



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 3339/2024

In the matter between

**LEHLOHONOLO WILLAM HASH
CHARLSE OPPONG KYEKYEKU
CHANTELLE MARAIS
DISEMA ISAAC MOETSI
TOM NORMAN PULE
LINTENNE MINAH RAMOKONE
TSOKOLO SIMON RAMOLULA
LERATO MIRANDA SEKhibANE
LENNOX LETLAKA THEBELE
ELCORD HEMILTON WESI**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT
SEVENTH APPLICANT
EIGHTH APPLICANT
NINETH APPLICANT
TENTH APPLICANT**

and

**SHADRACK NDLELA MAHLABA
NAPO TRUEMAN MOETSI**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Hash and Others v Mahlaba and Another* (3339/2024) [2026]
ZAFSHC 114 (24 March 2026)

Coram: MHLAMBI J

Heard: 20 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 9h30 on 24 March 2026

Summary: Non-compliance with order in terms of Uniform Rule 35(3) – application to strike out – court's discretion to overlook formalistic defects in favor of deciding matters on merits – application dismissed.

ORDER

- 1 The application to strike out the first respondent's defence is dismissed.
 - 2 The application costs are reserved for later adjudication.
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JUDGMENT

Mhlambi J

[1] On 11 September 2025, the applicant filed a motion to strike out the first respondent's defense with costs on an attorney and client basis, relating to an order dated 12 June 2025, requiring the respondents to produce certain documents under Uniform Rule 35(3). The order states that:

- '1. Condonation for late filing of the Answering Affidavit is granted.
2. The First and Second Respondents shall furnish the following documents to the Applicant within 20 court days from the date on which this order is served on the Respondent.
 - 2.1. A copy of the written communication by means of which the Defence of the Trust was communicated to the Plaintiff in or during February 2020, as alleged in paragraph 23 of the plea.
 - 2.2 The annual financial statements of the Mamvulani Trust for the period March 2019 to 2021.
 - 2.3 The bank statements of the Mamvulani Trust for the period March 2019 to February 2025.
 - 2.4 In the event that the Financial Statements and Communication of the Trust's Defence is not in possession of the Respondents or do not exist, Respondents must serve and file affidavit stating that those documents do not exist, within 20 court days of this order.
3. The First and Second Respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application dated 28 February 2025, including wasted costs of 8 May 2025 on a party and party client, including costs of counsel on scale B.'

[2] The application is opposed, and the second respondent deposed to an affidavit under the court order dated 12 June 2025, stating that, by virtue of his position as trustee of the trust, he was duly authorized to depose to the affidavit on behalf of the respondents. He had personal knowledge of the requested records and could determine whether they were within the respondents' knowledge. He addressed paras 2.1, 2.2, and 2.3 of the order dated 12 June 2025 as follows:

'Ad paragraph 2.1.

The respondents does not have in their possession any written communication sent or communicated to the Plaintiff or the representative at the time. After diligent search it could not be located.

Ad paragraph 2.2 and 2.3

The financial statements of the Mamvula Trust. For the period March 2019 to 2021 are not available and do not exist.

The bank statement of the Mamvulani Trust for the period of March 2019 to February 2025 are not available and account is closed.'

[3] The applicants argued that the first respondent failed to comply with the court order by failing to provide the documents listed in paras 2.1 to 2.3 of the order. He also failed to submit an affidavit as required by para 2.4 of the order.

[4] In the answering affidavit to the application to strike out the first defendant's defense, the second respondent stated that the main case was against the Mamvulani Trust (trust), of which he and the first respondent are trustees, and that settled law allows them to be sued in their personal capacities. The documents requested under rule 35(3) were the trust records. It could not be inferred that each respondent was expected to provide those documents if they were available. Paragraph 2.4 clearly indicated that the respondents must serve and file an affidavit, which they did. According to the respondents, the application was opportunistic.

[5] The applicants argued that the respondents' position lacked merit. Their main claim was directed personally against the respondents for the trust's debts owed to the applicants, not against the trust itself. The claim that the first respondent lacked a document was hearsay unless confirmed by an affidavit from the first respondent.

Both respondents were ordered to produce the listed documents and provide it to the applicants. If they did not have financial statements and communications, they were to file an affidavit stating that these documents do not exist.

