



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no.: D4464/2022

In the matter between:

AIMESSA INVESTMENTS

PLAINTIFF

t/a **ABBA MOOSA WHOLESALERS**

and

ETHEKWINI MUNICIPALITY

DEFENDANT

ORDER

The following orders are granted:

1. The application is dismissed.
 2. The defendant is directed to pay the plaintiff's costs up to, but not including, 31 July 2024 on Scale B.
 3. Thereafter, each party shall bear its own costs.
-

JUDGMENT

BRAMDHEW AJ

Introduction

[1] This is an application brought by the plaintiff in terms of Uniform Rule 35 for an order striking out the defendant's defence in an action pending between the parties. .

[2] The issues for determination are:

- a. whether the defendant complied with an Order of this Court directing it to deliver a response to the plaintiff's Notice in terms of Uniform Rules 35(3) and 35(6).
- b. if not, whether the non-compliance was wilful.
- c. the prejudice that the plaintiff would suffer if the defence is not struck out as opposed to the prejudice that the defendant would suffer if its defence is struck out.
- d. if the defence is struck out, whether judgment can be granted in favour of the plaintiff.

The background facts

[3] The plaintiff is the occupier of a building at 3[...] F[...] D[...] Road, Overport, Durban ("the premises") which it occupies for trading purposes. On 10 May 2021, there was a fire that broke out on the second floor of the building at 3[...] F[...] D[...] Road, Overport, Durban. This building is adjacent to the premises. On 5 May 2022, the plaintiff instituted action against the defendant pleading that, as a result of the negligent conduct of the defendant (and its employees), the fire spread to the premises and caused substantial damage to the premises and the plaintiff's stock, fixtures, fittings, machinery and equipment. On 5 July 2022, the defendant delivered a plea setting out details of the steps taken when its employees arrived at the scene of the fire. The defendant has denied

liability to the plaintiff. On 23 October 2023, the plaintiff served an amended Particulars of Claim. On 14 November 2023, the defendant delivered its consequentially amended Plea. Thereafter, the discovery processes were implemented, which gives rise to this application.

[4] For convenience, I set out the timeline of the exchange of documents thereafter:

- a. on 13 October 2022, the plaintiff delivered notices in terms of Uniform Rules 35(1), (6), (8) and (10).
- b. on 4 December 2023, the plaintiff delivered a Request for Further Particulars to the defendant's Plea for the purposes of preparation for trial.
- c. on 12 December 2023, the plaintiff delivered a notice in terms of Uniform Rules 35(3) and (6) – which notice is dated 6 December 2023.
- d. on 4 March 2024, the defendant delivered its reply to the plaintiff's Request for Further Particulars.
- e. on 11 March 2024, the plaintiff served a notice in terms of Rule 30A in respect of the Request for Further Particulars, indicating that the defendant's reply lacked detail and sufficiency necessary to enable the plaintiff to properly prepare for trial.
- f. on 27 March 2024, the defendant served it's a Reply to the Request for Further and Better Particulars.

[5] What serves before me relates to the plaintiff's notice in terms of Uniform Rules 35(3) and 35(6) and I need to consider the content of the notice, the relevant portion of which I reproduce below:

"KINDLY TAKE NOTICE that the Plaintiff believes that there are, in addition to the documents disclosed in the Defendant's Discovery Affidavit, certain documents, audio and video recordings which are in possession of the Defendant, and which are relevant to the matter in question in this action.

