

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:

23 May 2025
DATE

SIGNATURE

[Redacted signature]

CASE NO: 2020/18095

In the matter between:

ARTHUR MICHAEL AFADZI

Applicant/ Plaintiff

and

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

First Respondent/Defendant

**UNKNOWN EKURHULENI METRO POLICE
OFFICERS**

**Second
Respondent/Defendant**

THE MINISTER OF POLICE

Third Respondent/Defendant

REASONS FOR JUDGMENT

GOODENOUGH AJ:

ORDER

The application is dismissed with costs on party and party scale.

SUMMARY

1. Contrary to the Applicant's contentions, I find that the First and Second Respondents did indeed comply with their obligations under the Applicant's Rule 35(3) Notice by stating under oath that they are not in possession of Items 2 to 6 listed in the Rule 35(3) notice and explaining their reasons therefor and that there is no valid basis in which to grant an order to compel them to make the further and better discovery which the Applicant has called for.
2. The Applicant has not discharged its onus (as described in In Swissborough Diamond Mines and Others v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 320F-H) to persuade the Court to go behind the First and Second Respondents' affidavit.
3. The Applicant has acted unreasonably in persisting with its application, which I dismiss with costs.

INTRODUCTION

4. This was matter number 46 on the Special Interlocutory Court Roll and was heard by me on Tuesday 6 May 2025, when , I dismissed the Applicant's application for an order to compel further and better discovery, and gave a very short *ex tempore* judgment.
5. On 17 May 2025 the Applicant, in writing, requested that I give reasons for my order, and I have decided to hand down a more detailed judgment than the very brief *ex tempore* judgment given at the time.

6. I have had regard to the heads of argument for the Applicant and for the First and Second Respondents that were uploaded to Case Lines .
7. I set out my reasons for judgment below:
8. This is an interlocutory application in terms of Rule 35(7) of the Uniform Rules of Court, wherein the Applicant seeks an order compelling the First and Second Respondents to make discovery of certain documents requested in the Applicant's Rule 35 (3) notice.
9. The first two paragraphs of the Draft Order uploaded by the Applicant ¹on 25 November 2025 refers to "*the Respondent*" i.e. in the singular and does not specify as to against which of the three cited Respondents the compelling order is being sought.
10. However, in paragraph 1.1 of the Applicant's heads of argument uploaded by the Applicant ² the Applicant 's legal representative clarifies that a compelling order is only being sought against the First and Second Respondents.
11. I will therefore not deal with evidence relating only to the Third Respondent and will confine myself to the merits of the application against the First and Second Respondents only.
12. The attorneys of record for the First and Second Respondents are Strydom Bester Inc³

HISTORY

¹ Case Lines 21-5

² Case Lines 29-146

³ Case Lines 29-78.

13. The cause of action by the Applicant involves a shooting incident that the Applicant alleges took place on 3 September 2019 in which the Applicant was shot multiple times in his legs .⁴

The Rule 35(3) Notice.

14. On 3 May 2024, the Applicant delivered a Rule 35(3) notice ⁵ which called on the First Respondent and Third Respondent to produce for the Applicant's inspection

"1. Kempton park SAPS Police Docket under case number 406/09/2019" and

"2. SAP 5 and 10"

"3. Joint SAPS and EMPD operational plan for the riots in Kempton Park on the 3rd September 2019"

"4. SAPS and EMPD 132(b) (vehicle register) of all vehicles assigned to the operation plan on the 3rd of September 2019 at Kempton Park following the riots"

"5. Documentary proof of training of both SAPS and EMPD members in crowd management who participated in quelling the riots in Kempton Park on the 3rd of September 2019"

"6. Tracker records of all SAPS and EMPD vehicles assigned to the operation in Kempton Park riots on the 3rd of September 2019"

15. However, the Applicant omitted to serve the page in its Rule 35(3) notice that listed the requested Items 3 to 6 thereof. ("the incomplete Rule 35(3) notice").⁶

Response to the incomplete Rule 35(3) notice

16. On 8 May 2024, the First and Second Respondents' attorney delivered an unsworn reply to the incomplete Rule 35(3) notice Rule 35(3) notice ⁷. In paragraph 2 of that unsworn reply the deponent stated that the deponent did not know the

⁴ Case Lines 02-4 para 6 of particulars of claim.

