 290.3 and 290.4 of the answering affidavit in the main application.

3 It is further directed that the documents referred to in paragraph 2 above are to be provided subject to the following confidentiality regime:

3.1 Novus will provide the documents to Caxton's attorneys of record, and in doing so will indicate which documents Novus claims are confidential (the confidential documents).

3.2 Save for purposes of consulting with counsel or any independent experts or unless the Court orders otherwise, Caxton's attorneys of record shall not disclose directly or indirectly to any other party (including Caxton) any part of the confidential documents.

3.3 Caxton's attorneys of record and independent experts given access to the confidential documents pursuant to paragraph 3.2 above will sign a confidentiality undertaking confirming that they will not disclose directly or indirectly the contents of the confidential documents to any other party (including Caxton) other than a party that has also signed a confidentiality undertaking in terms of paragraph 3.2 above.

3.4 In the event that Caxton's attorneys of record, on behalf of Caxton, dispute that any document or documents asserted by Novus to be confidential is or are, in fact, confidential, then Caxton's attorneys of record are given leave, on behalf of Caxton, to urgently approach the Court on the same papers, supplemented as may be necessary, for an order providing for the exclusion of such document or documents from the confidentiality regime.

3.5 Confidential documents may only be referred to in affidavits deposed to by the legal representatives or independent experts of the parties, and any such affidavits will also be treated as confidential.

4 Caxton is ordered to file its replying affidavit in the main application within 20 days after receipt of all the documents pursuant to paragraphs 2 and 3 above.

5 The respondent in the interlocutory application is ordered to pay the costs of such application, including the costs of two counsel where so employed.'

JUDGMENT

Petse AP (Molemela, Plasket and Hughes JJA and Unterhalter AJA concurring):

Introduction

[1] The Companies Act[1] permits a certain category of persons[2] to serve a demand on a company requiring the company concerned to commence or continue legal proceedings, or take related steps, to protect the interests of the company in question.[3] In the context of the facts of this case the appellant, Caxton and CTP Publishers and Printers Limited (Caxton) falls within the class of persons contemplated in s 165(2) of the Companies Act who may serve a demand upon a company, namely, the respondent, Novus Holdings Ltd (Novus), to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company concerned. If the company upon which a demand has been served refuses to initiate or continue legal proceedings, the person who made the demand in terms of s 165(2) may apply to court for leave to bring or continue legal proceedings in the name and on behalf of the company concerned.[4] This is precisely what happened in this case.

The parties

[2] Novus is a public company listed on the Johannesburg Securities Exchange. Novus' core business entails the publication and printing of books, magazines, newspapers and related activities. It is the respondent both in the

[1] Act 71 of 2008 (the Companies Act).
[2] See s 165(2) of the Companies Act.
[3] See s 165 of the Companies Act which is quoted in full in paragraph 5 below.
[4] Section 165(5).

main application, which is still pending, and in the interlocutory application, related to the main application, the latter application being at the centre of this appeal.

[3] Caxton is likewise a public company and, like Novus, is one of the largest publishers and printers in the country of books, magazines, newspapers and related activities. It is also listed on the Johannesburg Securities Exchange. Caxton and Novus are commercial competitors. Caxton is a minority shareholder in Novus, holding 7,5 per cent of the latter's shares.

Background

[4] The facts upon which this appeal hinges are fairly straightforward and may be summarised as follows. On 7 April 2020, and pursuant to s 165(2) of the Companies Act, Caxton served a demand upon Novus to institute legal proceedings against Lebone Litho Printers (Pty) Ltd (Lebone). According to Caxton, the envisaged legal proceedings would seek to have a commission agreement (and any related agreements) concluded between Novus and Lebone declared illegal and void. In terms of the impugned agreement, Novus undertook to pay commission to Lebone in relation to a public procurement contract between Novus, on the one hand, and the Department of Basic Education (DBE), on the other, for the printing, packaging and distribution of school workbooks throughout the country.

[5] Section 165 of the Companies Act, which is headed 'Derivative actions', in relevant parts provides:

'(1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

(2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person—

(a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;

(b) is a director or prescribed officer of the company or of a related company;

(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

(3) A company that has been served with a demand in terms of subsection (2) may apply within 15 business days to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

(4) If a company does not make an application contemplated in subsection (3), or the court does not set aside the demand in terms of that subsection, the company must—

(a) appoint an independent and impartial person or committee to investigate the demand, and report to the board on—

(i) any facts or circumstances—

(aa) that may give rise to a cause of action contemplated in the demand; or

(bb) that may relate to any proceedings contemplated in the demand;

(ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings; and

(iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings; and

(b) within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, either—

(i) initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company, as contemplated in the demand; or

(ii) serve a notice on the person who made the demand, refusing to comply with it.

(5) A person who has made a demand in terms of subsection (2) may apply to a court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if—

(a) the company—

(i) has failed to take any particular step required by subsection (4);

(ii) appointed an investigator or committee who was not independent and impartial;

(iii) accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;

(iv) acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or

(v) has served a notice refusing to comply with the demand, as contemplated in subsection (4)*(b)*(ii); and

(b) the court is satisfied that—

(i) the applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

(iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.

. . .

(7) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that—

(a) the proposed or continuing proceedings are by—

(i) the company against a third party; or

(ii) a third party against the company;

(b) the company has decided—

(i) not to bring the proceedings;

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision—

(i) acted in good faith for a proper purpose;

(ii) did not have a personal financial interest in the decision, and were not related to a person who had a personal financial interest in the decision;

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) reasonably believed that the decision was in the best interests of the company.

(8) For the purposes of subsection (7)—

(a) a person is a third party if the company and that person are not related or interrelated; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

. . .

(14) If the shareholders of a company have ratified or approved any particular conduct of the company—

(a) the ratification or approval—

(i) does not prevent a person from making a demand, applying for leave, or bringing or intervening in proceedings with leave under this section; and

(ii) does not prejudice the outcome of any application for leave, or proceedings brought or intervened in with leave under this section; or

(b) the court may take that ratification or approval into account in making any judgment or order.

(15) Proceedings brought or intervened in with leave under this section must not be discontinued, compromised or settled without the leave of the court.

(16) For greater certainty, the right of a person in terms of this section to serve a demand on a company, or apply to a court for leave, may be exercised by that person directly, or by the Commission or Panel, or another person on behalf of that first person, in the manner permitted by section 157.'

[6] Invoking s 165(4), Novus appointed retired Deputy President of the Supreme Court of Appeal, Justice Louis Harms, as an independent and impartial person (the independent and impartial person) to investigate the demand, and thereafter to report to its board of directors on the matters set out in s 165(4).[5]

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[5] Section 165(4) reads:

'(4) If a company does not make an application contemplated in subsection (3), or the court does not set aside the demand in terms of that subsection, the company must—

(a) appoint an independent and impartial person or committee to investigate the demand, and report to the board on—

(i) any facts or circumstances—

(aa) that may give rise to a cause of action contemplated in the demand; or

(bb) that may relate to any proceedings contemplated in the demand;

(ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings; and

Upon receipt of the independent and impartial person's report, Novus advised Caxton that the latter's demand to institute legal proceedings against Lebone was declined. Undaunted, Caxton instituted the main application[6] against Novus, in which leave is sought to bring the envisaged action in the latter's name and on its behalf.

[7] Unsurprisingly, Novus has steadfastly resisted the relief sought by Caxton in the main application. In its answering affidavit in the main application, Novus makes reference to several documents, one of which is the s 165(4) report, in terms of which it sought to demonstrate that the proposed action lacked any prospect of success or was simply devoid of merit.

[8] Novus' multiple references to certain documents in its answering affidavit prompted Caxton to ask for the production of the documents concerned by invoking rule 35(12) of the Uniform Rules. This, too, was resisted by Novus, who refused to make any of the documents sought available to Caxton for its inspection and, if deemed necessary, copying. Caxton then brought the interlocutory application in the Western Cape Division of the High Court, Cape Town (the high court), in terms of rule 30A of the Uniform Rules, to compel the production for inspection and copying of the documents sought. Caxton's interlocutory application takes centre stage in this appeal.

(iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings; and

(b) within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, either—

(i) initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company, as contemplated in the demand; or

(ii) serve a notice on the person who made the demand, refusing to comply with it.'

[6] The main application was instituted on 10 July 2020.

