RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA

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22 November 2017 Our ref: Raj Daya/Jay Balkishun Your ref:

Dear Sir/Madam,

PROPOSED AMENDMENTS TO UNIFORM RULES 35(12) AND 35(14)

As part of its rule review function, the Rules Board for Courts of Law has considered amending subrules (12) and (14) of Uniform Rule 35, which provides for Discovery, Inspection and Production of documents.

Subrule (12) which provides for a party to require such party's opponent to make available for inspection and copying at any time before the hearing of a matter, of a document or tape recording referred to in the opponent's pleadings or affidavits, does not make provision for the procedure, manner or format in which a response to such request is to be provided.

Subrule (14) which provides for a party to request for purposes of pleading, after appearance to defend has been entered, of a document or tape recording in the opposite party's possession, is also being reviewed similarly to subrule (12) since it does not provide the procedure to produce the document or tape recording.

As part of its consultative process in rule making and amendment, the Rules Board invites your comments and input on the draft amendments which it proposes to Uniform Rules 35(12) and (14). Draft amended rules 35(12) and (14) are annexed hereto, marked "**ANNEXURE A**" and "**ANNEXURE B**", respectively.

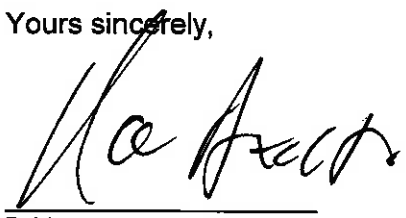
For ease of reference a copy of Uniform Rule 35 is also annexed, marked "**ANNEXURE C**".

Your comments, which may be delivered to the Rules Board or emailed to Mr. J Balkishun, email JBalkishun@justice.gov.za should be sent to the Rules Board by Friday, 12 January 2018.

Board members appointed in terms of Section 3 of the Rules Board for Courts of Law Act 107 of 1985
Justice SA Majiedt(Chairperson), Justice FE Mokgohloa(Vice-Chairperson)Adv.M Motimele SC, Ms. J Wessels,Mr.P Hundermark , Adv.P Farlam SC, Adv.A Platt SC, Professor.M Paleker ,Ms.E de Klerk, Mr.G Bellairs, Ms.N Ndlovu, Mr.M Kutama, Mr.A Essa ,Mr.R Isaacs

The Rules Board looks forward to receiving any comments or input which you may submit and thanks you for same.

Yours sincerely,



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ANNEXURE A

RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA

35 Discovery, inspection and production of documents

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

(i) produce such document or tape or electronic recording for **[his]** inspection and to permit **[him]** the party requesting production to make a copy or transcription thereof; **[.]** or

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

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

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

[Subrule (12) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

'ANNEXURE B'

RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA

35 Discovery, inspection and production of documents

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

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

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

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

ANNEXURE C

35 Discovery, inspection and production of documents

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

[Subrule (1) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

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

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

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

(c) such documents and tape recordings which he or his agent had but no longer has in his possession at the date of the affidavit. A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

[Subrule (2) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

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

[Subrule (3) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(4) A document or tape recording not disclosed as aforesaid may not, save with the leave of the court granted on such terms as to it may seem meet, be used for any purpose at the

trial by the party who was obliged but failed to disclose it, provided that any other party may use such document or tape recording.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(5) *(a)* Where a registered company as defined in the Motor Vehicle Insurance Act, 1942, as amended, is a party to any action by virtue of the provisions of the said Act, any party thereto may obtain discovery in the manner provided in paragraph *(d)* of this subrule against the driver or owner (as defined in the said Act) of the vehicle insured by the said company.

(b) The provisions of paragraph *(a)* shall apply *mutatis mutandis* to the driver of a vehicle owned by a person, state, government or body of persons referred to in sub-section (3) of section *nineteen* of the said Act.

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

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

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

[Subrule (6) substituted by GN R2004 of 15 December 1967, by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

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

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

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

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

[Subrule (8) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(9) Any party proposing to prove documents or tape recordings at a trial may give notice to any other party requiring him within ten days after the receipt of such notice to admit that those documents or tape recordings were properly executed and are what they purported to be. If the party receiving the said notice does not within the said period so admit, then as against such party the party giving the notice shall be entitled to produce the documents or tape recordings specified at the trial without proof other than proof (if it is disputed) that the documents or tape recordings are the documents or tape recordings referred to in the notice and that the notice was duly given. If the party receiving the notice states that the documents or tape recordings are not admitted as aforesaid, they shall be proved by the party giving the notice before he is entitled to use them at the trial, but the party not admitting them may be ordered to pay the costs of their proof.

[Subrule (9) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

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

[Subrule (10) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(11) The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his power or control

relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet.

[Subrule (11) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

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

[Subrule (12) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

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

[Afrikaans text of subrule (13) amended by GN R2047 of 13 December 1996.]

(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.

(15) For purposes of rules 35 and 38 a tape recording includes a sound track, film, magnetic tape, record or any other material on which visual images, sound or other information can be recorded.

[Subrules (14) and (15) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]