



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 64478/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

26.8.2024.
DATE

SIGNATURE

In the matter between:

KHOLISWA LUSASENI

Applicant

and

MALERIA DANIEL MASHAMAITE

Respondent

JUDGMENT

MPSHE AJ

1. This application served before me on the 2nd of August 2024. It was initially unopposed. This is an application in accordance with Rule 35 (3) to the Rules of this Court.

BACKGROUND

2. The parties held a pre-trial conference on the 31st of January 2020. In that conference respondent promised to revert back to the applicant regarding certain questions. Upon request, the respondent provided answers to the stipulated questions. In addition, the applicant, through rule 35 (3) of the Rules of Court requested certain documentation from the respondent. The respondent provided some of the requested documentation and, as a result of the inadequacy of the documentation, the applicant filed this application stating non-compliance with rule 35 (3) to the Rules of Court.
3. The application was served on the respondent on 17th May 2024. Two months later the respondent filed a notice of intention to oppose on the 1st August 2024.
4. On 30th July 2024 the respondent filed an affidavit resisting the application. On this affidavit the respondent denies possession of certain documents whilst stating that some of the documents have already been provided to the applicant. I will state only the affidavits alleged not to be in the possession of the respondent, these are:

Item 4: All affidavits prepared/signed by the plaintiff as required in terms of section 19(F) of the Road Accident Fund Act.

Item 6: Any witness statements in respect of the injuries sustained by the plaintiff on the day of the accident, her visit the hospital and sequelae of the plaintiff injuries.

Item 11: Information obtained by the defendant from plaintiff on past medical expenses incurred and any future medical expenses as a result of the plaintiff's injuries and sequelae.

Item 12: Documentation obtained by the defendant from the plaintiff on employment and or loss of employment.

5. The applicant then sent a letter to the respondent dated 1st August 2024 advising respondent "that the responding affidavit by the respondent in terms of rule 35 (3) does not comply with the rule. The letter lays out the deficiencies in the responding affidavit and reads. The responding affidavit does not state if the defendant was previously in control of the requested documents, if it is now in possession/control of the documents and if it had the documents previously, where the documents are now and if he is not in possession of same anymore."
6. On the hearing of this Application Ms. Mitchell raised two points in limine, namely that:

- (i) The notice of motion was defective and not in compliance with rule 6(5)(h) to the Rules of Court in that it does not provide for three days as required.
- (ii) The applicant launched the application in terms of rule 35(3) to the rules instead of rule 35(7) to the Rules of Court.

FIRST POINT IN LIMINE

7. I do not intent wasting time on the first point in limine save to state that the respondent reacted to the notice of motion. The rational for the notice of motion is to place the other party to understand the matter to be brought against him/her. This has been achieved. What is to be noted is that the respondent, despite the absence of dies on the face of the notice of motion is aware that he filed the answering affidavit out of time. It is reiterated that rules are made for the court and not court for the rules.

SECOND POINT IN LIMINE

8. In argument the respondent submitted that the rule employment by applicant is incorrect. She stated that rule 35(7) and not 35(3) sought to have be employed. Counsel for the applicant argued that rule 35(7) was not applicable but rule 35(3) to Rules of the Court.
9. The purpose of this application is to supplement an inadequate discovery by the respondent. In addition thereto, through a letter by the applicant dated 01 August

2024 calling upon the defendant to state the whereabouts or otherwise of documents if known by the defendant.

Ms Mitchell for the respondent argued that utilization of sub-rule (3) was incorrect and that sub-rule (7) should have been utilized. She referred in her argument to the case of *Guldenpfening v Guldenpfening*¹ at paragraph [9] thereof:

"I respectfully disagree with submission that rule 35 (7) is to be used "to compel further and better discover" I base my disagreement on the interpretation of rule 35(7) which suggest that the rule is to be utilized "if any party fails to give discovery."2

Rule 35 (3) of the Uniform Rules of Court reads:

"If any party believes that there are, in addition to documents or tape recordings discloses 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 sub-rule (6), or to state on oath within ten days that such documents are not in possession, in which event he shall state their whereabouts, if known to him."

This rule concerns documents not yet discovered.

¹ 2010 JDR 0197 (GNP).

² See also CHANNON V MONAMA & OTHERS 2024 JDR 2597 (GP) @ [18] & [19]; RELAMS (PTY) LTD V JAMES BROWN & HAMER LTD.1983 (1) 556 (NPD @ 559 C-D. Also see MV URGUP: OWNER OF THE MV URGUP V WESTERN BULIC CARRIERS (AUGUST) 1999 (3) S.A 500 CPD @ 515 C-D.

10. Mr Snyman for the applicant is of the opinion that there has been no compliance with the rule, with particular reference to the phrase:

“.....or 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”.

Ms Mitchell on the other hand argued that it suffices to state that they are not in possession of the documents. It is not in dispute that the respondent has discovered certain documents other than those mentioned in paragraph 4 above. I do not find merit in the submission of Ms Mitchell.

11. In the *Amalgamated Beverage Industries*³ matter the Court held as follows:

“[8] The plaintiff counsel submitted that Rule 35 (3) requires no more than that a party should state that it is not in possession of the requested additional documentation and where they can be found, if it so knows. I need not state that it does not know where the documents are. I disagree for the following reasons:

*[8.1] The rule requires a party to state that its documents are not in possession, to disclose the whereabouts of documents, if such is known to it. In my view, it is paramount for a party who does not know the whereabouts of the documents to indicate in unequivocal terms that he does not know where they can be found. Otherwise its knowledge of the whereabouts or the lack thereof will remain a speculation. Plaintiff did not declare in any of its responses that it does not know the whereabouts of the requested documents and instead insists that it is not required to do so”.*⁴

³ AMALGAMATED BEVERAGE INDUSTRIES V M.MKHONDO TRANSPORT CC TA MLP TEMBISA NORTH & ANOTHER (3109214) 2023 ZAGPPHC 832.

12. In *Guldenpfenning v Guldenpfenning* the following is said:

*"In my view, the above provisions are unambiguous. All what the party receiving a rule 35(3) notice has to do, is first, to make documents listed in rule 35(3) notice available for inspection and / or secondly, in the event he does not have the documents, to depose to an affidavit stating the whereabouts of such documents."*⁵

13. I now deal with rule 35(7) which reads as follows:

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

This rule is about a party who has failed to give discovery. In this case respondent has given discovery under sub-rule (1) and (3). This sub-rule is applicable where there has been a failure to comply with sub-rule (1) to (6).⁶

14. I conclude that the application is properly before court in accordance with rule 35(3) to the rules of court.

⁴ Ibid para 8.

⁵ Ibid note 1 at para 6.

⁶ See also *EIKENHOF PLASTICS BOTTLING CO PTY LTD AND OTHERS V BOE BANK LTD 2000 (2) 211 S.A @ 212 E-G.*

The following order is made:

1. The respondent is ordered to deliver the documentation as required by the applicant in the notice in terms of rule 35(3) dated 17 May 2024 within 5 days from date of service of this order on the applicant's attorneys.
2. In the event the respondent fails to comply with the order in 1 above, the respondent's defence and plea will automatically be struck out and the application will be entitled to refer the matter to the default judgement roll.
3. The respondent is ordered to pay the costs of this application on an attorney and client scale, alternatively scale c of rule 67.

M J MPSHE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for applicant: Adv M Snyman SC instructed by Andre Du Plessis Inc.

Counsel for respondents: Ms S Mitchell instructed by Mothle Jooma Sabdia Inc

Attorneys.

Attorney for respondents:

Date heard: 2 August 2024

Date of Judgment: 26 August 2024