

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

22 May 2025
DATE

SIGNATURE

A handwritten signature in black ink, which appears to be "D. [redacted]", is written over a black rectangular redaction box.

CASE NO: 2014/44510

In the matter between:

TUSWA BONGANI PATRICK

Applicant/ Plaintiff

and

THE MINISTER OF POLICE

First Respondent/Defendant

SYDNEY MULAUDZI

**Second
Respondent/Defendant**

REASONS FOR JUDGMENT

GOODENOUGH AJ:**ORDER**

1. The striking off application is dismissed with costs on the party and party scale.

SUMMARY

2. The compelling order by Moorcroft AJ ("the Moorcroft order") and the application to strike out were not served on the Second Respondent, who is not represented by the State Attorney. There can therefore be no question of my making any order against the Second Respondent.
3. The compelling order was served on the State Attorney, who represents the First Respondent only.
4. The striking out application was bad in law because – contrary to what is stated in the Applicant's founding affidavit - the First Respondent did indeed on 14 March 2023 timeously comply with the Moorcroft order by delivering a sworn Reply in compliance with the Applicant's Rule 35(3) Notice within the 5 day deadline stipulated in the Moorcroft order, stating under oath that the requested SAP 15 document which the Applicant had called for in its Rule 35(3) notice does not exist.
5. The fact that paragraph 1 of the Moorcroft order additionally stated that the First Respondent must "*deliver the SAP 15 requested therein to the applicant*" does not persuade me to grant a striking out order.
6. I have a discretion as to whether or not to strike out the First Respondent's defence to the action.
7. In my view it would be inappropriate for me to strike out the First Respondent's defence in circumstances where the First Respondent

delivered an affidavit - within the five day deadline - stating that the SAP 15 document does not exist and explaining why that is so.

8. In the exercise of my discretion, I decline to strike out the First Respondent's defence.

INTRODUCTION

9. On 6 May 2025, I dismissed the Applicant's application to strike out the Respondents' defence to the action under the above case number.
10. My reasons are set out below.

HISTORY

11. The action arises from an incident wherein the Second Respondent, an employee of the First Respondent, allegedly unlawfully and culpably shot the Applicant.

Rule 35(3) Notice

12. On 10 August 2022, the Applicant delivered to First Respondent a Rule 35(3) notice¹ calling on the First Respondent to produce the following documents for the Applicant's inspection:
"1..Profile file of the second defendant from the time he joined the SAPS to date"
"2. SAP 15"
13. The First Respondent did not respond to that Rule 35(3) notice.

¹ Case Lines 30-20.

Application to compel a Reply to the Rule 35(3) Notice

14. On 30 August 2022, the Applicant served on First Respondent an application to compel First Respondent to comply with the Rule 35(3) notice.²
15. The Applicant's Notice of Motion prayed in paragraph 1:

"The Respondent ... be ordered in terms of Rule 35(7) to comply with Rule 35(3) within 5 (five) days from date of service of this order on the Respondents attorneys"

The Moorcroft order

16. On 3 March 2023, Moorcroft AJ made an order ("the Moorcroft order") in the following terms:

"1.. The respondents (defendant in the main action) are hereby ordered, in terms of Rule 35(7), to comply with the applicant's rule 35(3) notice and deliver the SAP 15 requested therein to the applicant (plaintiff in the main action) with 5 (FIVE) days from date of service of this order on the respondents' attorneys of record.

"2.. Should the respondents be in default of paragraphs 1 above, the applicant is granted leave to approach the above Honourable Court, with duly supplemented papers, for an application to strike out the respondent's pleaded defence.

"3. Ordering the respondents to pay the costs of this application on an attorney and client scale."

Substantial compliance with the Moorcroft order:

17. Rule 35(3) reads as follows:

"(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

² Case Lines 28-1

possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known." [my underlining].

18. The underlined words in Rule 35(3) have the effect that if the recipient of the Rule 35(3) notice states under oath that the requested document is not in his possession or does not exist then, by doing so, the recipient has complied with the Rule 35(3) notice.
19. The First Respondent did indeed on 14 March 2023 (being the last day permitted under the Moorcroft order) timeously deliver such a Reply:³
20. On 14 March 2023, the First Respondent delivered "Respondent's Reply to Applicant's Rule 35(3) Notice"⁴ (the Reply)".⁵
21. In paragraphs 4 to 6 of the Reply, the First Respondent's witness, namely attorney Mr. Oscar Mathebula, stated under oath as follows:
"4.. This affidavit is meant to give a clear indication that the Second Respondent herein was a detective who was based at the Provincial detective's unit. As such he covered cases in the whole of Gauteng Province. He was not assigned to any police station. They never signed any Sap 15 [.] detectives are not assigned to any Police Station and/or report to any particular police station.