[9] In support of the interlocutory application, Mr Paul Michael Jenkins, Caxton's chairman, stated, to the extent relevant for present purposes, as follows:

'25 I shall indicate below that all the documents forming the subject matter of this application are (a) in Novus's possession, (b) not privileged, and (c) relevant to issues in the main application.

26 In the circumstances, Caxton is entitled to the documents, and this Court should order Novus to provide them subject to a suitable confidentiality regime.

27 In Novus's refusal letter, it objects to production of the documents on three broad grounds:

27.1 It says that the documents are not relevant.

27.2 It says one of the documents (i.e. the Harms report) is privileged.

27.3 It says that the documents are confidential, and disputes that the confidentiality regime proposed by Caxton would adequately protect the confidentiality of the documents (although it does not propose any alternative).

. . .

29 The confidentiality of documents does not provide a basis for refusing to furnish them. At best, it justifies the imposition of a confidentiality regime involving the granting of restricted access to those documents. As I shall indicate below, Caxton has no difficulty with the imposition of such a confidentiality regime.

. . .

36 In South African law there are two types of legal privilege: legal advice privilege and litigation privilege. Although Novus appears to rely only on the latter, I briefly summarise each below and explain why neither applies to the Harms report.

. . .

38 Litigation privilege protects communications between legal advisers and their clients on the one hand and third parties on the other hand, provided that:

- the communication was made for purposes of being placed before the legal adviser in order to enable him or her to give legal advice;
- the communication was made for the purpose of pending litigation or litigation that was contemplated as likely at the time; and

- as with legal advice privilege, the legal adviser must have been acting in his or her capacity as a legal professional, the communication must have been made in confidence, and the communication or advice should not facilitate the commission of a crime or fraud.

. . .

40.2 Section 165(4) requires an independent and impartial person to conduct an investigation of a section 165(2) demand and to report to the Board of a company. The investigator is statutorily required to report on facts or circumstances that may give rise to a cause of action as specified in the section 165(2) demand; the probable costs of any such action; and whether it is in the best interests of the company to pursue that action. The investigator is not called upon to give legal advice. The mandate is investigative. The report and its recommendations do not constitute legal advice.

40.3 Moreover, in this matter the investigator is not a practising attorney or advocate, or even an in-house legal adviser. Judge Harms is a judge (albeit that he has been discharged from active service). He does not hold himself out as a professional legal adviser. There is no suggestion by Novus that Judge Harms was retained to provide legal advice in a professional capacity. Judge Harms undertook a statutory investigation pursuant to section 165(4) at the behest of Novus.

. . .

42 Moreover, section 165(5) of the Companies Act contemplates that one of the jurisdictional requirements for an application in terms of section 165(5) is if the Court finds that a report in terms of section 165(4) "was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendation". The Court could only assess this if the report were placed before it, and if the parties could interrogate whether the report was inadequate or was irrational or unreasonable in its conclusions. Section 165(5) therefore makes it plain that, even if section 165(4) reports are legally privileged (which is denied for the reasons given above), the privilege would be overridden by legislation.

43 If this Court were to take a different view of the matter and were to find that the Harms report is protected by privilege, then Novus has in any event waived any privilege that may be found to exist.'

[10] In Novus' opposition to the application to compel, Mr Neil Birch, its Chief Executive Officer, (again to the extent here relevant) stated:

'9. The substantive right to institute or continue proceedings in the name of the company is created by statute and arises only when leave is granted by a court to obtain to institute or continue proceedings in the name of the company. . . .

. . .

13. To the contrary, Caxton insists on being granted access to the investigator's report and to Novus' books of account and records beyond the scope of sections 26 and 31 of the Act and whilst its rights in present context are limited to only the invocation of the procedural leverage mechanism provided for in section 165.

14. In doing so, Caxton thwarts the nature of the main proceedings and attempts to convince that its own interpretation of the general processes of discovery in ordinary proceedings between parties asserting substantive rights must trump the specific provisions of section 165.

. . .

15.4. Yet, if Caxton is now (in the preliminary process of consideration of the exercise of the leverage right) granted the relief sought on the interlocutory proceedings to obtain access to Novus' books connected with the contemplated legal proceedings, Caxton (through its agents) would be in possession of Novus' records that are protected by confidentiality and legal privilege. The confidentiality regime does little to console. Caxton's legal representative has acted as its advisor since at least 2014 in all of the bitter feuds that characterised the fierce rivalry between the parties who are the biggest competitors in the market segment. Since 2016 Nortons also acted as Caxton's legal advisors in respect of the prolonged DBE tender review proceedings. Caxton's legal representatives may be bound by their undertaking of confidentiality, but they would hardly be able to clear their minds of the information to which they would be made privy. To expect of them to divorce their minds in future advice to Caxton from the information to which they have been made privy would be tantamount to assuming godly abilities on their part.

. . .

24. Having regard to the above, Caxton is not entitled to the documentation demanded in the interlocutory applications. . . .

. . .

27. 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 discovered. It is

not a tool designed to put a party in a position to draw the battle lines and establish the legal issues.

. . .

32. Neither the application contemplated in section 165(5) of the Act, nor the Court's rules of procedure can be used by a disgruntled party (such as Caxton) to launch a fishing expedition for facts to found an action. If Caxton is unable in its demand and in the founding affidavit to the main application to set forth a cogent, albeit not necessarily with the precision required for pleading, basis for the company to institute the contemplated proceedings, Caxton is acting vexatiously.

. . .

70. For the above reason, none of the documents which Caxton requires Novus to produce for inspection are relevant to the issues in the main application:

70.1 Item 1: The Harms Report:

70.1.1. The Harms Report was prepared for the primary purpose of advising the Board on aspects relating to the proposed litigation contemplated in the Demand. The content of the Harms Report formed part of the information that was considered by the Board before deciding to refuse to comply with the Demand.

70.1.2. Neither the Board's decision nor the Harms Report forms the subject-matter of the main application and neither are relevant to the issues therein.

70.1.3. Caxton has to demonstrate with reference to documentation and evidence in its possession why it should be granted leave, notwithstanding the Board's decision to refuse to litigate against Lebone.

70.2. Items 2, 4, 5, 6, 7, 8, 9, 10 and 11:

70.2.1. As I have already indicated above, Caxton misconstrued the nature of the main application and its entitlement to documentation and information.

70.2.2. Caxton is not required to convince the Court in the main application that Novus has an unassailable case against Lebone.

70.2.3. Caxton accordingly does not have to allege every fact required to sustain a cause of action and/or furnish the Court with evidence or *facta probantia* in support of each and every of those facts.

70.2.4. What Caxton has to demonstrate is that the proceedings which Caxton wishes to institute against Lebone in Novus' name "involves a trial of a serious question of material consequence" to Novus.

70.2.5. None of the documents which Caxton seek under the above item numbers relate to any aspect of section 165 of the Act which Caxton is required to satisfy. Those documents are consequently irrelevant to the issues in the main application.

70.3 Item 3: the information that Judge Harms was given access to:

70.3.1. The Harms Report was prepared for the primary purpose of advising the Board on aspects relating to the proposed litigation contemplated in the Demand.

70.3.2. The documents and information which was provided to him for the purposes of conducting his investigation are irrelevant to the issues in the main application.

70.3.3. Caxton has to demonstrate with reference to documentation and evidence in its possession why it contends that the Court should interfere in Novus' management, disregard the Board's decision not to litigate against Lebone and grant Caxton leave to litigate in the name and on behalf of Novus against Lebone.

. . .

77. The very purpose of the report was to provide Novus' Board with legal advice on aspects relating to litigation which Caxton demanded Novus should commence against Lebone. Differently put, the Harms Report was prepared by the Board's mandatee for the sole purpose of him advising the Board in coming to its decision whether Novus should commence the litigation as demanded by Caxton, or not.

78. Without the Demand, which by its very nature contemplated litigation, the Harms Report would not have existed. The Harms Report was accordingly prepared in circumstances and for the very purpose that litigation was contemplated. This included, amongst also the proceedings contemplated in the Demand, the invoking by Caxton of its procedural leverage right in terms of section 165.'

[11] Caxton's application to compel the production of the documents sought came before Baartman J, who dismissed it with costs. In dismissing the application, the learned Judge held, in essence, that all of the documents required by Caxton were irrelevant. Insofar as the report of the independent and impartial person is concerned, the high court held that it was, by its very nature and the circumstances attendant upon its production, privileged. And, further, that Novus had not, by quoting parts of the report, waived the privilege attaching to

the report. In elaboration, the high court concluded that the fact that the report 'was commissioned in circumstances where litigation was contemplated'[7] was reinforced by the undisputed and long litigation history between the parties, who are business arch-rivals.

