

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/40889

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

7 NOVEMBER 2025

Judge Dippenaar

In the matter between:

MINISTER OF POLICE

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN
POLICE SERVICE

COMMANDING OFFICER OF THE SOUTH AFRICAN
POLICE SERVICES POLICE STATION DOBSONVILLE
THE STATE ATTORNEY

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

and

**MIDNIGHT STAR TRADING 437 CC T/A
BRAAMFISCHER SPAR**

RESPONDENT

IN RE:

MIDNIGHT STAR TRADING 437 CC T/A BRAAMFISCHER SPAR

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

**NATIONAL COMMISSIONER OF SOUTH AFRICAN
POLICE SERVICE**

SECOND DEFENDANT

**COMMANDING OFFICER OF THE SOUTH AFRICAN
POLICE SERVICES POLICE STATION DOBSONVILLE**

THIRD DEFENDANT

THE STATE ATTORNEY

FOURTH DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 07th of NOVEMBER 2025.

DIPPENAAR J:

[1] The applicants seek to compel the respondent to discover certain documents referred to in their notice in terms of r 35(12) and r 35(3), served on the applicants on 21 June 2023. The respondent opposes the application. It contends that its response constituted due compliance with the notice and that the application should accordingly be

dismissed with costs. In that response, the respondent contended that the documents were not in its possession and their whereabouts were unknown.

[2] At the hearing, the parties agreed that the application should be adjudicated on the basis of r 35(3) and that r 35(12) was not applicable. The applicants further abandoned reliance on some of the documents sought in their original notice. Four categories of documents remained: the respondent's audited financial statements for the financial years ending February 2018 to February 2022; its tax returns for the financial years ended February 2018 to February 2022; insurance claims submitted to SASRIA and CCTV footage available from 7 to 18 March 2019. Certain ancillary relief was sought in the event the respondent did not comply with the compelling order, together with costs.

[3] Two issues require adjudication: First, whether condonation should be granted to the respondent for the late delivery of its answering affidavit. Second, whether the applicant was entitled to a compelling order.

[4] I deal with the condonation issue first. The respondent did not comply with the r35(3) notice within the stipulated ten day period. Accordingly, the applicants launched a compelling application on 26 July 2023. The respondent only delivered an affidavit responding to the notice on 26 June 2024. That affidavit was deposed to by the respondent's attorney. It delivered an answering affidavit to the application, together with a condonation application for its late delivery on 5 September 2024. On 3 October 2024, the respondent delivered a confirmatory affidavit by one of its employees supporting its response to the said notice. It was contended that its failure to deliver an answering affidavit was not prejudicial to the applicant that it was an "oversight by its legal team". At the hearing, respondent's counsel, properly in my view, clarified the position that it was a conscious decision, given the respondent's stance that it had properly responded to the notice.

[5] The respondent's conduct is open to substantial criticism and it did not fully or properly explain the reasons for its default. Despite there being no substantial prejudice

on the part of the applicants that cannot be addressed by way of an appropriate costs order, it was still incumbent on the respondent to show good cause. Condonation is not there for the mere asking.¹ A party seeking condonation must show sufficient cause entitling it to a court's indulgence. Of great significance is that the explanation must be reasonable enough to excuse the default. Here the delay was occasioned by the stance adopted by the respondent.

[6] Given all the facts I am not persuaded that condonation for the late filing of the answering affidavit should be granted to the respondent. The respondent's answering affidavit in any event does not take the matter any further, even if it had been admitted. No attempt was made therein to clarify any of the responses given to the applicant's r 35(3) notice. Instead, it was merely repeated that primarily the respondent does not have the documents in its possession. In relation to the tax returns, it was contended that 'it is not necessary for purposes of determining quantum in the respondent's claim against the applicants.'

[7] I turn to the merits of the application. Despite the applicant limiting the ambit of the documentation sought at the hearing, the respondent maintained its stance that the application should be dismissed.

[8] The relevant principles are summarised in *Louw v Grobler and Another*² and it is not necessary to repeat them. Of particular relevance to the present context is the principle set out in para 15 as follows:

'The Court will go behind the affidavit only if it is satisfied-(i) from the discovery affidavit itself' or (ii) from the documents referred to in the discovery affidavit; or (iii) from the pleadings in

¹ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) paras 20-23.

² *Louw v Grobler and Another* [2021] ZAFSHC 223 and the authorities cited in paras 10 to 17.

the action; or (iv) from the admissions made by the party making the discovery; or (v) from the nature of the case or the documents in issue.'

[9] This conforms with the principle set out in *Rellams (Pty) Ltd v James Brown & Hamer Ltd*³ that although courts should generally not go behind the party's affidavit that documents are not relevant, such affidavit is not conclusive. In *Rellams*, it was also held that discovery affidavits must be made by the parties themselves and not by their attorneys unless special circumstances exist.⁴ The respondent only belatedly complied with this requirement. The applicant's criticism on this issue is thus justified.