⁵ Case Lines 29-62

⁶ Case Lines 29-93. On 17 May 2024, the Applicant acknowledged its omission to include the missing page

⁷ Case Lines 29-104

whereabouts of the *SAP 5 and 10* [being item 2 requested in the Rule 35(3) notice] and that that these are not in the possession of First Respondent and Second Respondent.

17. To that unsworn reply, the deponent attached a copy of Item 1 that the Applicant had requested in the Rule 35(3) notice , namely *Kempton park SAPS Police Docket under case number 406/09/2019*.

18. On 17 May 2024, the Applicant's attorney acknowledged the Applicant's omission to include the missing page⁸

19. Thereafter, on 22 May 2024 - after the missing page of the incomplete Rule 35(3) notice had been supplied to the First and Second Respondent's attorney - the First and Second Respondent's attorney delivered a letter to the Applicant's attorney:

19.1. stating the First and Second Respondents attorneys "*are unfortunately not in possession of items 3-6 but we will enquire from our client whether they are in possession thereof and will revert in this respect.*" and

19.2. suggesting that he would email the *remaining* documents upon receipt thereof to curtail the Applicant's costs and stated that he awaited the Applicant's response.⁹

20. The Applicant did not respond to that letter.

Launching of the application to compel

21. Instead of responding to the helpful and considerate letter from the attorney for First and Second Respondents, the Applicant simply proceeded to launch his application to compel:

⁸ Case Lines 29-93 and 29-94

⁹ Case Lines 29-94

22. On 16 August 2024, the Applicant delivered an application to compel against all three Respondents¹⁰, ¹¹ . Even though there are three Respondents in the application to compel, the Notice of Motion in paragraphs 1 and 2 asks for an order only against “the Respondent” i.e. in the singular.

Events following the launching of the application to compel

23. On 23 August 2024, the First and Second Respondents’ attorney sought confirmation from the Applicant’s attorney as to whether the application to compel was being made against First and Second Respondents .

24. On 26 August 2024 , the Applicant’s attorneys confirmed that this was indeed the position¹²

25. On 27 August 2024, the First and Second Respondents delivered their notice of intention to oppose.¹³

26. On 17 September 2024, the First and Second Respondents delivered “ *First and Second Defendants’ Affidavit in terms of Rule 35(3)*”¹⁴, again attaching the document that had been requested in Item 1 of the Rule 35(3) notice and stating again that they are not in possession of the SAP 5 and 10 [i.e. Item 2 on the Rule 35(3) notice]¹⁵

26.1. In paragraph 2 of that that affidavit the deponent stated that the deponent did not know the whereabouts of the *SAP 5 and 10* [being item 2 requested in the Rule 35(3) notice) and that that these are not in the possession of First Respondent and Second Respondent.

¹⁰ Case Lines 29-37

¹¹ Case Lines 29-52

¹² Case Lines 26-4, second para

¹³ Case Lines 29-96

¹⁴ Case Lines 29-78

¹⁵ Case Lines 29-81 para 5

26.2. No mention was made in that affidavit of Items 3 to 6 requested in the Rule 35(3) notice.

27. On 21 November 2024, the First and Second Respondents delivered a further, opposing affidavit, deposed to by the First and Second Respondent's attorney Mr Strydom:

27.1. reiterating that First and Second Respondents do not have possession of the documents referred to as Items 2 to 6 of the Rule 35(3) notice, and

27.2. stating further that those items 2 to 6 are presumably in the possession of the Third Respondent and that in their view those Items 2 to 6 originated in the office of the Third Respondent and

27.3. stating further that the First Respondent is neither the originator nor the author of those documents, and

27.4. stating further that they were never in possession of the First Respondent.¹⁶

28. Acceptance of the hearsay evidence in paragraph 4.2 of Mr Strydom's affidavit for purposes of the application to compel

28.1.1. The Applicant's legal representative did not raise the point that the evidence of the First and Second Respondent's deponent (being their attorney Mr Strydom) in the paragraph 4.2 of the confirmatory affidavit is hearsay evidence.

28.1.2. For purposes of this application to compel discovery, I accept that 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.

29. The Applicant nevertheless proceeded to retain its application on the roll for 26 November 2024, notwithstanding that the First and Second Respondent had

¹⁶ Case Lines 29-103 at paras 5.2 to 5.5.

timeously delivered a notice of intention to oppose. and the affidavit dated 21 November 2024¹⁷

30. On 22 November 2024, the attorney for First and Second Respondents delivered a further affidavit ¹⁸ wherein their attorney Mr Strydom explained the following:

"4.1. The Plaintiff's Notice in terms of Rule 35(3) dated 3 May 2024 was served upon our offices, only containing pages 1,3 and 4. Page 2, containing items 3 to 6 was omitted from this Notice. A copy of a letter received from the Plaintiff's attorneys dated 17 May 2024 in which they admit that there was a "glitch" with the pages of their Notice in terms of Rule 35(3), is attached hereto marked Annexure "A".