[12] Subsequently, on 2 March 2021, the learned Judge granted Caxton leave to appeal against her judgment to this court, noting that she was 'persuaded that there is "some other compelling reason why the appeal should be heard".'

[13] The central issue in this appeal, crisply stated, is whether the documents sought by Caxton in terms of its rule 35(12) notice delivered on 11 August 2020, all of which were referred to in Novus' answering affidavit in the main application, are relevant and therefore ought to be produced for inspection and copying. In addition, the appeal raises the question whether the report of the independent and impartial person is privileged and thus protected against disclosure. If the report is found to be privileged, an allied issue will arise, namely whether in quoting virtually the entire conclusion of the report in its answering affidavit Novus had, as a result, waived the privilege attaching to the report.

[14] Rule 35(12) provides:

'*(a)* Any party to any proceeding may at any time before the hearing thereof deliver a notice [as near as may be] in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to –

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

. . .

[7] *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (case no 8908/2020) (WCC) Unreported para 18.

(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.'

[15] There are two features that strike one about the provisions of rule 35(12). First, to invoke the rule, the pleadings or affidavits of the other party must make reference to the document or tape recording concerned. Thus, any such reference will trigger the right of the adversary to require that such document(s) or tape recording(s) be produced for inspection, copying or transcription.

[16] It must, however, be pointed out that what is meant by the word 'reference' requires some elucidation in at least two fundamental respects. The document or tape recording must have been referred to in a party's pleadings or affidavits in general terms, a detailed or descriptive reference is not required.[8] However, a mere reference by deduction or inference does not suffice for purposes of rule 35(12).[9] On this score, what this court said most recently in *Democratic Alliance and Others v Mkwebane and Another*[10] is instructive. The court said the following:

'. . . What will not pass muster is where there is no direct, indirect or descriptive reference but where it is sought through a process of extended reasoning or inference to deduce that the document may or does exist. Supposition is not enough.' (Footnotes omitted.)

[17] The second point that requires emphasis is that the rationale for a party's entitlement to see a document or tape recording, referenced in the other party's pleadings or affidavits, is that a party cannot ordinarily be required to answer

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[8] *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648A-D; *Protea Assurance Co Ltd and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 (C) at 248H; *Business Partners Ltd v Trustees, Riaan Botes Family Trust, and Another* 2013 (5) SA 514 (WCC) at 518G-519F.

[9] See, for example, *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) at 436B-C; *Holdsworth and Others v Reunert Ltd* 2013 (6) SA 244 (GNP) at 246I-J.

[10] *Democratic Alliance and Others v Mkhwebane and Another* [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) para 28.

issuably before they are given the opportunity to inspect and copy, or transcribe the document or tape recording mentioned in the adversary's pleadings or affidavits.[11]

[18] Further, a party failing to comply with such notice 'shall not, save with the leave of the court, use such document or tape recording in such proceeding'. However, the other party's failure to produce the document(s) or tape recording(s) does not preclude the party that called for the production of such document(s) or tape recording(s) from using the document(s) or tape recording(s) in question.

[19] The nature and effect of the sanction against the defaulting party contained in rule 35(12) was explained by Botha J in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*[12] thus:

'The sanction provided for in Rule 35(12) is, in my view, quite different in nature and effect from the kind of sanction envisaged in Rule 30(5). The sanction in Rule 35(12) is of a negative nature, being to the effect that the party failing to comply with the notice shall not . . . use the document in question, provided that any other party may use such documents. It is a sanction that comes into operation automatically upon non-compliance with the provisions of the Rule. Rule 30(5), on the other hand, operates in an entirely different manner. Under that Rule a party making a request, or giving a notice, as the case may be, to which there is no response by the other party, may give a further notice to the other party that after the lapse of seven 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 seven days mentioned, application may then be made to Court and the Court may make an appropriate order. That is a positive form of relief provided for and, as I have said, in my view it is quite different from the sanction contained in Rule 35(12).'

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[11] See in this regard: *Protea Assurance Co Ltd and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 (C) at 249B.

[12] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 459F-460A (*Coucourakis*).

[20] However, 'a party who gives notice under rule 35(12) may not be content with just the negative sanction provided by the rule'. So said Ponnan JA in *Centre for Child Law v The Governing Body of Hoërskool Fochville and Another*,[13] who went on to state that '[i]n that event it is to rule 30A that such a party must turn'.

[21] The learned Judge of Appeal continued (para 16):

'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 ten 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 ten 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".'

[22] Former rule 30(5) – which was operative when *Coucourakis* was decided – was later repealed and substituted with the current rule 30A, which reads:

'(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order–

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

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

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

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[13] *Centre for Child Law v The Governing Body of Hoërskool Fochville and Another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 15 (*Hoërskool Fochville*).

[23] As to the ambit of rule 35(12), the court in *Gorfinkel v Gross, Hendler & Frank*[14] stated as follows:

'*[P]rima facie* there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12). That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. (See the *Moulded Components* case *supra* at 461D-E.) Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within the limitations which I have mentioned, the onus would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document.'[15]

[24] Much later, in *Unilever plc and Another v Polagric (Pty) Ltd*,[16] Thring J referred with approval to the dictum in *Gorfinkel* mentioned in the preceding paragraph. However, in *Hoërskool Fochville* this court expressed serious reservations about the correctness of the statement in *Gorfinkel* to the effect that the party who makes reference to documents in its pleadings or affidavits bears the onus to set up facts 'relieving him of the obligation to produce the document' required by his or her adversary. This court said that:

'Approaching the matter on the basis of an *onus* may well be to misconceive the nature of the enquiry. . . 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).'[17] (Footnotes omitted.)

[25] I propose dealing first with the law relating to the obligation of a party who makes reference in its pleadings or affidavits to documents or tape

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[14] *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) (*Gorfinkel*).
[15] At 774G-J.
[16] *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C).
[17] *Hoërskool Fochville* para 18.

recordings to produce those documents or tape recordings when a demand therefor has been made by the adversary. First, it is necessary to emphasise that 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.[18]

[26] Unlike the other rules relating to discovery generally, rule 35(12) is designed to cater for a different set of circumstances. Its provisions are generally deployed to require the production of documents or tape recordings before the close of pleadings or the filing of affidavits. In *Unilever*,[19] the objective of rule 35(12) was explained, with reference to previous decisions of our courts,[20] thus:

'[A] defendant or respondent does not have to wait until the pleadings have been closed or his opposing affidavits have been delivered before exercising his right under Rule 35(12): he may do so at any time before the hearing of the matter. It follows that he may do so before disclosing what his defence is, or even before he knows what his defence, if any, is going to be. He is entitled to have the documents produced "for the specific purpose of considering his position".'

[27] That the ambit of rule 35(12) is very wide admits of no serious doubt. Its extensive reach was explained by Friedman J in *Gorfinkel*[21] as follows:

'There are undoubtedly differences between the wording of Rule 35(12) and the other subrules relating to discovery, for example subrules (1), (3) and (11) of Rule 35. The latter subrules specifically refer to relevance whereas subrule (12) contains no such limitation and is *prima facie* cast in terms wider than subrules (1), (3) and (11).

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[18] *Santam Ltd and Others v Segal* 2010 (2) SA 160 (N) 162E-F; *MV Alina II, Transnet Ltd v MV Alina II* 2013 (6) SA 556 (WCC) at 563F-G.
[19] At 336G–J.
[20] See, for example, *Erasmus v Slomowitz* (2) 1938 TPD 242 at 244; *Gehle v McLoughlin* 1986 (4) SA 543 (W) at 546D; *Protea Assurance Co Ltd and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 (C) at 249B-D.
[21] At 773G-J.

It is nevertheless to my mind necessarily implicit in Rule 35(12) that there should be some limitation on the wide language used. One such limitation is that a party cannot be compelled under Rule 35(12) to produce a document which is privileged.'

