

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2018 - 45020

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
<u>27/03/2025</u> 	
DATE	SIGNATURE

In the matter between:

YUGANDREN REDDY

Applicant

and

GROWTHPOINT PROPERTIES LIMITED

Respondent

JUDGMENT

PJ DU PLESSIS AJ

Introduction

- [1] In this opposed motion, the applicant (Mr Reddy) in order to avoid legal costs took a decision not to partake in an application to compel discovery. The result being not only a court ordered strike out of his defence, but also a default judgment was granted by the Registrar for almost R6 000 000 in 3 separate claims,¹ perpetuated by an administrative failure in his attorney's office. He now moves for rescission of the order and default judgment in terms of the provisions of Rule 42(1)(a) on the basis that they were erroneously granted or sought in his absence.
- [2] In the Main action, Growthpoint is the plaintiff against two defendants the first being Infoguardian (Pty) Ltd and the second Mr Yugandren Reddy. It all concerns a lease agreement in regard to a property.
- [3] In the process of the litigation, replication to Mr Reddy's plea was given on 08 August 2023 by Growthpoint. Growthpoint on 15 August 2023, requested premature discovery, delivering notices in terms of Rule 35 (1) (6) (8) and (10) which should have been delivered on 22 August 2023 (10 days) the actual date for close of pleadings. Mr Reddy ignored the premature discovery request, so when Growthpoint attorneys felt that 20 days had passed, being 12 September 2023, they, on 15 September 2023 sent a letter to Mr Reddy's attorney demanding that he file his discovery affidavit by 22 September 2023 or the court will be approached to compel him to do so. No discovery affidavit was filed by the applicant until 19 June 2024. By then, the court was already approached with an application to compel discovery lodged at the end of April 2024 of which the applicant had full knowledge and chose not to attend.
- [4] A court order followed (first order), by Allen AJ wherein he, on 13 May 2024, compelled discovery within 5 days of service, failing which the striking out of Mr Reddy's defence. This order was served electronically on 14 May 2024 on the applicants' attorneys, who misfiled it as per their affidavit. The continued non-reaction from Mr Reddy led to the request for default judgment (second order) which was granted by the Registrar on 26 June 2024, now the applicant wants both orders rescinded.

¹ Default Judgment order granted claims A = R833 190,99; B= R970 821, 92; C= R4 267 821,08. All with interest of 12% and Costs on attorney and own client in the first two.

- [5] When the applicant's attorney filed his discovery affidavit on 19 June 2024, he realised that their defence was struck out due to noncompliance with the first order, and that an application for default judgment was awaited. He communicated, on 24 June, with the attorneys of the respondent (Growthpoint) voicing his dissatisfaction with the first order and giving them an ultimatum to abandon the first order by 28 June, only to be informed by the respondent's attorneys, on 27 June, that default judgment was granted on 26 June 2024.
- [6] The above sets the scene for the applicant (Mr Reddy) submitting that the court grants rescission of the first order and the second should automatically lapse due to its interdependence.
- [7] The respondent is opposing the application saying the orders are not erroneously granted or interdependent and rescission of one does not affect the other. They emphasise the point that the applicant decided not to take part in the proceedings; and that Rule 42(1)(a) is only applicable to procedural irregularities, of which they submit there were none.
- [8] In amplification of his argument, the applicant states that the original discovery notices were premature as the underlying discovery notices were served before the close of pleadings, therefore violating Rule 35(1). The court was not informed of this pre-maturity when the first order was granted.
- [9] The order granted was not in line with the Practice Manual 2018 directive 16.12 under the heading "General order for discovery", which excludes the striking out portion of the first order.
- [10] The first order included a strike-out penalty in 5 days. This was not explicitly requested in the respondent's application to them; and differed materially from the relief sought in the Notice of Motion, which was, 10 days to comply, paying costs and further and or alternative relief.
- [11] The first order implemented a "one-step" strike-out of their defence, violating the "two-step" process required by Rule 35(7) and as established in case law. This "one-step" process did not allow the applicant the opportunity to explain his lack of compliance, or ask for condonation. It immediately struck out his plea "and

closed the court doors for him" denying him his section 34 Constitutional Rights (access to courts), in an action he was defending for 6 years.

[12] Regarding the Second Order the applicant claims it should be automatically rescinded if the First Order is, due to its inter-dependency.

12.1 Alternatively, the second order was "erroneously granted" because:

12.1.1 It incorrectly held both defendants jointly liable when relief was only sought against the applicant,

12.1.2 It was based on a **Damages Claim**: which is not a "liquidated demand" that the Registrar is authorized to grant. Evidence should have been presented to a court for determination of reasonableness of rental amounts and the period for which damages can be claimed.