"4.2. After having received the omitted page containing items 3 to 6, we confirmed to the Plaintiff's attorneys that the First Defendant is not in possession of the aforesaid documents. I attach hereto our letter dated 22 May 2024 addressed to the Plaintiff's attorneys , marked Annexure "B". "

31. I similarly receive such hearsay evidence for the same reasons set out in paragraph 28 of this judgment.

32. On 26 November 2024, Mabesele J removed the matter from the unopposed roll and ordered the Applicant to pay the costs.

33. Thereafter, the Applicant re-enrolled the matter to be heard on 6 May 2025

34. On 19 February 2025, the Applicant delivered – well out of time – a replying affidavit¹⁹.

34.1. The Applicant did not request condonation for the late delivery of this replying affidavit. I decline to receive the Applicant's replying affidavit into evidence.

34.2. There is in any event nothing in the replying affidavit that could assist

¹⁷ Case Lines 29-96.

¹⁸ Case Lines 29-89

¹⁹ Case Lines 29-119

the Applicant is being granted the requested compelling order.

My reasons for finding that the First and Second Respondents are in substantial compliance with the Rule 35(3) notice:

35. In my view, the legal effect of the two affidavits delivered for the First and Second Respondents is that they have substantially complied with their obligations under Rule 35(3).

36. 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 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]

37. 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 and explains why that is so then, by doing so, he has complied with the Rule 35(3) notice.

38. The Applicant in paragraph 2 of the Applicant’s heads of argument, states that the Respondents have failed to provide the Applicant with the documents requested in the Applicants said notice with the exception of only the docket that has so far been discovered.

39. However, contrary to what the Applicant submits, the correct legal position is as follows: the fact that the documents have not been provided does not in itself

mean that the First and Second Respondents have failed to comply with their obligations under the Rule 35(3) notice, which according to the provisions of Rule 35(3) is sufficiently complied with if the recipient “state[s] 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”

40. Contrary to the submissions made in the Applicant’s heads of argument to the effect that “*the First and Second Respondents have not advanced any valid reasons under Rule 35(7) as to why they are not in possession of the documents as requested by the Applicant because it falls within their domain*”, the First and Second Respondents have indeed in the affidavits given comprehensive reasons as to why they are not in possession of the requested documents.²⁰

41. Contrary to the submissions made in the Applicant’s heads of argument to the effect that : “*The First and Second Respondents conduct amounts to an abuse of Court processes and are unduly delaying the finalisation of the matter*”, the true position, in my view, is that it is rather the Applicant who has been unreasonable in its conduct in respect of not only bringing but persisting with this application.

THE QUESTION OF THE COURT’S GOING BEHIND THE AFFIDAVITS

42. During argument, the Applicant’s legal representative submitted that I am obliged to make a finding that the First and Second Respondents, contrary to what has been stated under oath on their behalf, are indeed in possession of Items 2 to 6 of the Rule 35(3) notice.

43. However, no adequate basis has been laid by the Applicant for the Court to go behind the First and Second Respondent’s evidence to the effect that they do not have Items 2 to 6 in their possession:

²⁰ Case Lines 29-103 at paras 5.2 to 5.5.

43.1. 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:

“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:

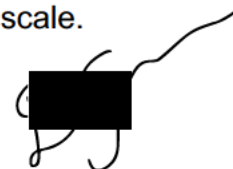
- (i) The discovery affidavit itself; or*
- (ii) The documents referred to in the discovery affidavit; or*
- (iii) The pleadings in the action; or*
- (iv) Any admissions made by the party making the discovery affidavit; or*
- (v) The nature of the case or the documents in issue”²¹.*

43.2. 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.

43.3. He also did not refer to or make submissions about the contents of the Applicant’s Replying Affidavit.

ORDER

44. The application is dismissed with costs on party and party scale.



D. GOODENOUGH

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

²¹ 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,.

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 23 May 2025

Appearances:

for the Applicant: Mr H.C. Makhubele

for the Respondent : Adv. Liphoto

Heard on: 6 May 2025

Delivered on: 23 May 2025