[6] They further argued that the purpose of the court order was not to change the law of evidence by allowing one respondent to make allegations on behalf of the other respondent, thereby admitting inadmissible hearsay evidence. The goal of para 4 of the court order was to determine whether the respondents failed to produce the documents as ordered. They must submit an affidavit, either by both respondents individually stating that these documents did not exist or could not be found, or by the second respondent submitting an affidavit to this effect and the first respondent submitting a confirming affidavit.

[7] The first respondent filed a confirmatory affidavit supporting the application to strike out the first respondent's defense and verified the accuracy of the second respondent's answering affidavit as it related to him. After reviewing the events, it became clear that the applicants were satisfied with the second respondent's answer as outlined in the affidavits and, therefore, are not seeking any relief from him in this application.

[8] The core issue is whether the first respondent has submitted the required affidavit. The applicant argued that the first respondent failed to comply with the court order and that the court must exercise its discretion judiciously when deciding on the relief to grant. The applicants contend that, despite the current application to strike out, the first respondent continues to refuse to produce the documents as ordered by the court. Alternatively, he still refuses to file an affidavit claiming or stating that the ordered documents do not exist.

[9] In *Pangbourne Properties Ltd v Pulse Moving CC and Another*,¹ it was held that when all the papers are before the court and the matter is ready for consideration, arguing that the replying affidavit – and consequently the answering affidavit – should be disregarded because they were filed late, is too formalistic and futile. Doing so

¹ *Pangbourne Properties Ltd v Pulse Moving CC and Another* [2010] ZAGPJHC 121; 2013 (3) SA 140 (GSJ).

would only force the parties to start the same proceedings from scratch on the same facts.

[10] The court went on to state that:

‘[19] . . . It is in the interests of justice that the affidavits be taken into account and that this matter be finalised and unnecessary additional costs be avoided. Insofar as it may be necessary and within my discretion to allow the late filing of the answering affidavit and the late replying affidavit, I do so in order to decide the merits of the dispute between the parties unfettered by technicalities.’

[11] In *Nedbank Limited v Hattingh and Others*,² the court stated that courts should decide cases based on their merits and should disapprove and dismiss only those technical defenses that cause delays and serve no other purpose.

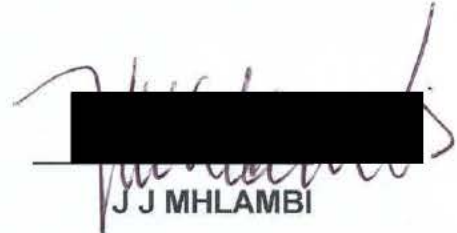
[12] I find the applicants’ argument flawed: that despite the current application, the first respondent continues to refuse the production of the documents as ordered by the court or to file an affidavit stating that the ordered documents do not exist. In their heads of argument, the applicants stated that the first respondent had failed to submit his affidavit confirming the second respondent’s affidavit, which was filed on 11 July 2025 in response to the court order. The first respondent, however, filed his confirmatory affidavit along with the second respondent’s answering affidavit. I see no merit, therefore, in the applicants’ view that they are prejudiced by the first respondent’s failure to comply with the court order, as they cannot move the matter forward or serve and file a request for further particulars for trial.

[13] The wording of the court order is somewhat ambiguous – para 2.4 states that ‘Respondents must serve and file affidavit stating that those documents do not exist,’ which leads to different interpretations of the order. I am not convinced that the applicant is entitled to the relief sought. The awarding of costs is at the court’s discretion, and given the circumstances, I find it fair to both parties that the costs of the application be deferred for decision at the trial.

² *Nedbank Limited v Hattingh and Others* [2022] ZAFSHC 44 (7 March 2022).

[14] I, therefore, make the following order:

- 1 The application to strike out the first respondent's defence is dismissed.
- 2 The application costs are reserved for later adjudication.



A handwritten signature in dark ink, appearing to read 'J J Mhlambi', is written over a solid black rectangular redaction box.

J J MHLAMBI
JUDGE OF THE HIGH COURT

Heads prepared by

For the appellant: GJ Eberson
Instructed by: EG Cooper & Majiedt
Bloemfontein

For the respondent: RJ Nkhahle
Instructed by: Fixane Attorneys,
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