[28] In order for the production of a document to be compellable under rule 35(12) it is necessary that reference to such document must have been made in the adversary's pleadings or affidavits. In *Magnum Aviation Operations v Chairman, National Transport Commission, and Another*,[22] the court, in ordering the applicant to produce documents to which reference had been made in the founding affidavits, said the following relative to rule 35(12):

'In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document, you must produce it. Even more is it so in this case where the implication in paras 19.4 and 19.6 is that, if the NTC had called for and looked at the financial statements of Operations, it might well have come to a different conclusion.'[23]

I agree with this analysis.

[29] In similar vein, Friedman J put it thus in *Gorfinkel* (at 774E-H):

'As Rule 35(12) can be applied at any time, ie before the close of pleadings or before affidavits in a motion have been finalised, it is not difficult to conceive of instances where the test for determining relevance for the purposes of Rule 35(1) cannot be applied to documents which a party is called upon to produce under Rule 35(12), as for example where the issues have not yet become crystallised. Having regard to the wide terms in which Rule 35(12) is framed, the manifest difference in wording between this subrule and the other subrules, ie subrules (1), (3) and (11) and the fact that a notice under Rule 35(12) may be served at any time, ie not necessarily only after the close of pleadings or the filing of affidavits by both sides, the Rule should, to my mind, be interpreted as follows: *prima facie* there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12).'

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[22] *Magnum Aviation Operations v Chairman, National Transport Commission, and Another* 1984 (2) SA 398 (W).

[23] At 400B-D. See also *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) para 14.

[30] In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another*,[24] the Constitutional Court underscored the importance of disclosure in court proceedings. It stated as follows:

'Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial.'

Although these remarks were made in a different context, by parity of reasoning, they apply with equal force to the circumstances of this case.

[31] The other point that bears emphasising is that as this court rightly observed in *Hoërskool Fochville*, a court considering an application under rule 30A to compel production of documents sought pursuant to rule 35(12) enjoys 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'.[25] And that the court 'should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production'.[26] In the same case, Ponnan JA added that 'a court will not make an order against

[24] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) para 25.
[25] *Hoërskool Fochville* para 18.
[26] Ibid.

a party to produce a document that cannot be produced or is privileged or irrelevant'.[27]

[32] The juridical framework within which a court considering an application to compel production of documents or tape recordings sought pursuant to rule 35(12) was neatly captured by Navsa ADP in *Democratic Alliance and Others v Mkwebane and Another* as follows:[28]

'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.'

[27] Ibid.
[28] Paragraph 41.

[33] Recognising that some of the documents requested in its rule 35(12) notice might well contain commercially sensitive information, Caxton proposed that the production of such documents could, by agreement between the parties, be made subject to an appropriate confidentiality regime limiting their inspection to Caxton's attorneys, counsel and independent experts. However, Novus was unpersuaded by the effectiveness of the proposed confidentiality regime. Consequently, Novus remained steadfast in its objection to the production of the documents sought.

[34] As already indicated, Novus' blanket refusal to produce the documents listed in Caxton's rule 35(12) notice precipitated the delivery by the latter of a rule 30A notice on 19 August 2020. And, in accordance with the wording of rule 30A, the notice cautioned Novus that unless it purged its non-compliance with the rule 35(12) notice and produce the requested documents, Caxton would, after five days of the date of service of the rule 30A notice, apply to court for an order compelling the production of the documents sought. Similarly, Caxton's rule 30A notice failed to elicit the desired outcome.

[35] The principles that have crystallised over the years and may be extracted from the various decisions of our courts can be succinctly stated as follows. As a general rule, a document to which reference has been made in a pleading or affidavit is susceptible to production.[29] Nevertheless, a court will refuse to order production of a document that is not in the possession or under the control of the other party or which is privileged or irrelevant.[30] By relevance is meant that

[29] *Democratic Alliance and Others v Mkwebane and Another* [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) para 41; *Contango Trading SA v Central Energy Fund SOC Ltd* [2019] ZASCA 191; [2020] 1 All SA 613 (SCA); 2020 (3) SA 58 (SCA) para 9.
[30] *Democratic Alliance and Others v Mkwebane and Another* [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) para 41; *Centre for Child Law v The Governing Body of Hoërskool Fochville and Another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 18.

the document or tape recording in question 'might have evidentiary value' or 'might assist' the party seeking production in relation to any 'aspects or issues that might arise' in light of the facts stated in the pleadings or affidavits.[31]

[36] To conclude on this aspect, it is necessary to emphasise that a court considering an application to compel production of the documents or tape recordings which are the subject of a rule 35(12) notice exercises a discretion in a broad sense.[32] A court exercising a discretion in the true sense may properly come to different decisions having regard to a wide range of equally permissible options available to it. A discretion in the true sense was described by E M Grosskopf JA in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')*[33] in these terms:

'The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.'

[37] An appellate court may therefore interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle, or has not brought an unbiased judgment to bear on the question under consideration, 'or has not acted for substantial reasons'.[34] In

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[31] *Democratic Alliance and Others v Mkwebane and Another* [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) para 41; *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 316G.

[32] *Naylor and Another v Jansen* [2006] ZASCA 94; [2006] SCA 92 (RSA); 2007 (1) SA 16 (SCA) para 14; *Gaffoor NO and Another v Vangates Investments (Pty) Ltd and Others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA); [2012] 2 All SA 499 (SCA) para 41.

[33] *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800E-H.

[34] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and the cases therein cited; *Hotz and Others v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) para 28.

contrast, where the court of first instance exercised a wide or broad discretion an appellate court is in as good a position to exercise this type of discretion and would not hesitate to interfere in circumstances where, in its view, the court of first instance exercised its discretion improperly.[35] Accordingly, to all intents and purposes the question here boils down to the simple fact as to whether on a consideration of all the relevant factors the high court came to a correct decision when it refused to order production of documents that are: (i) relevant; (ii) in the possession of the other party; and (iii) not protected by legal privilege. Borrowing the phraseology used by the Constitutional Court, '[t]he question is a simple one: was the High Court right or wrong in its conclusion?'.[36] This is against the backdrop of what this court said in *Democratic Alliance v Mkwebane*, that '[t]he 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'.[37]

[38] For the sake of completeness on this score, it is necessary to emphasise that in the context of rule 35(12) the discretion with which the court is vested is narrowly circumscribed. Thus, once the applicant has established the requisite elements set out in this rule, the scope, if any scope exists at all, to refuse relief to the applicant is limited. Accordingly, in the event that a court seized with an application to produce documents subject to the rule 35(12) notice concludes that the documents sought to be produced: (a) have been referenced in the adversary's pleadings or affidavits; (b) are relevant; and (c) are not privileged, the application for their production must, in the ordinary course, necessarily succeed. It is therefore in the light of the foregoing principles that this appeal

[35] *Hoërskool Fochville* para 30; *Contago* paras 28-34; *Democratic Alliance v Mkwebane* paras 42-45.
[36] See in this regard: *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) para 80.
[37] *Democratic Alliance v Mkwebane* para 41.

must be considered and determined, with due regard to the nature of the relief sought by Caxton in its main application.

Relief sought in main application

[39] The provisions of s 165, to the extent relevant for present purposes, have already been quoted extensively in paragraph 5 above. As is apparent from the text of s 165 itself, the section creates a statutory dispensation in terms of which a person – within the meaning of the section – may bring legal proceedings in the name and on behalf of a company. In order to do so, such a person must, as a general rule and absent exceptional circumstances,[38] first serve a demand on the company concerned to commence or continue with legal proceedings. As already indicated above, having received a demand from Caxton as contemplated in ss 165(2) and (3), Novus appointed an independent and impartial person to investigate the demand and report to its board.[39] Upon receipt of the report, Novus declined to commence legal proceedings. As a result, Caxton applied to court for leave to bring the envisaged proceedings in the name and on behalf of Novus. For the court to grant Caxton leave to do so, Caxton must establish the existence of one or more of the jurisdictional requirements stipulated in s 165(5)*(a)* of the Companies Act. I interpose to mention that this issue presents no controversy, it being common cause between the parties that Caxton has done so.