[13] The respondent counter arguments to the above are that the claim of premature notice is a defence against the original disclosure application, an application from which the applicant by choice elected to absent himself. It can therefore not be a procedural error. It was submitted that the applicant should have reasonably foreseen the order(s) being granted.

[14] Further, that the respondent's application included a request for "further and/or alternative relief" and a Judge has a discretion which can be judicially exercised to grant the order given, including the strike-out penalty, which is in alignment with the court's practice directives.

[15] As to the second order the respondent submits:

15.1 Rescission of the first order does not automatically rescind the second.

15.2 While conceding the error regarding the first defendant's liability (and having filed a consent to rescission of judgment against same) they argue the claim for damages in the second order is "liquid" because it's based on a contract with agreed-upon terms and is capable of speedy calculation. The orders are therefore independent from each other.

[16] The respondent argues the wilful decision to ignore court procedures, and blaming a misfile by his attorneys for his failure to not react to the first order which was served on them, does not constitute grounds for rescission of any of the orders.

Analysis

[17] It was made very clear by our Constitutional Court in the matter of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*,² that:

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, ...is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.”³

“...He has locus standi to approach this Court for rescission in terms of rule 42. ..., having standing is not the end of the story. Any party personally affected by an order of court may seek a rescission of that order. But these sorts of proceedings have little to do with an applicant’s right to seek a rescission and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met. ... It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought. Both grounds must be shown to exist.”⁴
[Emphasis Added]

[18] Interlocutory orders are interim and regulates procedure during the progress of a trial. It helps to manage the litigation process ensuring fairness and efficiency. Such orders are usually not appealable unless they have a “final effect”.⁵

² [2021] ZACC 28; 2021 (11) BCLR 1263 (CC).

³ Id at [53].

⁴ Id at [54].

⁵ See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533B.

- [19] I start with the absence of the applicant, by choice, from the disclosure proceedings. This is part of the interlocutory process and the applicant may have been busy finalising his disclosure affidavit, as he alleges, but making a conscious choice not to attend court where you allege prematurity, a valid defence, in an application forcing you to comply with an issue in the trial process, should be fatal, as you deny yourself the right to be heard and to see exactly what order was prayed for against you.⁶
- [20] Our Highest court in *Zuma* confirmed: "Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted."⁷ [Emphasis Added]
- [21] The applicant's absence was by choice, a bad one, now viewed in hindsight. His absence was, however, on an election made on what he and his attorneys were given notice of, regarding the application the respondent was bringing. They clearly foresaw no real harm on the papers presented to them. This as the served documents were as per the "General order for discovery" Practice Manual (PM) 16.12.⁸
- [22] I underlined the above in par. 20, because of the submission by the applicant that the founding affidavit to compel discovery asked to compel them to disclose in 10 days, pay cost and "further and or alternative relief" ONLY. The striking out of their defence was not contained therein. It is therefore clear that the strike out order obtained, differed from the order the applicant thought was being sought.
- [23] The respondent correctly submitted that there was a request for "further and or alternative relief" and that Judge Allen had a judicial discretion to grant the strike out as he did. I find that it is highly improbable that " further and or alternative relief" would be used by a judge exercising a judicial discretion, to grant a

⁶ See note 2 at [56]: "the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected" Emphasis Added.

⁷ Id at [61].

⁸ 10 Days to comply and Cost order; See below Par 24.

significantly different form of relief. Especially relief not specifically mentioned in a notice of motion, and definitely not, if it has the potential of causing serious prejudice to a party.

[24] This as “further and alternative relief” is generally understood to be a relief that is:

24.1 Consistent with the main relief sought or a lesser form thereof;

or

24.2 Closely related to the issues raised in the application.

[25] Courts have inherent powers to regulate proceedings and ensure fairness. A judge may, order relief that was not specifically requested, but this is done sparingly and only when:

25.1 It is clear that the opposing party would not be unfairly prejudiced.

25.2 The evidence and arguments presented clearly support the alternative relief.

25.3 The alternative relief is in line with the overall goal of the legal proceeding.

[26] References was made to the PM of 2018 and the Consolidated Practice Directives (CPD). It is as correctly pointed out by the applicant that the PM in directive 16.12 under the heading “General order for discovery” does not contain as an example of a draft order, the “striking out provision”, contained at no 2 in the First Order.

