



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2024 -105499

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED
26/01/2026

DATE

SIGNATURE

In the matter between:

TENDAMUDZIMU MANFRED NEMUKULA

APPLICANT

and

JUAN TREPTOW

RESPONDENT

JUDGMENT

BHOOLA AJ,

Introduction

[1] This matter concerns an interlocutory application in terms of Rule 35(7) of the Uniform Rules of Court to compel the respondent, who is the defendant in the main action, to serve and file a discovery affidavit in terms of Uniform 35(1), within ten (10) days from date of service of this order.

Background facts

[2] This application arises from a pending action in which the applicant instituted a claim against the respondent, who in turn delivered a counterclaim.

[3] The pleadings were closed on 24 January 2024.

[4] On 27 January 2025, the applicant served a notice in terms of Rule 35(1) on the respondent, calling upon him to make discovery on oath of all documents relevant to the matters in dispute. The *dies* for filing expired on 25 February 2025, without delivery of the discovery affidavit.

[5] On 28 February 2025, following correspondence from the applicant's attorneys, the respondent's attorney served an unsigned discovery affidavit, indicating that a signed version would follow. The affidavit, however, was purportedly deposed to by Mr Clement Dankuru, a legal specialist for Hollard Insurance Company, a third-party insurer which alleged that it had indemnified the defendant against damages arising from the motor vehicle collision. Mr Clement Dankuru averred that he did not have, and never had possession or control of documents relating to the action other than those listed in the schedule. The respondent raised no objection to the first part of the schedule but objected to the second part.



[6] The respondent contends that the application is moot, as discovery was effected.

[7] The applicant rejects the purported discovery affidavit, contending that it is defective and non-compliant with Rule 35. The affidavit was not deposed to by the respondent but by a third party, and thus constitutes inadmissible hearsay. The applicant maintains that the respondent must personally depose to the affidavit.

[8] The applicant accordingly seeks an order compelling the respondent to serve and file his discovery affidavit within ten (10) court days of service of this order, together with costs.

Issues

[9] The issues for determination are:

9.1 whether a discovery affidavit in terms of Uniform Rule 35, deposed to by Mr Clement Dankuru, a third-party insurer, claiming rights by virtue of subrogation but not cited or joined as a party to the proceedings, is valid for purposes of the action.

9.2 whether condonation should be granted for the late filing of the respondent's answering affidavit.

Legal Framework and General Principles

[10] Rule 35(1) provides that any party to action proceedings may, by notice, require another party to make discovery on oath within twenty (20) days of all documents

and tape recordings relating to any matter in dispute which are, or have at any time been, in the possession or control of such party.

[11] Rule 35(2) provides that the party required to make discovery must do so within twenty (20) days.

[12] The obligation to make discovery is expressly imposed upon a party to the proceedings. A discovery affidavit is not a mere formality, it is a sworn statement made under oath regarding the existence, possession, and whereabouts of relevant documents. It is a procedural mechanism designed to ensure fairness and transparency.

[13] The Uniform Rules do not contemplate that a non-party may assume the procedural obligations of a litigant absent formal joinder, third party notice or substitution.

[14] Rule 35 (7) provides “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.”

[15] Rule 1 defines “party” as including a plaintiff, defendant, applicant, respondent or other litigant, and, where the context requires, such party’s attorney with or without an advocate. .”



[16] The general principle is that a party to litigation must depose to the discovery affidavit, as it is a sworn statement of documents in their possession or control.¹

[17] The doctrine of subrogation is well established in our law of insurance. Once an insurer has indemnified its insured, it is entitled to step into the shoes of the insured and to exercise such rights as the insured had against third parties responsible for the loss.

[18] In *Ackerman v Loubser*², the court confirmed the doctrine of subrogation and recognised that where an insured recovers from a wrongdoer after being indemnified, the insurer is entitled to the benefit of that recovery to the extent of its payment.

[19] In *Commercial Union Insurance Co of SA Ltd v Lotter*³, the Court reaffirmed that subrogation entitles an insurer to enforce the insured's rights against third parties, but only to the extent that such rights validly existed in the insured.

[20] In *Rand Mutual Assurance Co Ltd v Road Accident Fund*⁴, the Supreme Court of Appeal confirmed that, in appropriate circumstances and absent procedural prejudice, an insurer may institute proceedings in its own name on the basis of subrogation.

[21] These authorities concern the substantive rights of an insurer following indemnification. They do not hold that subrogation, without more, confers procedural party status upon an insurer in existing litigation to which it has not been joined.

¹ Gorfinkel v Gross, Hendle & Frank 1987 (3) SA 766(C)

² 1918 OPD 31 at 36

³ 1999 (2) SA 147 (SCA)

⁴ (484/07) [2008] ZASCA 114; 2008 (6) SA 511 (SCA) ; [2009] 1 All SA 265 (SCA)

[22] More recently, the principle that only the litigant of record may depose to a discovery affidavit was reaffirmed in *Esperance Vineyards Farming (Pty) Ltd v Liebenlogistics (Pty) Ltd (WCC, 3 September 2025, unreported)*⁵. In that matter, the court rejected an insurer's attempt to depose to discovery on behalf of the insured, holding that subrogation does not dispense with the procedural requirement that the party to the litigation must swear to discovery. This authority confirms that, in both the main action and the counterclaim, the defendant must personally depose to discovery, even if only to state that the relevant documents are in the possession of Hollard Insurance. I am persuaded by this decision.

