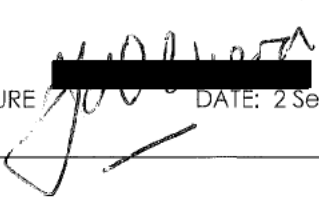




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE  DATE: 2 September 2025

Case No. 42568/2019

In the matter between:

**GRAND BRIDGE TRADING 74 (PTY) LTD
t/a RED APPLE FURNITURE**

Plaintiff/Respondent

and

COCHRANE STEEL PRODUCTS (PTY) LTD

Defendant/Applicant

JUDGMENT

D'OLIVEIRA AJ:

1 The applicant is Cochrane Steel Products (Pty) Ltd. The applicant is the defendant in the action to which this interlocutory application relates. The respondent is Grand Bridge Trading 74 (Pty) Ltd t/a Red Apple Furniture. The

respondent is the plaintiff in the action. In what follows, the parties will be referred to as in the action.

2 In this application, the defendant applies to set aside the plaintiff's application to compel dated 20 February 2024, as an irregular step.

3 In the application to compel, the plaintiff applies for an order compelling the defendant to discover:

"The electronic eml version of 'Email Message 3' sent by David Epstein of the Defendant, from the email address depstein@cochraneglobal.com to Ashton Pollard and Monty Rademeyer of Rademeyer Attorneys as well as Lex Cochrane and several other members of staff of the Defendant on 25 November 2022, as referenced in the Respondent's Cyanre Findings Report dated 12 April 2023."

4 In this judgment, the above will be referred to as "*Email 3*".

5 In the action, the plaintiff sues the defendant for damages in the amount of R6 302 837.89, being the alleged reasonable and necessary costs of repair of a fence installed by the defendant in order to restore it to the appearance and quality of "*RAL3001 signal red paint*".

6 In paragraphs 12 to 15 of the defendant's plea, the defendant pleads that the defendant had offered, and the defendant had accepted, a 15-year guarantee on the supplied material. The defendant pleads that the consequent agreement did not include a guarantee against discolouration of the coating of the fence.

7 In paragraph 3 of the replication, the plaintiff pleads that no agreement was concluded on the basis of the alleged guarantee.

8 The plaintiff pleads specifically that *“the plaintiff did not hear of, nor had sight of, the alleged ‘offered guarantee’ before the defendant’s plea was served; the document and its contents is accordingly denied and disputed”*.

9 The issues that arise on the pleadings, therefore, include whether the alleged guarantee was in fact sent to the plaintiff, and whether the parties concluded an agreement on the basis of the alleged guarantee.

10 Accordingly, on 13 October 2022, the defendant discovered an email apparently sent by the defendant’s Max Heinzelmann to the plaintiff’s Ismail Patel attaching the guarantee. The email is dated 15 July 2013. It will be referred to in this judgment as *“Email 1”*.

11 Then on 22 February 2023, the defendant discovered an email apparently sent by Ismail Patel to Max Heinzelmann on 15 July 2013, acknowledging receipt of his email. This email will be referred to in this judgment as *“Email 2”*.

12 Since the plaintiff pleads that *“the plaintiff did not hear of, nor had sight of, the alleged ‘offered guarantee’ before the defendant’s plea was served”*, the authenticity of Email 1 and Email 2 are in dispute.

13 In the circumstances, both parties have appointed experts to analyse Email 1 and Email 2.

14 The plaintiff learned about the existence of Email 3 when the draft report of the defendant’s expert was provided to it.

15 Email 3, which attaches Email 1 and Email 2, is an email sent by the defendant to its attorneys. In the application to compel, and on the basis of advice from

the plaintiff's expert, the plaintiff claims that it is imperative that it obtain the original electronic or eml version of Email 3, together with its attachments, in order to be able to definitively determine the authenticity of Email 1 and Email 2.

16 The plaintiff says that it is for this reason that, on 10 November 2023, the plaintiff delivered a Rule 35(3) notice requiring the discovery of Email 3. The plaintiff maintains that it is not interested in any of the privileged content of Email 3 or the email thread in which Email 3 is contained. It is interested in the disclosed portion of Email 3, the metadata of Email 3, and the two attachments.

17 The defendant refused production of Email 3 in answer to the plaintiff's Rule 35(3) notice on 24 November 2023 on the basis that Email 3 was "*without doubt privileged*". Over and above this, the defendant stated that Email 3 had no relevance to the dispute and that the plaintiff ought to be capable of verifying the authenticity of Email 1 and Email 2 with reference to its own records.

18 After a further exchange of letters, the plaintiff launched an application to compel discovery of Email 3 in terms of Rule 35(7) on 20 February 2024.

19 The defendant responded by delivering a notice of irregular step in terms of Rule 30 on 6 March 2024.

20 The current application by the defendant to set aside the plaintiff's application to compel follows on this notice of irregular step.