"5.. It follows therefor that, the Second Respondent was not assigned and/or reported to any Police Station. Sebenza Police Station is a station in which the crime of shooting in this matter was reported.

³ Case Lines: 30-79

⁴ Case Lines 30-79

⁵ Case Lines 30-81

“6.. It follows therefore that the SAP 15 which is requested herein is not in place and/or available, as the Second Respondent was not required to sign an SAP 15 when he reported on duty.”

Premature launching of the striking out application

22. Notwithstanding the First Respondent's timely delivery of the Reply, which complies with the requirements of Rule 35(3), the Applicant nevertheless delivered its striking out application on the same day on which the Reply was delivered.
23. I note that, whereas the Notice of Motion is dated 15 March 2023⁶, it was in fact served on 14 March 2023⁷.
24. Both documents – that is the Reply and the striking out application - were delivered on the same day, namely 14 March 2023.
25. One cannot discern from the respective date stamps as to which document was served first. In my view, whatever the sequence was, the Applicant did not act appropriately:
 - 25.1. In what I shall term “Scenario A”: the Reply was served first and then the striking out application was served later in the day.
 - 25.2. In what I shall term “Scenario B”: the striking out application was served first and the Reply was served later in the day.
26. If Scenario A is what took place, the legal significance thereof would be that the Applicant wrongly failed to disclose in his founding affidavit the fact that the Reply had indeed been served earlier that same day. On the evidence

⁶ Case Lines 30-2

⁷ Case Lines 30-1 date stamp

before me, I cannot justify make a finding on the probabilities that Scenario A is what took place.

27. If Scenario B is what took place, the legal significance thereof is that the Applicant delivered its striking out application prematurely, because the First Respondent was permitted in terms of the Moorcroft order to comply with the Rule 35(3) notice within 5 days (i.e. by 14 March 2023). The Applicant should have waited until the next day (15 March 2023) before delivering the striking out application in order to make sure as to whether or not the Reply had been served by close of business on the previous day.

First Respondent's answering affidavit to the striking out application

28. On 3 May 2023, the First Respondent delivered an Answering Affidavit to the striking out application wherein First Respondent reiterated what had been stated in the Reply, namely that the SAP 15 document does not exist, explaining why that is so⁸, and reiterating that First Respondent did timeously deliver its reply as required by the Moorcroft order.⁹

Applicant's very late replying affidavit

29. I see on Case Lines¹⁰ that on 21 February 2025 - being nearly two years after the 14-March-2023 service of the Reply - the Applicant delivered a Replying Affidavit to the First Respondent's Answering Affidavit. The deponent is the Applicant's attorney.

My refusal to condone the late delivery of the Applicant's replying affidavit

30. The Applicant's rather terse proffered basis for condonation of the very late delivery of the answering affidavit ¹¹ namely that "*the reason for the late filing being that the file was misfiled as a closed file by our firm's filing clerk*" is

⁸ Case Lines 30-101 para 8.1 et seq

⁹ Case Lines 30-98

¹⁰ Case Lines 30-121 to 30-128

¹¹ Case Lines 30-125 para 6

woefully inadequate to justify condonation. In this regard I agree with the submissions made in the First Respondent's heads of argument.¹²

31. I decline to grant condonation for the late filing of the Replying Affidavit.

The replying affidavit does not assist the Applicant

32. Even if I had granted condonation, the contents of the replying affidavit would not have persuaded me that I should go behind the First Respondent's evidence contained in the Reply.