The Defendant is requested to make the documents, audio and video recordings listed below, available for inspection in accordance with Rule 35(6) or to state under oath or affirm within ten (10) days that such documents are not in the Defendant's possession, in which event, the Defendant shall state their whereabouts if known: -

- 1. ESS Incident Report in relation to Incident No. I2105100004.*
- 2. Emergency Call Centre Occurrence Book for the period 10/05/2021 to 13/05/2021, both dates inclusive.*
- 3. Occurrence book for the Durban Central Fire Station for the period 10/05/2021 to 13/05/2021 inclusive.*
- 4. Audio Recordings of all the Radio Messages in relation to incident No. I2105100004 received by or emitted from the Emergency Control Centre.*
- 5. Report compiled by the Fire Safety Officer in respect of incident No. I2105100004.*
- 6. All video recordings taken at the site of the aforesaid incident over the period 10/05/2021 to 13/05/2021."*

[6] On 29 April 2024, the plaintiff sought and obtained the following Order, by consent between the parties:

"

- 1. The respondent is directed to comply with the applicant's notice in terms of rules 35(3) read together with rule 35(6) (annexure "ME2" to the founding affidavit) within ten (10) days from the date of service of this order upon it.*
- 2. In the event of the respondent failing to comply with paragraph 1 above, the applicant is hereby granted leave to apply on the same papers, duly supplemented as necessary, for an order striking out the respondent's defence and granting judgment in favour of the applicant against the respondent as per prayers 1-3 of the applicant's amended particulars of claim dated 19 October 2023.*
- 3. The respondent is directed to pay the costs of this application on the party and party scale "A".*

- [7] Thereafter, the defendant delivered its response to the plaintiff's rule 35(3) notice, dated 8 May 2024 and reproduced below:

"AD PARAGRAPH 1

Item "A": Attached.

AD PARAGRAPH 2

Item "B" Attached.

AD PARAGRAPH 3

Item "C": Attached.

AD PARAGRAPH 4

The Defendant is not in possession of the audio recordings.

AD PARAGRAPH 5

Item "D": Attached.

AD PARAGRAPH 6

Item "E": Attached."

- [8] Items A, B, C and D were attached to the notice delivered by the defendant. Item "E" was not attached.

- [9] On 16 May 2024, the plaintiff's attorney sent a letter to the defendant's attorney, the relevant portion of which stated:

"3. We are instructed as follows:

- a. Your Client's abovementioned reply remains non-compliant with the Rules of Court;*
- b. Any "reply" ought to have been done on affidavit as required by the Rules of court and not on Notice;*

c. *Notwithstanding the above, the reply is non-compliant in merit in the following respects:*

- i. *Ad Paragraph 4 – the reply is incomplete in that specific reference is made in annexure “B” to certain radio messages (wherein the contents are explicitly recorded in the Occurrence Book printout) and therefore, should your Client not be in possession thereof, it is required to adduce to an affidavit confirming the same with a reasonable explanation. It has thus far failed to do so;*
- ii. *Annexure “D” – has not satisfied the request made by our Client in that the pictures mentioned in the report are not attached thereto as requested;*
- iii. *Ad Paragraph 6 – The reply has not satisfied the request made by our Client in that Annexure “D” makes mention of multiple forms of evidence collected from the scene which has not been provided.”*

[10] On 20 May 2024, the defendant's attorney sent an email requesting an indulgence to comply with the order. The relevant portion reads:

“Please note that to date we have not received the information requested from our client.

However, our client is liaising with the relevant officials to gather all the information.

Can you kindly grant us an extension to comply with the Court Order?

We anticipate that we will be able to issue a notice to inspect the requested information on or before 30 May 2024.”

[11] By email response on 21 May 2024, the plaintiff's attorney indicated:

“2. Client instructs us as follows:

- a. *A substantial period of time has lapsed regarding the requests;*

- b. Notwithstanding an order being granted, your Client remains non-compliant;*
- c. Accordingly, our Client will be proceeding in terms of paragraph 2 of the order dated 29 April 2025.05.21 (sic)."*

[12] Thereafter, the defendant's attorney advised the plaintiff's attorney that its email was sent to its client to apply pressure, and an indulgence was sought. This was, once again, denied by the plaintiff on 24 May 2024.

[13] On 24 May 2024, the plaintiff served its application to strike out the defendant's defence.