Evaluation

[23] In terms of Rule 1 of the Uniform Rules of Court, a "party" is confined to those litigants formally cited in the proceedings, namely the plaintiff, defendant, applicant or respondent. An insurer exercising rights of subrogation does not, by that fact alone, become a party to the litigation. The insurer remains a third party in relation to the proceedings unless expressly joined or substituted.

[24] As was emphasised in *Commercial Union Assurance Co of SA Ltd v Lotter*,⁶ subrogation entitles the insurer to act in the name of the insured, but it does not confer independent *locus standi*. Likewise, in *Rand Mutual Assurance Co Ltd v Road Accident Fund*,⁷ the Supreme Court of Appeal confirmed that subrogation is a derivative right, enforceable only through the insured, and does not render the insurer a party to the action. Accordingly, for purposes of discovery and procedural obligations, the insurer cannot be treated as a "party" under Rule 1 unless properly joined to the proceedings.

⁵ (17144/24) [2025] ZAWCHC 399 (3 September 2025)

⁶ 1999 (2) SA 147 (SCA)

⁷ (484/07) [2008] ZASCA 114; 2008 (6) SA 511 (SCA) ; [2009] 1 All SA 265 (SCA)

[25] Party status in litigation is a matter of procedure regulated by the Uniform Rules and the common law relating to joinder, substitution, and intervention.

[26] A person or entity becomes a party to proceedings by being cited in the pleadings, joined in terms of the Rules (including Rule 13 where applicable), or by order of court.

[27] Subrogation operates between insurer and insured. It regulates their internal rights and the insurer's entitlement to pursue recovery from third parties. It does not, without procedural steps, transform the insurer into a litigant in pending proceedings.

[28] To hold otherwise would permit entities not cited on the record, not subject to the court's jurisdiction as parties, and not exposed to adverse costs orders, to perform core procedural acts reserved for litigants.

[29] The discovery affidavit delivered in response to the applicant's Rule 35 notice was deposed to by a representative of an insurer who states that the insurer has indemnified the respondent and was subrogated to the respondent's rights in respect of the counterclaim.

[30] The insurer is not cited as a plaintiff, defendant, applicant, respondent, or third party in these proceedings. No order has been granted joining it as a party, nor has any Rule 13 third-party procedure been invoked in respect of it.

[31] The affidavit is not framed as one made by the respondent through an authorised officer or representative with knowledge of the respondent's records and documents. Instead, it is expressly made by the insurer in its own capacity.

[32] In these circumstances, the affidavit is not an affidavit by a "party" as contemplated in Rule 35.

[33] Discovery is foundational to the fairness of civil trials. The oath taken in a discovery affidavit binds the litigant to full and frank disclosure and exposes that litigant to the consequences of non-compliance, including adverse inferences, cost orders, and, in appropriate cases, the striking out of a claim or defence.

[34] Allowing a non-party to assume this role would blur lines of accountability. The opposing party is entitled to discovery from its opponent in the litigation, not from a separate juristic person whose procedural status is undefined.

[35] If an insurer wishes to participate directly in the conduct of the litigation by asserting its subrogated rights, the Rules provide mechanisms for joinder or substitution. Until such steps are taken, the procedural obligations remain those of the cited party.

Condonation

[36] The respondent seeks condonation for the late filing of his answering affidavit. The principles governing condonation are well established. In *Melane v Santam Insurance Co Ltd*,⁸ the Appellate Division held that the court must consider the degree

⁸ 1962 (4) SA 531 (A)



of lateness, the explanation therefor, the prospects of success, and the importance of the case. These factors are interrelated and must be weighed together.

[37] The delay in this matter was not excessive. The respondent filed his answering affidavit shortly after the expiry of the *dies*, and the explanation tendered is that the affidavit was prepared but not finalised in time.

[38] While the explanation is not entirely satisfactory, the prejudice to the applicant is limited, as the matter remains at an interlocutory stage. The interests of justice favour that the issues be ventilated on their merits rather than disposed of on a technicality.

Conclusion

[39] Subrogation entitles an insurer to the benefit of the insured's rights against third parties. It does not, without formal procedural steps, confer party status in pending proceedings.

[40] Rule 35 requires discovery to be made by a party to the litigation. A discovery affidavit deposed to by a non-party insurer, acting in its own name on the basis of subrogation, does not comply with the Rule.

[41] The discovery affidavit delivered on behalf of the respondent is therefore defective.

[42] Applying the *Melane*⁹ test, I am satisfied that condonation should be granted for the late filing of the respondent's answering affidavit.

Order

[43] In the result, I make the following order:

43.1 Condonation is granted for the late filing of the respondent's answering affidavit.

43.2 the discovery affidavit delivered on behalf of the respondent dated 5 March 2025 is declared non-compliant with Rule 35 and is set aside.

43.3 the respondent is directed to deliver a proper discovery affidavit, deposed to by himself, within ten (10) court days of service of this order.

43.4 the discovery affidavit must comply fully with Rule 35 of the Uniform Rules of Court.

43.5 Should the respondent fail to comply with paragraph 43.3 above, the applicant may enrol the matter for appropriate relief, including striking out of the defence or dismissal of the counterclaim.

⁹ 1962 (4) SA 531 (A)



43.6 The respondent is ordered to pay the costs of this application.



CB. BHOOLA

Acting Judge of the High Court

Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 26 January 2026 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 January 2026

APPEARANCES

Date of hearing: 24 November 2025

Date of judgment: 26 January 2026

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