[40] In addition, it will be incumbent upon Caxton to satisfy the court that: (a) in seeking leave, it is acting in good faith; (b) the proposed proceedings involve the trial of a serious question of material consequence to Novus; and (c) it is in the best interests of Novus that Caxton be granted leave to commence the

[38] See s 165(6) of the Companies Act.
[39] Section 165(4).

proposed proceedings.[40] Section 165(7) of the Companies Act, in turn, ameliorates the position of the company – Novus in this case – by creating a rebuttable presumption that, if the proposed action is against a third party, and the company has decided not to bring the proposed action – as Novus has – granting leave will not be in the best interests of the company – in this case Novus – if certain requirements are met. Some of these requirements are, for example, whether all of the directors who participated in the decision; '(i) acted in good faith for a proper purpose; (ii) did not have a personal financial interest in the decision, and were not related to a person who had personal financial interest in the decision; (iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and (iv) reasonably believed that the decision was in the best interests of the company'.[41]

Contentions of the parties

[41] The contentions of the parties may briefly be stated as follows. Caxton contended that: (a) all of the documents required in terms of its rule 35(12) notice are referred to – albeit not annexed – in Novus' answering affidavit in the main application and are in the latter's possession; and (b) all of the documents are relevant, and to the extent that privilege is asserted in relation to one of them – ie the report of the independent and impartial person – the document concerned was not created for the purpose of being placed before a legal advisor in order to obtain legal advice; and that, in any event, even if the report is privileged, such privilege was waived when Novus chose to quote extensively from the report in its answering affidavit. Consequently, Caxton argued, the high court should have ordered production of the documents requested, and therefore erred in not doing so.

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[40] Sections 165(5)*(b)*(i), (ii) and (iii) of the Companies Act.
[41] Section 165(7)*(c)* of the Companies Act.

[42] For its part, Novus contended that none of the documents requested by Caxton in the latter's rule 35(12) notice is relevant. What is more, Novus submitted, the report of the independent and impartial person prepared pursuant to 165(4) of the Companies Act is immune from disclosure by virtue of its privilege. The foundation for this contention was that the report came into being for the purpose of litigation that was contemplated as likely at the time of its production. Furthermore, it was argued that the documents are confidential and that the confidentiality regime proposed by Caxton does not adequately protect its commercial interests. And, more compelling, that, in any event, the high court properly exercised its discretion in terms of rule 30A in refusing production of the documents sought.

Were the documents sought referred to in Novus' affidavits?

[43] The touchstone for production of documents or tape recordings pursuant to rule 35(12) is whether any 'reference' to the documents or tape recordings in question has been made in the other party's pleadings or affidavits.

[44] In this matter Novus has, in resisting the relief claimed in the main application, made extensive references to a host of documents to demonstrate that Caxton's application is unmeritorious. In addition, Novus asserted that Caxton's invocation of s 165 of the Companies Act is a ruse used in order to harass Novus, Caxton's commercial arch-rival. Insofar as the report of the independent and impartial person is concerned, Novus contended that it is protected against production by virtue of the litigation privilege attaching to it. Thus, barring the issue of privilege (and whether Novus has waived privilege) the first requirement of rule 35(12) has been satisfied.

Are the documents required relevant to the issues between the parties?

[45] In order to determine whether the documents that are the subject-matter of this appeal are relevant, it is necessary first to have regard to the kernel of the dispute between the parties in the main application. As already indicated, that Caxton has the requisite legal standing to bring the main application is not in dispute. Nor is it contested that all the documents sought are in the possession or control of Novus. What is, however, hotly contested by Novus is whether Caxton has made out a case in order to satisfy the court in due course that: (a) in instituting the main application it is acting in good faith; (b) the proposed proceedings involve the trial of a serious question of material consequence to Novus; and (c) it is in the best interests of Novus that Caxton should be granted leave to commence the proposed proceedings in the name and on behalf of Novus.

[46] With respect to all of these issues, it is as well to bear in mind that it is not for this court in the present matter to make findings that Caxton has satisfied the requirements of s 165(5)*(b)*. That will be a matter for the court seized with the main application in due course. All what Caxton need establish in this appeal is that the documents bear relevance to the issues raised in the main application. This can be demonstrated with reference to the fact that the documents were called in aid and heavily relied upon by Novus in opposing the relief sought by Caxton. In *Democratic Alliance v Mkwebane*,[42] this court stated that reliance on a document or tape recording by an adversary 'is a primary indicator of relevance'. Whilst acknowledging that such reliance cannot be used as 'the sole indicator', this court nevertheless recognised that the materiality of the document 'in relation to the issues that might arise or to a defence that is available to the party seeking production'[43] is another important consideration. As to the latter

[42] Paragraph 34.
[43] Paragraph 34.

aspect, there can be no doubt that in relying on the documents in question, Novus sought to dispel the notion harboured by Caxton that its dealings with the DBE and Lebone are tainted with impropriety on its part. That is one of the critical issues that will loom large in the main application.

[47] In *Gorfinkel*, Friedman J had occasion to consider the issue of relevance in relation to rule 35(12). After making reference to previous decisions of our courts, and in particular *Universal City Studios v Movie Time*,[44] the learned Judge said:[45]

'With regard to relevance there must also, in my view, be some limitation read into Rule 35(12). To construe the Rule as having no limitation with regard to relevance could lead to absurdity. It would be absurd to suggest that the Rule should be so construed that reference to a document would compel its production despite the fact that the document has no relevance to any of the issues in the case. It is not difficult to conceive of examples of documents which are totally irrelevant. Booysen J in the *Universal City Studios* case gave one such example. What is more difficult to decide is where the line should be drawn. A document which has no relevance whatsoever to the issues between the parties would obviously, by necessary implication, be excluded from the operation of the Rule. But would the fact that a document is not subject to discovery under Rules 35(1), 35(3) or 35(11) render it immune from production in terms of Rule 35(12)?'

[48] The learned judge then continued:[46]

'In my view the parameters governing discovery under Rules 35(1), 35(3) and 35(11) are not the same as those applicable to the question whether a document is irrelevant for the purposes of compliance with Rule 35(12). A party served with a notice in terms of Rule 35(1) is obliged to make discovery of documents which may directly or indirectly enable the party requiring discovery either to advance his own case or to damage that of his opponent or which may

[44] *Universal City Studios v Movie Time* 1983 (4) SA 736 (D). at 774A-C.
[45] *Gorfinkel* at 774A-D.
[46] *Gorfinkel* at 774C-F.

fairly lead him to a train of enquiry which may have either of these consequences. Documents which tend merely to advance the case of the party making discovery need not be disclosed.' He then concluded that the party who had made reference to the documents sought was under an obligation to produce them.

[49] As previously indicated, the high court refused to order production of the documents sought, because it found, in essence, that they were irrelevant to the issues raised in the main application. And that, as a result, Caxton would derive no benefit from the production of the documents in question. In reaching that conclusion the high court erred. As Friedman J rightly observed in *Gorfinkel* 'the parameters governing discovery under Rules 35(1), 35(3) and 35(11) are not the same as those applicable to the question whether a document is irrelevant for the purposes of compliance with Rule 35(12)'. In contrast, the scope of rule 35(12) is wide enough to cover every situation where the party calling for production of documents requires them for purposes of assessing his or her position.[47] And this is precisely what obtains in this case.

[50] I turn now to consider the individual categories of documents whose production Caxton sought to compel in this matter. This aspect of the case raises the question as to whether on an objective evaluation of the issues raised in the main application the documents sought are relevant. An allied question is whether one of the documents, namely the report, is privileged. In resisting the application to compel production of the documents, Novus disputed their relevance. In its answering affidavit in the main application, Novus accepted that the report was produced pursuant to s 165(4) of the Companies Act by the independent and impartial person who was instructed to investigate Caxton's

[47] See *Democratic Alliance v Mkwebane* para 34, and the authorities discussed therein.

demand and to report to the Board on the facts or circumstances that bear on the demand. Yet, it asserted in its answering affidavit that the 'very purpose of the report was to provide Novus' Board with legal advice relating to litigation which Caxton demanded Novus should commence against Lebone'.

Is the report of the independent and impartial person privileged?

[51] Novus asserted that the report is privileged and therefore protected from disclosure. In particular, it relied on litigation privilege contending that when the independent and impartial person was appointed pursuant to s 165(4) litigation was contemplated as likely. In order to sustain a defence based on litigation privilege, it is incumbent upon Novus to establish that: (a) the communication sought to be protected was made for the purpose of being placed before its legal advisor with a view to give legal advice; and (b) the communication was made for the purpose of either pending litigation or litigation that was contemplated as likely at the time.