33. Paragraph 13 of the Applicant's Replying Affidavit reads as follows:

" 13.1. Furthermore, the 1st Respondent pleaded in its amended plea dated 18 December 2018 that the Second Defendant was off duty on the date of the incident and if that was the case, how did the Deponent satisfy himself that was indeed the case if he didn't have the SAP 15, SAP 26 or the Second Respondent's Pocket Book",

*"13.2. The Applicant further submit that all members of the South African Police Services are subjected to some sort of checks and monitoring whether be it in a form of the SAP 15. SAP 26 or the pocket book which the First Respondent ought to have delivered within a period of five days upon being served with the order of the Honourable Moorcroft J dated 3rd March 2023"*¹³

34. The Applicant's Replying affidavit does not in my view assist the Applicant to discharge the onus he bears to persuade the Court to go behind the First Respondent's evidence in its Reply:

35. In Swissborough Diamond Mines and Others v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 320F-H the following was held:

¹² Case Lines 48-8 para 11 to Case Lines 48-10 para 13.4

¹³ Case Lines 30-127 para 13

“Accepting that the onus is on the party seeking to go behind the discovery affidavit, the court, in determining whether to go behind the discovery affidavit, will only have regard to the following:

- (i) The discovery affidavit itself; or*
- (ii) The documents referred to in the discovery affidavit; or*
- (iii) The pleadings in the action; or*
- (iv) Any admissions made by the party making the discovery affidavit; or*
- (v) The nature of the case or the documents in issue”¹⁴.*

36. In the present matter, the Applicant ‘s legal representative during his argument did not persuade me that I should go behind the contents of the Reply.
37. His argument was simply that the second portion of paragraph 1 of the Moorcroft order was not complied with and that for that reason I must strike out the First Respondent’s defence.

Acceptance of the First Respondent’s hearsay evidence for purposes of the striking out application

38. The Applicant’s legal representative did not raise the point that the evidence of the First Respondent’s deponent (being First Respondent’s attorney) in the Reply is hearsay evidence.
39. For purposes of this striking out application I accept such hearsay evidence in the interests of justice as envisaged in Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, taking into account the nature of the current interlocutory application proceedings, the nature of the evidence and the purpose for which it is being tendered.

¹⁴ Quoted in the judgment of Mnisi AJ in Channon N.O. v Monama et al Case number 64482/2020, Gauteng Division, Pretoria 13 June 2024,.

Reasons why I decline to strike out the First Respondent's defence

40. In argument, the Applicant's legal representative submitted that I am obliged to strike out the First Respondent's defence because the First Respondent has failed to comply with the words in paragraph 1 of the Moorcroft order, namely "*deliver the SAP 15*".

41. In my view, I am not obliged to strike out the First Respondent's defence: Rule 35(7) reads as follows
"(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." [my underlining].

42. The operative word in Rule 35(7) is "*may*". The word "*may*" indicate that I have a discretion to strike out or not to strike out the First Respondent's defence.

43. In my view it would be inappropriate for me to exercise my discretion in favour of striking out the First Respondent's defence in the current circumstances where the First Respondent has stated under oath that the SAP 15 document does not exist and explained why that is so, and where the Applicant has made no effective effort to discharge its onus to persuade me to go behind the First Respondent's Reply.

44. The First Respondent did comply with the requirements of Rule 35 (3) in that the First Respondent did indeed "*state on oath that such document...s are not in such party's possession*".

45. The evidence on oath means that it was simply not possible for the First Respondent to comply with the additional words in the Moorcroft order, namely “*deliver the SAP 15*”.
46. It cannot be right for the Court to punish the First Respondent for failing to produce a document which has been stated under oath to be non-existent.
47. To grant the Applicant a striking out order would in my view be to allow the Applicant to abuse the process of the Court.
48. In the circumstances, I decline to exercise my discretion in favour of striking out the First Respondent’s defence.

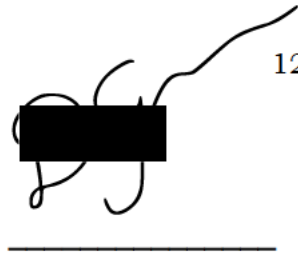
Costs

49. The First Respondent in its heads of argument¹⁵ argues that I should make a punitive costs order on the scale as between attorney and client against the Applicant on the basis that the Applicant deliberately concealed from the Court the fact that the First Respondent delivered its Reply in 14 March 2023.
50. In my view, the evidence on record does not in my view go far enough to persuade me that the Applicant or his attorney deliberately concealed from the Court the fact of the service of the Reply when the striking out application was served and the when the founding affidavit was deposed to.
51. It is possible that Scenario B above is what happened.

Order

52. The application is dismissed with costs on party and party scale on Scale B.

¹⁵ Case Lines 48-1



D. GOODENOUGH
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 22 May 2025

Appearances:

for the Applicant: Mr H.C. Makhubele

for the Respondent : Adv. O.Tommy

Heard on: 6 May 2025

Delivered on: 22 May 2025