[27] The CPD of 2023, effective from 22 August 2023, was replaced by Revised CPD 1 of 2024, effective from 26 February 2024, and amended on 12 June 2024 still in operation. The latter applicable to the period in which the first order was granted on 13 May 2024. The 2023 (old) CPD read in para 47:

“Any party who, having reason to be aggrieved by the other party’s neglect, dilatoriness, failure or refusal to comply with any Rule of Court, provision of the Practice Manual or provision of this directive must utilise the Interlocutory Court to compel compliance from the delinquent party: further,

47.1: If a party, ..., fails to comply with a complying order, served on that party, and a rule of court provides that such non-compliance may entitle an aggrieved party to apply to strike out the claim or defence, such application to strike out shall *again* be enrolled in the Special interlocutory Court for final relief.⁹

[28] The current Revised CPD¹⁰ in regard to the striking of a defence is at paragraph 27 with the heading: “The Special Interlocutory Court (SIC): Role and function applicable to all categories of matters”. It states that:

“27.1 The SIC is established to address the delinquency of an adversary in respect of non-compliance with the provisions of this directive or of the practice manual of the court or of any of the Uniform Rules of Court, in all cases. ...whether or not such matters are opposed or unopposed.

27.2 Any party who, having reason to be aggrieved by the other party’s neglect, dilatoriness, failure, or refusal to comply with any rule of court, provision of the practice manual or provision of this directive must utilize the SIC to compel compliance from the delinquent party.

27.3 The orders obtainable in the SIC are of a strictly interlocutory nature, not of a substantive nature.

27.11 To prevent unnecessary delays, additional costs, and a waste of court resources caused by non-compliance with orders handed down in the SIC, a party may seek an order in the SIC that provides for the *ipso facto* striking out of the claim or defence in the event that the other party fails to comply with an order granted by the SIC within a specified time, provided that-

⁹ Compliant with the wording of RULE 35 (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.

¹⁰ Applicable to this matter as the first order was granted on 13 May 2024.

- 27.11.1 The order has been served on the delinquent party, and
27.11.2 A rule of court provides that such non-compliance entitles an aggrieved party to apply to strike out the claim or defence. (Annexure 8 - strike out draft order)”

[29] It is noted that:

29.1 This (one and only) application was brought by the respondent (as applicant) in the SIC. This whilst par 27.11 is clear that there must be a non-compliance with a granted SIC order, which was served on the delinquent party (27.11.1) and then only “a party may seek an order” in line with Annexure 8 (27.11.2) applying for a “strike out”.

29.2 The directive is clear there must be a first served order, not-complied with, before a strike out order may be sought. Also, that the draft order presented to Allen AJ was not as per Practice manual 16.12, “General order for discovery” but indeed Annexure 8 (used only when seeking the strike out at first served order non-compliance). Annexure 8 also refers to 10 days not 5 as was presented.

[30] The Revised CPD 2024 was therefore not complied with and this is fortified by the fact that the proviso in 27.11.2 holds that a strike out of a defence is only entitled to, by an aggrieved party, if the rules of court provide for such. The applicable Rule being, Rule 35 (7).

[31] In *Ikamva Architects CC v MEC for the Department of Public Works and Others*,¹¹ Plasket J, writing on behalf of a Full Bench of the Eastern Cape High Court held, in paragraphs 27-31, as follows: (albeit obiter)

“[27] “I am mindful of the dangers of *obiter dicta* and the reasons why courts should, as a general rule, pronounce only on what has to be decided. In this case, however, I consider it necessary to say something, for the guidance of courts of first instance, about orders such as the one with

¹¹ [2014] ZAECGHC 70.

which this case is concerned and about the consequences for the defendants of their defence being struck out automatically.

[28] ... The fact that orders like this have been made before does not mean that they should be made in the future. Rule 35(7) creates a procedure specific to the enforcement of obligations to discover properly...

[29] In my view, certainty and fairness dictate that the proper approach when a party does not comply with any of his or her obligations in terms of rules 35(1) to (6) is to apply to compel compliance in terms of rule 35(7) and that contemplates the striking out of a defence, not automatically on non-compliance, but on application on the same papers, amplified if necessary. It is only when the court has had the opportunity to decide that grounds exist for the striking out of the defence that an application for default judgment may be made.

[30] In the light of rule 35(7) – a purpose-made procedure to compel discovery – I have my doubts that an order striking out a defence automatically is competent but I express no firm view on that. If it is, then, in my view, it is the type of order that should be reserved for only the most unusual of cases, and then it would be expected of an applicant that he or she place facts before the court to justify the making of such an order.

[31] Finally, the fact that in this case the defendants' defence has been struck out does not mean that nothing can be done by them. They can, even at this late stage, still comply with the order, give a full explanation of their default and apply for their defence to be re-instated. Rule 27 allows for this, even after the expiry of the ten-day period stipulated in the order."