[52] In *Competition Commission v Arcelormittal South Africa Ltd and Others*,[48] it was stated that litigation privilege, which is one of two components of legal privilege, is designed to 'protect communications between a litigant or his legal advisor and third parties, if such communications are made for the purpose of pending or contemplated litigation. It applies typically to witness statements prepared at a litigant's instance for this purpose. The privilege belongs to the litigant, not the witness, and may be waived only by the litigant'. Such communications are therefore protected from disclosure unless the privilege attaching thereto has been waived by the litigant. (See D T Zeffert and A P Paizes *The South African Law of Evidence* 3 ed (2017) at 732-745.

[48] *Competition Commission of South Africa v Arcelormittal South Africa Ltd and Others* [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) para 20.

[53] It was contended on behalf of Novus that the s 165(4) report constitutes a communication between Novus and the independent and impartial person, who is a third party. And the fact that s 165(4) itself contemplates litigation by Novus against Lebone, in accordance with the demand, places the report squarely in the realm of professional privilege.

[54] Counsel for Caxton countered Novus' contention by submitting that the report was sought and prepared solely for the purpose of meeting the requirements of s 165(4) of the Companies Act. Thus, so it was argued, there could be 'no suggestion that it was created for the purpose of being placed before Novus' attorneys or other legal advisors so that they could provide legal advice.

[55] The contention advanced on behalf of Novus prompts the following question: what is the object and purpose of s 165(4) of the Companies Act. Section 165(4) was quoted in full in paragraph 5 above. Briefly stated, its provisions are to the effect that if a company chooses not to act in accordance with s 165(3) it must appoint an independent and impartial person to investigate the demand and thereafter report to the board of directors on certain aspects as therein stipulated. And, within 60 days of the demand or any extended period, either initiate or continue legal proceedings or serve a notice on the person who served the demand refusing to comply therewith.

[56] On this score, it is as well to remember that the logical point of departure in any interpretive exercise is the language of the instrument itself in the light of its context and purpose, all of which constitute a unitary exercise.[49] These

[49] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18. See also: *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 62 (CC) para 18; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) para 18.

interpretive precepts, aptly described as 'the triad of the text, context and purpose' in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,[50] were said to be 'the relationship between the words used, the concepts expressed by [the] words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined'. Bearing these considerations in mind, it becomes readily apparent that having regard to the language, context and purpose of s 165(4), its manifest and primary purpose would be frustrated if the interpretation for which Novus contended were to be ascribed to this provision.

[57] The key object and purpose of s 165(4) is, as is manifest from the text itself, to enable a company faced with a demand pursuant to s 165(2) to obtain an objective assessment by an independent and impartial person after investigating the demand and advising on its implications as contemplated in s 165(4)*(a)*(i)-(iii). Thus, in appointing the independent and impartial person, Novus was constrained by the strictures of s 165(4), because it had elected not to avail itself of the mechanism for which s 165(3) provides. Furthermore, whatever doubt there may have been as to the purpose for which the report was prepared is dispelled by the report itself, in which the independent and impartial person himself explicitly refers to what he understood to be his 'obligations as set out in s 165(4) of the Companies Act to report to the Board'. Thus, his brief from Novus was unequivocal: consider the demand by Caxton and advise the board on the issues spelt out in the section itself.

[50] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

[58] That the board might also have intended to submit the report to Novus' legal advisers for legal advice cannot change the essential character and key purpose of the report as explained in the preceding paragraph. In any event, as this court pointedly remarked in *Contango*,[51] the mere say-so of the litigant that a document is protected by litigation privilege is not 'sufficient to withhold disclosure of a document.[52] Rather, it is the 'purpose for which the document was prepared' that 'lay at the heart of the analysis'.[53]

[59] Accordingly, the point here is this: the key object of the report of the independent and impartial person is to advise the board of directors on the matters specified in s 165(4)*(a)* of the Companies Act. Put differently, the purpose sought to be achieved under s 165(4) is to determine whether or not the demand has substance and issues related thereto. This is therefore the overriding consideration in determining the status of the report.

[60] That this must be so is made plain when the wording of the provisions of s 165(4)*(b)*(i) is contrasted with that of s 165(4)*(b)*(ii). It is manifest from a textual, purposive and contextual reading of s 165(4)*(a)* that the appointment of an independent and impartial person or committee is designed to establish whether or not the demand made on the company to 'initiate or continue legal proceedings as contemplated in the demand' is well-founded. This is further underscored by the fact that s 165(4)*(b)*(i) requires the company – within 60 days or within the extended period allowed by a court – to either initiate or continue with the legal proceedings contemplated in the demand. Alternatively,

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[51] *Contango Trading SA v Central Energy Fund SOC Ltd* [2019] ZASCA 191; [2020] 1 All SA 613 (SCA); 2020 (3) SA 58 (SCA).
[52] *Contango* para 34.
[53] Ibid.

the company may instead 'serve a notice on the person who made the demand refusing to comply with it'.

[61] Counsel for Novus sought to circumvent this interpretation by arguing that the interpretation for which Caxton contended was not the sole purpose of the provision under consideration. He submitted that the provision has a secondary purpose which was to advise Novus' board of directors with respect to the legal proceedings contemplated in the demand and, to that extent, the report is protected by legal privilege. In my view such a reading of the provision, that is s 165(4), would undermine the architecture of s 165 as a whole and render it unworkable in some respects. If Novus' proposed meaning of s 165(4) were to prevail, one may then rhetorically ask: how the person who has made a demand on the company in terms of s 165(2) could, for example, impugn the report of the independent and impartial person or committee under s 165(5)*(a)*(i), (ii) and (iii) of the Companies Act if it is protected against disclosure by virtue of being privileged.

[62] As to several purposes to which a statutory provision may be directed, the learned author R Sullivan in her work titled *Statutory Interpretation* 2 ed (2007) at 196 states:

'Even though we often speak of "the" purpose of legislation, as if there were only one, it is apparent that every piece of legislation has multiple purposes that operate at different levels of generality. In sophisticated purposive analysis the interpreter attempts to identify and work with the primary objects, the secondary considerations, and the specific functions of legislation at all levels, from the words to be interpreted and the provision in which they appear to larger units of legislation and the Act as a whole.'

Accordingly, it seems that the various purposes of legislation – if there be more than one – must be balanced and, if necessary reconciled in light of the context and meaning of the Act as a whole. And, as Smith J observed in *General*

Accident, Fire and Life Assurance Corporation Ltd v Goldberg[54] a document does not become 'privileged merely because afterwards the persons who obtained the report find it desirable or necessary to submit it to their legal advisors'.

[63] A further indication of the difficulty encountered by Novus on this score is that, as submitted on behalf of Caxton, s 165 too gives a further legislative indication that points away from the notion 'that s 165(4) reports attract legal privilege'. This is so, Caxton argued, because s 165(5)*(a)*[55] of the Companies Act 'contemplates that one of the jurisdictional requirements for an application under s 165(5) is if the court finds that a report in terms of s 165(4) "was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations".' I agree with counsel for Caxton that a determination of the kind envisaged in s 165(5)*(a)*(iii) can realistically be made only after the report has been placed before the court, and the parties themselves have had the opportunity to assess whether such report satisfies the requirements of s 165(5)*(a)*(iii), namely if it is adequate, rational or reasonable in its conclusions. In the final result, I accordingly find that the report is not privileged. Thus, Novus is under an obligation to produce the report pursuant to Caxton's demand therefor in terms of rule 35(12).

[64] This conclusion renders it unnecessary to consider Caxton's alternative argument, namely whether Novus, by quoting the conclusion of the report extensively in its answering affidavit thereby waived any privilege that might otherwise have attached to the report.

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[54] *General Accident, Fire and Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494 at 502.
[55] Section 165(5) quoted in paragraph 5 above.

The relevance of the individual documents

[65] Having disposed of both the procedural and substantive obstacles placed on Caxton's path to procure production of the documents sought, it is timely to consider the individual items (of the various documents) and, briefly, the ground(s) upon which their production was sought. As already pointed out above, Caxton sought production of the s 165(4) report. The report itself alludes to the limitations inherent in the investigation conducted by the independent and impartial person pursuant to s 165(4). Its disclosure, argued Caxton, is necessary in order to determine the bona fides of Novus' directors in declining to institute the proposed proceedings. In addition, upon sight of the report, so it was contended, Caxton can then determine whether the requirements of s 165(5)*(a)*(iii) have been met. Thus, the question whether the report can bear scrutiny in the context of s 165(5)*(a)*(iii) can only be answered once the report has been analysed. Both Novus and Caxton have each advanced competing contentions in the main application that seek to support the case of the one and undermine that of the other. Consequently, the information contained in the report may be useful to or destructive of either party's case on this score.