[14] On 18 July 2024, the defendant delivered a Notice to Inspect in the following terms:

"PLEASE TAKE NOTICE that you may inspect the following information requested in your notice of 6 December 2023:

- 1. The video recordings mentioned in paragraph 6.*
- 2. Audio recordings of all the radio messages.*
- 3. Photographs..."*

[15] On 19 July 2024, the defendant's attorney requested that the plaintiff's application to strike out the defendant's defence be withdrawn and it tendered the wasted costs of the application. On 25 July 2024, the plaintiff's refused the request and rejected the tender of costs.

[16] On 29 July 2024, the defendant's attorney addressed a letter stating:

"We confirm that your office complied with the notice to inspect on Friday, 26 July 2024.

The information was transferred into a USB that was in your representative's possession.

This morning, 29 July 2024, we received a notice of set down for the interlocutory application...

[17] On 30 July 2024, the plaintiff addressed a further letter to the defendant, the relevant portions of which read as follows:

“3. We record that you have to date failed to deliver an answering affidavit in the application notwithstanding the expiry of the time period for that purpose was some time ago

...

8. Your client failed to deliver an affidavit in which it dealt with the situation of its possession of the audio recordings referred to in our Client’s notice in terms of R35(3).

...

10. The recent notice to inspect, which significantly was delivered grossly out of time adverted to audio recordings that were tendered for inspection and copying.

11. The without prejudice inspection exercise conducted by our Client revealed no audio recording.

12. This belied your Client’s notice to inspect in relation to audio recordings.

13. The tender of inspection of audio recordings was in any event inconsistent with your Client’s formal response to the Court Order to the effect that it was not in possession of any audio recordings. ”

(my underlining for emphasis)

[18] It is common cause that the parties discovered that the incorrect information had been inspected on 26 July 2024. At the hearing of the matter, Counsel for both parties agreed that, pursuant to that discovery, the defendant tendered further information on a USB device.

[19] On 31 July 2024, the plaintiff’s attorneys indicated “*We confirm the further information was received without prejudice to Client’s rights.*” (my underlining for emphasis).

[20] The plaintiff contends that:

- a. the reply to its rule 35(3) and (6) notice was not on oath (despite accepting the documents provided in the defendant's notice).
- b. audio and video recordings referred to in the documents provided to the plaintiff were not simultaneously provided.
- c. the defendant tendered for inspection audio recordings despite indicating in its Rule 35 response that it did not have any.
- d. despite delivery of further information (pursuant to the discovery that incorrect information was tendered for inspection), the defendant has still not complied with the plaintiff's notice and the Court Order, and the defendant has not set out in what way it contends that it has complied.

[21] The defendant contends that:

- a. despite its response not being on affidavit, it has complied with the delivery of the requested documents.
- b. the defendant was not in possession of each and every audio or video recording that may have been referred to as its employees may not have been the parties which made such recordings.
- c. once the error in provision of incorrect information for inspection was discovered, the defendant gave the plaintiff the correct information.
- d. the plaintiff's response on 31 July 2024 confirmed that it had received the further information.
- e. the defendant cannot ascertain what was deficient with the further information provided for inspection.

[22] It is against this background that I am required to determine whether the defendant has complied with the notices and the Court Order.

The legal framework

[23] Uniform Rule 35(3) states that:

“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.”

[24] Uniform Rule 35(6) states that:

“Any party may at any time by notice in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver within five days, to the party requesting discovery, a notice in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of such party’s attorney or, if such party is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers’ books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party’s failure to produce any such document or tape recording for inspection shall preclude such party from using it at the trial, save where the court on good cause shown allows otherwise.”

[25] Uniform Rule 35(7) states that:

"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."