The grounds relied on by the defendant

21 The grounds on which the defendant asserts that the plaintiff's application to compel constitutes an irregular step are as follows:

- "1 *The plaintiff relies on uniform rule 35(7) and directs its application at testing the authenticity of evidence which the defendant avers at this stage is privileged as between attorney and client.*
- 2 *The defendant has responded to the plaintiff's notice in terms of uniform rule 35(3), in a letter dated 24 November 2023 and records that the email the plaintiff seeks is privileged as between attorney and client. The plaintiff is procedurally not entitled to apply under uniform rule 35(7) for the relief it does.*
- 3 *The plaintiff has invoked rule 35(7) to compel the defendant to make a privileged available to it for inspection and examination in order, so the plaintiff avers, to test the authenticity of evidence to be relied upon by the defendant at trial.*
- 4 *The plaintiff is not entitled to rely procedurally on rule 35 to test the authenticity of the defendant's evidence. It is at best entitled to dispute same in the appropriate manner at the appropriate time.*
- 5 *Uniform rule 35(9) provides the procedural mechanism where there is a dispute relating to the authenticity of evidence to be relied on by a party to the litigation.*
- 6 *Uniform rule 35(9) provides that, once invoked, the party wishing to rely on disputed evidence, shall be given the opportunity to provide such proof, as may be necessary, to satisfy the court as to the authenticity of the email before being entitled to use the evidence at trial.*
- 7 *The procedure provided for under rule 35(9) is not invoked in the procedural step advanced by the plaintiff.*

- 8 *In any event, to the extent that it could be alleged that the procedure under uniform rule 35(9) has been invoked, the defendant as the party intending to rely on the disputed evidence at trial is entitled and is required, in the face of a legitimate and competent challenge, to prove the authenticity of any disputed evidence, to the court.*
- 9 *It is not for the plaintiff to prove the authenticity or otherwise of the defendant's evidence. If the defendant fails to provide proof to the satisfaction of the court, it may not rely on the disputed evidence at trial.*
- 10 *Rule 35 does not provide the plaintiff with a mechanism to test the authenticity of the evidence to be relied upon by the defendant at trial."*

22 The underlining in the quotation above is in the original.

The relevant legal principles

- 23 In *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO*,¹ it was held that Rule 30(1) "*was intended as a procedure whereby hindrance to the future conduct of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed*".
- 24 It has long been held that Rule 30 applies only to irregularities of form, and not to matters of substance (*Singh v Vorkel* 1947(3) SA 400 (C), at 406, and *Odendaal v De Jager* 1961 (4) SA 307 (O), at 310F-G). This approach to the meaning and application of Rule 30 has been affirmed and applied in the Gauteng Division (see *Cochrane v City of Johannesburg* 2011 (1) SA 553

¹ 1981 (4) SA 329 (O), at 333G-H

(GSJ) para 30-31; see also *West Dune Properties 92 (Pty) Ltd v Kruger NO* [2025] ZAGPPHC 19 para 24-27).

25 In *BMW Financial Services South Africa (Pty) Ltd v Doola* [2025] ZAGPPHC 36, it was held that:

“An ‘irregular step’, as contemplated in rule 30(1), must be a procedural step which is taken in disregard of the rules, advances the process closer to completion and prejudicially affects the innocent party’s rights in the future conduct of their litigation.”

26 As indicated by the latter portion of the above definition in *BMW*, an irregular step will not be set aside if it does not have a prejudicial effect on the applicant’s rights in the future conduct of the litigation (see *BMW* para 19-21). In this regard, in *SA Metropolitan Lewensversekeringsmaatskappy*, it was held that:

“The exercise of the Court’s discretion has been consistently led by the presence or absence of prejudice in relation to the exercise of a party’s procedural right or duty to respond to a communication received, or to the taking of a next step in the sequence of permissible procedures to ripen the matter for proper orderly hearing. Where such prejudice is absent, a decision to set the irregular proceeding aside will not be given. On the contrary, the irregularity may be overlooked.”

Analysis

27 The suggestion that the application to compel is an irregular step because Email 3 is privileged is without merit.

28 Because Rule 30 deals with form and not with substance, the fact that Email 3
may be privileged does not cause the application to compel to be an irregular
step.

29 The defendant's reliance on privilege in grounds 1 and 2 above, is therefore
misplaced.

30 For the sake of clarity, I make no finding about whether Email 3 is privileged,
or whether the alleged privilege that attaches to Email 3 will mean that the
plaintiff's application to compel will be unsuccessful. That is for the court
hearing the Rule 35(7) application to decide.

31 The defendant's reliance on Rule 35(9) in grounds 5 to 7 is also misplaced.

32 Rule 35(9) provides:

"(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 being entitled to use them at the trial, but the party not admitting them may be ordered to pay the costs of their proof."