[66] Items 2 and 11 make reference to commission agreements concluded in April 2018 between Novus and Lebone but effective from November 2015. In the main application, Caxton seeks to have the commission agreements declared illegal. Caxton asserted that for the commercial rationale for such agreements to be properly assessed it will be necessary to scrutinise those agreements, including those that preceded them. As the commission agreements are at the core of Caxton's demand, there is, in my view, much to be said for this contention.

[67] Item 3 represents the documentation that Novus placed at the disposal of the independent and impartial person pursuant to s 165(4) of the Companies Act. Caxton asserted that this class of documentation is critical in determining the question whether it was of such a nature as to enable the obligation arising from s 165(4) being properly discharged. In addition, so Caxton argued, the documentation will have a bearing on how the presumption created in s 165(7) would, in the end, operate; that is, in favour of, or against, either of the antagonists in the litigation. In my view there is considerable force in Caxton's contentions.

[68] Items 4 and 6 related to reports that Lebone prepared periodically for submission to the DBE. According to Caxton, these reports bear relevance to the nature and extent of the work done by Lebone and whether the amount paid to it by Novus in accordance with their commission agreements was commensurate with the work that Lebone performed. Thus, these reports are relevant to the issues raised in the main application.

[69] Item 5 represents invoices and supporting documents submitted to the DBE. In its answering affidavit, Novus asserted that:

'. . . Lebone is tasked with ensuring that a streamlined process is implemented to make sure that the invoices together with all supporting documents are obtained and submitted to the DBE for payment in the shortest possible time. It is mainly for the successful execution of this function that Novus agreed to make the additional commission payments to Lebone if timeous payment is received from the DBE.'[56]

From these invoices, Lebone would be paid commission ranging from 10% to 13% depending on whether the DBE effected payment in settlement 'timeously' or not. The case sought to be made by Caxton in relation to this item in the

[56] Answering affidavit in the main application para 197.

proposed action is that Novus' commission payments to Lebone were disproportionate to the amount of work performed by the latter. This item, too, is relevant.

[70] Item 7 relates to what is termed 'annual inflation adjustments' and supporting 'documentary evidence' prepared and submitted to the DBE by Lebone for which the latter was paid commission by Novus.

[71] Item 8 represents invoices generated by Lebone and submitted to Novus in respect of 50% 'printing works for covers, tear-outs and stickers' as an integral part of the workbooks contract between the DBE and Novus. Caxton requires these documents which, according to it, 'will demonstrate how much Lebone was paid for the work that was outsourced to it by Novus'.[57]

[72] Item 9 relates to payments made by the DBE directly to Lebone in settlement of invoices prepared by and submitted by Lebone. Caxton asserted that these documents are relevant in order to determine whether there was not an overlap between the amounts payable by the DBE directly to Lebone and the commission paid by Novus to Lebone for work done by the latter with respect to the workbooks contract between the DBE and Novus.

[73] Item 10 relates to proof of deliveries (PODs) in respect of the workbooks contract between the DBE and Novus. According to Novus, the PODs were 'meticulously completed' and were 'collated and submitted with the invoice to the DBE'. The preparation and submission of these documents was Lebone's responsibility, which was required to ensure that all was in order so that settlement of the invoice amount to Novus could be effected without delay. For

[57] Paragraph 80 of Caxton's heads of argument.

its endeavours, Lebone was paid a commission. Again, Caxton contended that these documents are relevant to demonstrate the nature and extent of the work performed by Lebone to justify the commission paid to Lebone by Novus.

[74] Novus' sole objection to the production of the documents in issue is that they are all irrelevant to the proper determination of the main application. In elaboration, Novus contended that there is no demonstrable benefit that would accrue to its shareholders in the envisaged proceedings. On the contrary, argued Novus, there is a real likelihood that the proposed proceedings will be prejudicial to its shareholders. Caxton's true motives, asserted Novus, is to bring it to its knees and thus eliminate it as a formidable arch-competitor.

[75] As to the relevance of the documents in issue, I am persuaded that a case has been made out to compel their production. Novus itself heavily relied on these documents to bolster its case that the relief sought by Caxton in the main application ought to be declined. Insofar as the other bases upon which counsel for Novus relied to object to the production of the documents, I consider that they all represent matters that are either not in our remit or can properly be ventilated during the hearing of the main application. For the foregoing reasons therefore, I am prepared to order the production of the documents in issue for inspection and copying by Caxton subject to the qualification set out in paragraph 78 below.

[76] Novus also argued that production of the documents sought should be refused because Caxton invoked rule 35(12) after Novus had delivered its answering affidavit as a disguised attempt to obtain facts that Caxton requires to support its application; and that taking cognisance of the well-established rule

that an applicant must stand or fall by its founding papers,[58] Caxton's application to compel production of documents at this stage of the proceedings ought to be refused. These contentions cannot be sustained. The first difficulty with them is that they entirely ignore the plain wording of rule 35(12), which accords any party to any proceedings 'at any time before the hearing thereof' a right to call upon any other party in whose pleadings or affidavits reference is made to any document to produce such document. The other insurmountable difficulty for Novus is that Caxton, as the applicant in the main application, could not have invoked rule 35(12) until and unless reference was made to 'any document' in Novus' answering affidavit. Thus, the invocation of rule 35(12) by Caxton was triggered only when reference was made to the documents in question in Novus' answering affidavits. And, as already pointed out in paragraph 26 above, unlike rule 35(1),(2) or (3), rule 35(12) is designed to cater for a different set of circumstances.

[77] What is more is that Caxton is entitled to have sight of the documents referenced in Novus' answering affidavit so as to deal with them in its replying affidavit. Thus, Caxton does not, as Novus asserted, seek the documents to make out a case in reply but rather to deal with Novus' defences raised in the latter's answering affidavit.

Confidentiality

[78] There is one final issue relating to the principal relief sought by Caxton to address in this judgment. That issue concerns the contention advanced by Novus in resisting the interlocutory application, namely that the documents required contain sensitive commercial information that should not be disclosed, especially to a business rival and competitor like Caxton. The disclosure of

[58] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635-636 *in fine*.

sensitive commercial information by way of discovery is not novel. In countering Novus' contention, Caxton submitted in its heads of argument that the inspection of confidential documents may be circumscribed to protect the commercial interests of the party asserting confidentiality. In so doing, a court will strive to strike a fine balance between the competing interests of the litigants. A court will, in exercising its discretion, not adopt a predisposition either in favour of or against permitting production of the documents concerned. This was recognised in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others*.[59] There, the court stated that a conflict will occasionally arise between the necessity to protect one party's confidential information on the one hand, and 'the need to ensure that a litigant is entitled to present his case without unfair halters' on the other.[60] And all of this will be considered against the backdrop of the importance of the role fulfilled by discovery in the resolution of legal disputes. In order to resolve this conundrum, Schutz AJ in *Crown Cork* held that a court could impose 'appropriate limits' on the right of a litigant to have sight of the adversary's confidential documents.[61]

[79] In the same case, the learned Acting Judge went on to say:

'No less in South Africa than in England does the conflict arise 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

[59] *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W) (*Crown Cork*).
[60] *Crown Cork* at 1100A-B.
[61] *Crown Cork* at 1100B-C.

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.'[62]

The requirement for a fair trial is now buttressed by the values underpinning our constitutional order.[63]

[80] As pointed out by Botha J some four decades ago in *Moulded Components*, the court may, in granting the application – for production of confidential documents – impose suitable conditions relative to their inspection so as to protect the party asserting confidentiality as far as might be practicable. There, the inspection of the documents subject to production was confined to the experts of the applicant, of course as assisted by the applicant's legal representative, to the exclusion of the litigants themselves.

[81] Permitting the production of confidential documents subject to appropriate limits is now firmly established in our law. As it was expressed by Mthiyane JA more than a decade ago in *Tetra Mobile Radio (Pty) Ltd v Member of the Executive Council of the Department of Works and Others*:[64]

'. . . [I]f there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* [1998 (2) SA 109 (W) at 122I-J to 123A-B; 1997 (10) BCLR 1429; [1997] 4 All SA 94], where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of

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[62] *Crown Cork* at 1100A-D.

[63] See, for example, *De Beer NO v North-Central Local Council and South-Central Local Council and Others* 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC) paras 10, 11 & 13.