[32] I am in full agreement with the remarks made by Plasket J in the above quoted paragraphs. It is clear that a two-step process outlined in Uniform Rule 35(7) was not followed and as a result there was non-compliance with the rule and Consolidated Practice Directives 2024 as indicated above.

[33] The First Order was interlocutory and dependent on correct procedure to have been observed or it could be regarded as "erroneously granted". Rule 42 (1) (a)

caters for relief where there were procedural irregularities, lack of legal competence, or when the court was unaware of crucial facts.¹²

[34] I have serious reservations that Allen AJ would have used his judicial discretion in ordering a one-step strike out had he known of the prematurity in the application to compel discovery, where the pleadings was still open. Therefore, a crucial fact the court was unaware of and not brought to his attention by the respondent.

[35] Also, if Allen AJ was presented with the prayed for, served and applicable "General order for discovery" as draft order, which was served on the applicant. Not the one presented to him similar to Annexure 8, where no prior order of non-compliance existed, according to me procedural irregular. This action of the respondent should be frowned upon and is deserved of sanction to be reflected in the cost order.

[36] I therefore find that:

36.1 The relief obtained by the respondent in the Allen AJ order was never properly sought in their notice and is not covered by the request for "further and alternative relief".

36.2 The draft order provided to the Judge was not in accordance with the Practice manual, the Practice Directives or Rule 35 (7). It completely disregarded the two-step process required for the granting of such a strike out order. It was also not what was served on the applicant, which caused his decision not to attend. Therefore, although he did not (by choice) attend court after having been notified, he did so having been misled on what specific disclosure compliance application (strike out)

¹² Van Reenen J in *Pro Media Drukkers en Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C). The learned Judge dealt with the requirements for rescission with reference to a number of authorities appearing at p. 417, relating to rescission proceedings in terms of Rule 42 (1)(a), and re-emphasized that a Court has a discretion whether or not to grant an application for rescission under Rule 42 (1), and that relief will be granted if there was an irregularity in the proceedings, or if facts existed at the time the order was made, of which the Court was unaware of, and which, if known to it, would have precluded the granting of the order.

was going to be sought. The result, I find was an order unforeseen, granted in his absence due to misinformation.

36.3 The Judge was never informed that the respondent's notices for discovery under Rule 35 were delivered before the close of pleadings and as a result premature, which was expected to be disclosed by the respondent asking for such a sweeping order.

[37] All of the aforementioned causes me to find the applicant discharged the onus of proving that the order was granted in his absence and was erroneously granted/sought. Therefore, I exercise my judicial discretion to rescind the Allen AJ order dated 13 May 2024.

[38] In relation to the second order, the default judgment granted by the Registrar. I refer to the matter of *Government of the Republic of South Africa and Others v Von Abo*,¹³ holding that a second order arising in consequence of a first order would be legally untenable if the first order was wrong in law. On my rescission of the Allen AJ order dated 13 May 2024, I find everything that followed arose directly from the striking out order and the default judgment would not have been granted, but for that order. Therefore, they are interlinked and the one a consequence of the other. As a result, the second order granted by the Registrar is also rescinded.

Costs

[39] Punitive cost orders are awarded to send a strong deterrent message to litigators against improper conduct in legal proceedings. It exists to ensure fairness and to uphold the integrity of the judicial system.

[40] The respondent's misbehaviour is clearly visible in 36.1 - 36.3 *supra*. There was a clear abuse of court process yet the respondent entered opposition in this motion application in circumstances where the applicant and the court who issued the first order was misled. Applying on draft order, for relief they were not

¹³ 2011 (5) SA 262 (SCA) at [18].

entitled to in accordance with the Rules and directives. Relying on a general request of "further and alternative relief" alleging it will cover relief not properly sought, and alleging Judicial discretion was used where the Judge was not made aware of crucial facts that should have been brought to his attention.

Order

1. The order granted by the Honourable Allen AJ on 13 May 2024 is rescinded and set aside
2. The order granted by the Registrar of this court on 26 June 2024 is rescinded and set aside
3. The Respondent is ordered to pay the cost of this application on an attorney and client scale

A black rectangular box redacting the signature of the judge.

**PJ DU PLESSIS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Appearances:

For the Applicant:

Adv. E. Mann instructed by Albert
Jacobs INC.

For the Respondent:

Mr Telis Carides (Attorney with certified
Right of Appearance in the High Court)
for SSLR INC.

Heard on:

26 February 2025

Decided on:

24 March 2025