[10] In the present instance, the respondent's claim against the applicants is a damages claim based on a decrease in gross profit for periods ranging from March 2019 to February 2021. It pleads that *'the damages are calculated by comparing the average daily loss of gross profit calculated over the period as stated above and comparing it with the total daily gross profits for the same period for the previous year, duly adjusted by the assumption that the plaintiff's net income would have continued to increase by R1 062 856.00'*.

[11] In support of its claim it relies on an expert actuarial report compiled in December 2020. The report is qualified that it may be amended with additional information. Since that date, nearly five years has passed. According to the actuarial report it was anticipated that the respondent would be fully operational with effect from 1 March 2021.

[12] It is a statutory requirement for the respondent to prepare annual financial statements. The statements sought relate only to a period up to 2022, some years ago. The averment that the respondent is not in possession of annual financial statements other than the limited documentation discovered pertaining to the February 2019 financial year, is unconvincing. No attempt was made to proffer any explanation for any such state of affairs. The respondent's averments pertaining to its annual tax returns, do not pass

³ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

⁴ *Ibid* 558B-D.

muster. They are relevant to the issues in dispute and the submission of such returns is similarly a statutory requirement. The bald claim to confidentiality does not bear scrutiny.

[13] In the documentation discovered by the respondent, reference is made to payments made pursuant to a SASRIA claim. In order to obtain such payments, a claim must have been submitted. Such documents should reasonably be in the possession of the respondent. The same applies to the CCTV footage, referred to in a preliminary report discovered by the respondent.

[14] In all these circumstances a court may go behind the oath of the respondent as enunciated in *Louw*. There are in my view reasonable grounds for supposing that the respondent has the documents sought in its possession. Such documents are clearly relevant to the disputes between the parties and the claim advanced by the respondent.

[15] As pointed out by Twala J in *Alf's Tippers CC v Martha Susanna Steyn*:⁵ *'The purpose of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. ...Moreover it is every party's right to be given a fair trial as enshrined in the Bill of rights in the Constitution...'* Later it was held:⁶ *'There is a plethora of authority that litigation is not a game where the one party takes advantage of the other.'*

[16] Considering the relevant principles and the facts, I conclude that the compelling application must succeed. Costs follow the result. The applicant has been substantially successful in its compelling application. The respondent in its condonation application, seeks an indulgence for its non-compliance with the rules. Given that the respondent's conduct in relation to the application fell short of the standards expected, it should be held

⁵ *Alf's Tippers Cc v Martha Susanna Steyn* [2023] ZAGPJHC 527 para 5.

⁶ *Ibid* para 9 .C

liable for the costs of that application. Considering all the facts, it would be fair to the respective parties that counsel's costs be determined on scale B.

[17] The following order is granted:

[1] The respondent's condonation application for the late delivery of its answering affidavit is refused with costs;

[2] The respondent is ordered to make discovery on oath in response to the applicants' notice in terms of Rule 35(3) within ten (10) days of service of this order.

[3] The respondent is directed to discover the following documents:

a. Its audited financial statements of the financial years:

- i. 1 March 2017 - 28 February 2018 for both Tops and Spar
- ii. 1 March 2018 - 28 February 2019 for both Tops and Spar
- iii. 1 March 2019 - 28 February 2020 for both Tops and Spar
- iv. 1 March 2020 - 28 February 2021 for both Tops and Spar
- v. 1 March 2021 - 28 February 2022 for both Tops and Spar

b. Its Tax Returns for the financial years:

- i. 1 March 2017 - 28 February 2018
- ii. 1 March 2018 - 28 February 2019
- iii. 1 March 2019 - 28 February 2020
- iv. 1 March 2020 - 28 February 2021
- v. 1 March 2021 – 28 February 2022

c. Insurance claims submitted by the respondent to SASRIA in relation to the incident that occurred as a result of the strike action;

d. CCTV footage available for the period 7 March 2019 to 18 March 2019.

[4] In the event of the respondent failing to comply with 2 and 3 above, the applicants are granted leave to approach the Court on the same papers, duly supplemented where necessary, for an order in terms whereof the Plaintiff's claim under the case number 40889/2021 be struck out with costs;

[5] The costs of this application, together with the costs of 7 October 2024 when the matter was removed from the unopposed roll are to be paid by the respondent on scale B.


EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 06 NOVEMBER 2025

DATE OF JUDGMENT : 07 NOVEMBER 2025

APPEARANCES

APPLICANT'S COUNSEL : T. MAKOLA

APPLICANT'S ATTORNEYS : STATE ATTORNEY

RESPONDENTS' COUNSEL : X VAN NIEKERK

RESPONDENTS' ATTORNEYS : ML SCHOEMAN ATTORNEYS