[64] *Tetra Mobile Radio (Pty) Ltd v Member of the Executive Council of the Department of Works and Others* [2007] ZASCA 128; [2007] SCA 128 (RSA); 2008 (1) SA 438 (SCA) para 14 (*Tetra Mobile*). See also *Comair Ltd v Minister for Public Enterprises and Others* 2014 (5) SA 608 (GP); *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) paras 73-75.

consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other.'

[82] The decision of this court in *Bridon International Gmbh v International Trade Administration Commission and Others*[65] endorsed the adoption of the confidentiality regime crafted by the court a quo and observed that:

'As to the solution preferred by the court a quo, Bridon's main objection is that it is difficult to apply in practice and that it provides no absolute guarantee against leakage. Though these objections are not without substance, the types of restrictions imposed in the court a quo's order are not novel. Despite Bridon's pessimistic predictions similar orders had been granted before, for example, in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) and in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W). More recently, this type of order has also been used as a mechanism in the application of s 45(1) of the Competition Act 89 of 1998, which is very similar in wording to s 35(3), in that it requires the Competition Tribunal to "make any appropriate order concerning access to that confidential information" (see *Competition Commission v Unilever plc and Others* 2004 (3) SA 23 (CAC) at 30F-I).'

[83] It is not without significance that whilst Caxton's notice of appeal makes reference to a proposed confidentiality regime to be adopted in the event of the appeal succeeding, Novus contented itself with merely rejecting the proposed regime without suggesting an alternative regime. This was the position it elected to adopt even in its answering affidavit when resisting the production of the documents sought. Therefore, the task of this court is not made any easier because of the stance assumed by Novus relative to this aspect. However, it must be said that Novus' failure to address this aspect pertinently in its answering

[65] *Bridon International Gmbh v International Trade Administration Commission and Others* [2012] ZASCA 82; [2012] 4 All SA 121 (SCA); 2013 (3) SA 197 (SCA) para 35.

affidavit is not without consequences. Without any tenable explanation as to why the confidentiality regime proposed by Caxton is inadequate, there is no reason to fault the protection that it affords.

The replying affidavit in the main application

[84] Finally, it is necessary to deal with Caxton's quest to be afforded sufficient time within which to file its replying affidavit in the main application. It goes without saying that Caxton's replying affidavit is considerably long overdue. Caxton deliberately elected not to file its replying affidavit pending the outcome of its application to compel the production of the documents it sought from Novus.

[85] There is nothing in the language of rules 35(12) and 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 Uniform Rule 6(5)*(d)*(ii)[66] or 6(5)*(e)*,[67] as the case may be. In *Potpale Investments (Pty) Ltd v Mkhize*,[68] Gorven J rightly observed that the delivery of a notice in terms of rule 35(12) or (14) does not suspend the period referred to in rule 26 or any other rule. 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

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[66] Rule 6(5)*(d)*(ii) reads:
'within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents.'
[67] Rule 6(5)*(e)* reads:
'Within 10 days of the service upon the respondent of the affidavit and documents referred to in subparagraph (ii) of paragraph *(d)* of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.'
[68] *Potpale Investments (Pty) Ltd v Mkhize* 2016 (5) SA 96 (KZP) para 18.

a proper case therefor has been made out by the party seeking such indulgence. Indeed, this is what Uniform Rule 27 itself contemplates.

[86] It is as well to remember that the manifest purpose of discovery is, as was stated in *Durbach v Fairway Hotel, Ltd*,[69] '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'. Accordingly, discovery assists the parties and the court in discovering the truth, and, in doing so, helps towards a just determination of the case. This also saves costs.[70]

[87] As the time for the delivery of Caxton's replying affidavit has long come and gone, it made perfect sense therefore for Caxton to ask for leave to deliver its replying affidavit only once it has had the opportunity to inspect and copy the documents that Novus is required to produce in terms of this judgment. And given the voluminous nature of the documents involved, it is eminently reasonable and fair that it be afforded a reasonable period within which to do so. This will be reflected in the order made below. Similarly, it is only fair that Novus should be afforded a reasonable period of time within which to produce the documents sought. This, too, is catered for in the order below.

The order

[88] For all the foregoing reasons the appeal must succeed and, in the result, the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

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[69] *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) at 1083.
[70] *Santam Ltd and Others 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.

2 The order of the high court is set aside and in its place is substituted the following order:

'2.1 The respondent is directed to produce for inspection and copying the documents specified below within 30 (thirty) days of the date of this order pursuant to the appellant's notice in terms of rule 35(12) delivered on 11 August 2020.

2.2.1 Judge Harms' "report" prepared pursuant to s 165(4) of the Companies Act 71 of 2008 and submitted to Novus' Board on 28 May 2020 referred to in paragraphs 21 to 28 of the respondent's answering affidavit in the main application under case no 8908/2020 (the main application).

2.2.2 The "predecessors" to the "Commission Agreement", referred to in paragraph 27 of the answering affidavit in the main application.

2.2.3 The "documentation at Novus' disposal" to which Judge Harms was "given full access" referred to in paragraph 28 of the answering affidavit in the main application.

2.2.4 All "reports to the Department of Basic Education (DBE)" referred to in paragraph 195.2 of the answering affidavit in the main application.

2.2.5 All "invoices together with all supporting documents" submitted to the DBE, as referred to in paragraph 197 of the answering affidavit in the main application.

2.2.6 All "reports" submitted to the DBE by Lebone, as referred to in paragraph 198 of the answering affidavit in the main application, but only to the extent that they may be different to the reports referred to in paragraph 2.2.4 above.

2.2.7 All "annual inflation adjustments" and supporting "documentary evidence" submitted by Lebone to the DBE, referred to in paragraphs 199 and 200, respectively, of the answering affidavit in the main application.

2.2.8 All "invoices" submitted by Lebone to Novus for the "printing of 50% of all the required covers, tear-outs, and stickers", referred to in paragraph 201 of the answering affidavit in the main application.

2.2.9 "The contract with the DBE" that "Novus had to comply with", as referred to in paragraph 225.1 of the answering affidavit in the main application, and "the contract" that the "DBE made payment of invoices in accordance with", referred to in paragraph 244 of the answering affidavit in the main application (and each "contract", to the extent that paragraph 225.1 and paragraph 244 may refer to two separate contracts).

2.2.10 The "meticulously completed Proof of Deliveries (POD's)" that were "collated and submitted with the invoice to the DBE", referred to in paragraph 225.1 of the answering affidavit in the main application.

2.2.11 The "other impugned agreements" and "the impugned agreements" that were "negotiated and concluded" at the time that none of Novus's current directors served as directors, as referred to in paragraphs 290.3 and 290.4 of the answering affidavit in the main application.

3 It is further directed that the documents referred to in paragraph 2 above are to be provided subject to the following confidentiality regime:

3.1 Novus will provide the documents to Caxton's attorneys of record, and in doing so will indicate which documents Novus claims are confidential (the confidential documents).

3.2 Save for purposes of consulting with counsel or any independent experts or unless the Court orders otherwise, Caxton's attorneys of record shall not disclose directly or indirectly to any other party (including Caxton) any part of the confidential documents.

3.3 Caxton's attorneys of record and independent experts given access to the confidential documents pursuant to paragraph 3.2 above will sign a confidentiality undertaking confirming that they will not disclose directly or

indirectly the contents of the confidential documents to any other party (including Caxton) other than a party that has also signed a confidentiality undertaking in terms of paragraph 3.2 above.

3.4 In the event that Caxton's attorneys of record, on behalf of Caxton, dispute that any document or documents asserted by Novus to be confidential is or are, in fact, confidential, then Caxton's attorneys of record are given leave, on behalf of Caxton, to urgently approach the Court on the same papers, supplemented as may be necessary, for an order providing for the exclusion of such document or documents from the confidentiality regime.

3.5 Confidential documents may only be referred to in affidavits deposed to by the legal representatives or independent experts of the parties, and any such affidavits will also be treated as confidential.

4 Caxton is ordered to file its replying affidavit in the main application within 20 days after receipt of all the documents pursuant to paragraphs 2 and 3 above.

5 The respondent in the interlocutory application is ordered to pay the costs of such application, including the costs of two counsel where so employed.'

X M PETSE
ACTING PRESIDENT
SUPREME COURT OF APPEAL

APPEARANCES

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