[26] In *Howard v Blumenthal*¹, the Court considered Rule 35(7) and stated:

[17] *Rule 35(7) must be interpreted purposefully and in accordance with the guidelines established in Natal Joint Municipal Pension Fund vs Endumeni Municipality 2012 (4) SA 593 SCA. Put simply the court has a discretion whether to order compliance or to strike. This is made clear by the words used in the section namely "The court may order compliance and failing such compliance may dismiss the claim or strike out the defence."*

[18] *In Continental Ore Construction vs Highveld Steel & Vanadium Corporation Ltd 1971 (4) SA 589 (W) at 594 H, the court held that neither party has an absolute right to discovery the court has a discretion whether or not to order compliance with the rule.*

[19] *In Burmah Oil Co Ltd v Governor and Co of the Bank of England [1980] AC1090 at 1145 Lord Scarman said:*

"Although in the High Court discovery of documents is automatic in most civil litigation, this is no more than a convenient practice ordered and regulated by the Rules of Court: See RS 024, and the recent decision of this House in Science Research Council v Nasse [1980] AC1028. Discovery of documents remains ultimately a matter of the discretion of the Court."

[20] *A court may not grant an application to strike out unless it is satisfied that the Applicant will be prejudiced in the conduct of the claim or defence if the application is not granted (See Putco Ltd v TV & Radio Guarantee Co Pty Ltd 1984 (1) SA 443 (W)). Although this case dealt*

¹ (44102/2019) [2021] ZAGPJHC 363 (3 June 2021)

with strike out as regulated in Rule 23(2) and Rule 6(15) it is in my view also relevant for striking in terms of Rule 35(7). The Applicant must prove prejudice. This is not the case in the present matter.”

[27] In *Leask v East Cape Forest Products t/a Highbury Treated Timbers*², Plasket J (as he then was) stated (although in reference to Uniform Rule 31(4)):

“Three points warrant mention. The first is that the Rule applies not only where there has been a complete failure to furnish particulars, but also in the ostensibly less serious instances of failing to comply timeously or sufficiently. Secondly, it is clear that the ultimate remedy, the dismissal of an action or the striking out of a defence, is a drastic remedy. Thirdly, it is clear that the power to grant such a remedy is discretionary and that discretion must, no doubt, be exercised judicially.”

Application to the facts

[28] The defendant contends that it has complied with the Order directing it to respond to the plaintiff's rule 35(3) and 35(6) notices.

[29] In respect of the rule 35(3) notice, the defendant accepts that its response should have been on affidavit and was unable to provide any reason for failing to do so. Despite this non-compliance with the formal requirements of the rule, the defendant maintains that it has nonetheless delivered a substantive response.

[30] The plaintiff contends that documents provided in the defendant's notice and annexed as “B” and “D” referred to audio and video recordings that were not simultaneously provided. The defendant contends that it does not possess all such recordings, as its employees may not have been the creators of these materials. At the hearing, I enquired whether the plaintiff had considered serving a further notice in terms of Uniform Rules 35(3) or 35(6) upon learning

² (1285/07) [2008] ZAECHC at pages 6-7

of the existence of recordings referred to in the documents delivered by the defendant. *Mr Stewart*, the plaintiff's counsel, submitted that this was unnecessary, as such materials should have been disclosed from the outset.

- [31] There can be no dispute that the documents annexed to the defendant's response as "A", "B", "C" and "D" are the documents requested by the plaintiff in its notice. However, the plaintiff maintains the view that the recordings and/or pictures mentioned in annexures B and D should have been provided, despite not having requested pictures in its notice in terms of Uniform Rules 35(3) and 35(6).
- [32] In response to the rule 35(6) notice, the defendant made documentation available for inspection. At the hearing of the matter, both Counsel agreed that the term "documentation" may encompass audio and video recordings. Upon inspection, the parties discovered that some information initially provided was incorrect. Further information was then tendered by the defendant, which was inspected by the plaintiff.
- [33] The plaintiff alleges that the documentation remains incomplete but has not specified in what respects. At the hearing, *Mr Stewart* submitted that the defendant should have itemised all documentation tendered for inspection to demonstrate full compliance. However, neither party has assisted the Court by clarifying precisely what was made available and what was inspected. A bare assertion of insufficiency, without any particularity, is unhelpful.
- [34] The plaintiff also maintained that a further difficulty arises in the defendant's responses. On the one hand, it tendered audio recordings for inspection; on the other, in its rule 35(3) response, it stated that it does not possess these recordings. To my mind, the tender of audio recordings demonstrates an attempt by the defendant to comply. The plaintiff appears to place undue emphasis on a procedural issue rather than engaging with the substance of the defendant's response.