- 33 Rule 35(9) provides a mechanism by which a party can obtain admission of the authenticity of documents or tape recordings that it intends to adduce in evidence, prior to the trial. If a document or tape recording is not admitted in answer to a Rule 35(9) notice, then it must be proved. If it is admitted, then it need not be proved at trial. In prevailing practice, litigants frequently conclude agreements regarding the status of documents to achieve the same end.
- 34 Neither the existence of Rule 35(9), nor the fact that Rule 35(9) has not been utilised by the parties in this instance, causes the plaintiff's application to compel to constitute an irregular step.
- 35 That leaves the main objection by the defendant, which is contained either implicitly or explicitly in grounds 1 to 4 and 8 to 10 of the notice of objection. This is that the plaintiff is not procedurally entitled to rely on Rule 35(7) in order to obtain a document for the purpose of testing the authenticity of evidence to be relied on by the defendant at trial.
- 36 This main objection is also without merit.
- 37 Email 3, and in particular its attachments and the metadata contained in the eml version, is *prima facie* relevant to issues that arise squarely on the pleadings.
- 38 According to the plaintiff in the as-yet unanswered founding affidavit in the application to compel, Email 3 will show whether Email 1 and Email 2 are authentic, and in turn whether an agreement was concluded between the parties on the basis of the guarantee contained in Email 1.

- 39 Rule 35(15) provides that a document includes “*any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act, 2002*”.
- 40 Email 3, inclusive of its attachments and its metadata, therefore constitutes a document for the purposes of Rule 35.
- 41 The plaintiff was therefore entitled to deliver a Rule 35(3) notice requiring the discovery of Email 3 as a document, in the possession of the defendant, that is relevant to issues that arise on the pleadings.
- 42 In addition, the plaintiff’s launching of the application to compel in terms of Rule 35(7) in reaction to the defendant’s refusal to discover Email 3 in answer to the Rule 35(3) notice, was procedurally unobjectionable.
- 43 This is not to say that plaintiff will necessarily be successful in obtaining the discovery of Email 3 in the application to compel. That will be for the Court hearing that application to decide.
- 44 The suggestion in the grounds of objection, which was developed in argument, that it is necessary for the plaintiff to wait until the defendant decides whether to rely on Email 1 and Email 2 before the plaintiff is entitled to compel the discovery or production of Email 3, is not correct.
- 45 The pleadings are closed. The parties are in the process of preparing for trial. In that process, they are entitled to utilise the procedures provided by the Rules to obtain the discovery and production of the documents that are relevant to the issues raised by the pleadings, either in order to prepare their own case, or in order to prepare to meet the case pleaded by the other party.

That is what the plaintiff is attempting to do with recourse to Rule 35. It is entitled to do so.

46 During argument, the defendant's counsel relied on Rule 36(6).

47 Rule 36(6) reads:

"If it appears that the state or condition of any property of any nature whatsoever whether movable or immovable, may be relevant with regard to the decision of any matter at issue in any action, any party may at any stage give notice requiring the party relying upon the existence of such state or condition of such property or having such property in that party's possession or under that party's control to make it available for inspection or examination in terms of this subrule, and may in such notice require that such property or a fair sample thereof remain available for inspection or examination for a period of not more than 10 days from the date of receipt of the notice."

48 The defendant's counsel submitted that, if the plaintiff was entitled to Email 3, it was only entitled to its production in terms of Rule 36(6) and then only at a later stage.

49 This submission is incorrect.

50 Firstly, Email 3 is undeniably a document within the meaning of Rule 35(15). Rule 35 is the primary mechanism by which litigants can obtain the discovery and production of documents.

51 It may be that the eml version of an email may also fall within the definition of "immovable property" in Rule 36(6). But it is not necessary to decide this for the purposes of this application.

52 Because even if the eml version of an email constitutes “*immovable property*” for the purposes of Rule 36(6), this does not preclude it from being a document for the purposes of Rule 35, the discovery of which is compellable in terms of that Rule.

53 Secondly, as I understand the application to compel (which is attached to both the founding and the answering affidavit in the current application), the plaintiff seeks discover of Email 3 because its *content* is relevant to an issue on the pleadings, not because its “*state*” or “*condition*” is of relevance to a matter in issue. Rule 36(6), which applies to the latter, is not of application.

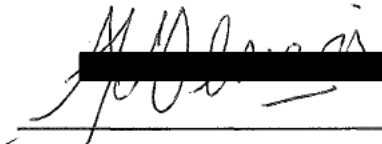
54 Thirdly, Rule 36(6) does not only apply “*at a later stage*”. It may be invoked “*at any stage*”. As stated above, the pleadings are closed and the parties are now busy with trial preparations.

55 Finally, even if it is assumed in favour of the defendant that Rule 36(6) applies, the submission by the defendant that the plaintiff might be entitled to the production of Email 3 in terms of Rule 36(6), provides another reason why the current application falls to be dismissed: the absence of prejudice.

56 For if the plaintiff is entitled to the production of the eml version of Email 3 under Rule 36(6), then the defendant cannot claim that the application to compel the production of Email 3 will cause it to suffer prejudice in the future conduct of the litigation.

57 For the above reasons, the following order is made:

“*The application is dismissed with costs on party and party scale B.*”


A J D'OLIVEIRA

Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 2 September 2025.

HEARD ON: 4 June 2025

DECIDED ON: 2 September 2025

For the Applicant: R S Willis SC and K Hardy
Instructed by Rademeyer Attorneys

For the Respondent A Vorster
Instructed by Martin Vermaak Attorneys Inc