[35] The defendant has not fully complied with the court order, particularly regarding the requirement to submit an affidavit in terms of rule 35(3). However, it has delivered the requested documents.

[36] Following this, the defendant also made documentation available for inspection, an opportunity of which the plaintiff availed itself. The Court has not been provided with any specific details regarding what was tendered, apart from the plaintiff's assertion that it was insufficient. I cannot determine whether there was any non-compliance and, if so, whether it was wilful.

[37] The defendant has made efforts to comply with the plaintiff's requests. It initially provided further particulars and subsequently supplemented them with better particulars. It responded to the rule 35(3) notice, and later tendered additional documentation for inspection, albeit after the Court Order was granted. Moreover, the defendant's attorneys sought an extension to obtain further information.

[38] In these circumstances, I cannot conclude that the defendant's non-compliance was wilful.

[39] The Court also enquired of *Mr Stewart* regarding the issue of prejudice. He submitted that it was irrelevant to this determination. I do not agree. The case of *Howard v Blumenthal*, which the plaintiff itself cited in its heads of argument, specifically considers prejudice as a relevant factor. There is no evidence before me demonstrating that the plaintiff will suffer prejudice if the application is not granted. By contrast, the defendant faces significant potential prejudice. The plaintiff's claim amounts to over R16 million, with serious financial implications, particularly when public funds are involved.

Conclusion and costs

[40] While the defendant has taken steps to comply with the plaintiff's requests and the Court Order, it ought to have followed the rules from the outset, particularly by providing a response to the rule 35(3) notice on affidavit. The delays in compliance could have been avoided had the defendant followed the

procedural requirements timeously. However, the documents requested by the plaintiff were provided in the defendant's response.

[41] After inspection of the tendered documents, the plaintiff could have indicated in what respects it alleges that the documentation provided was incomplete. This would have assisted both the defendant and this Court in determining the extent of non-compliance, if any, or wilfulness. The video and audio recordings requested in the plaintiff's rule 35(3) and 35(6) notice may have been included in the documentation tendered and inspected, but this Court has not been given that information.

[42] On 8 May 2024, the defendant provided a response to the plaintiff's notice, although not on affidavit. On 24 May 2024, the plaintiff served its application to strike out the defendant's defence. Thereafter, the defendant tendered documentation for inspection. In its letter dated 30 July 2024, the plaintiff records that the defendant delivered a '*formal response to the Court Order*'. On 31 July 2024, the plaintiff acknowledged that further information was received.

[43] The defendant only responded to the request for the inspection after institution of the plaintiff's application to strike out its defence. However, once in receipt of the documentation, the plaintiff failed to indicate in what manner it was insufficient. Accordingly, both parties bear some responsibility for the hearing of this application on the opposed roll. In the exercise of my discretion, I am of the view that whilst it is appropriate that the defendant pays the costs of this application until 31 July 2024, thereafter each party should bear its own costs in the interests of justice.

Order

[44] The following orders are granted:

1. The application is dismissed.

2. The defendant is directed to pay the plaintiff's costs up to, but not including, 31 July 2024 on Scale B.
3. Thereafter, each party shall bear its own costs.

BRAMDHEW AJ

Case information

Heard on: 4 March 2025

Judgment delivered: 19 March 2025

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