



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MAKHANDA**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES:
YES

DATE: 30 April 2026

SIGNATURE:

Case no: 1260/2023

In the matter between:

BUFFALO CITY METROPOLITAN MUNICIPALITY

Applicant

and

KLAAS CREATIVE (PTY) LTD

Respondent

Summary: Striking out defence - main action - Rule 30A(2) – Uniform Rules of Court.
Discovery - payment certificate. Diligent search – no success. Application dismissed
and costs in the main action.

JUDGMENT

NTLAMA-MAKHANYA AJ

- [1] The applicant brought this application in terms of Rule 30A(2) of the Uniform Rules of Court to strike out the respondent's claim in the main action. The subject of dispute is the respondent's failure to comply with a court order dated 25 March 2025. In that order, the respondent was compelled to discover the payment certificate within 10 days. The respondent failed to comply with the said order.

- [2] In the main action, the applicant is sued for the payment of **R1 334 905.05 (One Million, Three Hundred and Thirty-Four Thousand, Nine Hundred and Five Rand, Fifteen Cents)**. It is this claim that has become the subject of this application. Following this claim, the applicant launched interlocutory proceedings in terms of Rule 35(12) and 14 which sought the discovery of the payment certificate. The respondent was compelled to discover such a certificate within 10 days as per the court order stated above. The respondent states that he has been unable to comply with the said order because he was not in possession of the document. Therefore, he could not comply with the court order even after his "diligent search" for it.

- [3] In the present matter, the applicant prayed for striking out the respondent's application in the main action. He substantiated its purpose and contended that he seeks to (i) avoid hopeless litigation and (ii) fruitless use of human and financial resources in a matter that could be ultimately struck off.

- [4] On the other hand, the respondent submitted that he "diligently searched" for the payment certificate with no success. Further, the applicant is obligated as a sphere of local governance in terms of section 152(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) to fulfill his obligations. The respondent further submitted that the court order dated 25 March 2025 was a mere requirement in compliance with Rule 35(12) and 35(14). In addition, it was not simply the basis for the applicant to justify the striking out of the respondent's

defence on the grounds that the payment certificate was not provided. Further, the applicant is enriched because of his failure to pay for the services rendered.

- [5] The applicant (respondent in the main action) concluded an agreement with Umso / Imvusa (Don Civils) Joint Venture (Umso Civils) who is not joined in these proceedings to amongst other specific terms of the agreement construct housing units in terms of the main Memorandum of Agreement (MoA). The MoA is a cession agreement based on the principal agreement between the applicant and Umso Civils. Umso Civils would then appoint subcontractors towards the fulfilment of the terms of the agreement. The main action emanates from the services rendered by the respondent whilst subcontracted to Umso Civils. In this application, the applicant requires the discovery of the payment certificate and failing which this Court should strike out the respondent's defence in the main action. This background raises issues that are the subject of this dispute.

Issues

- [6] The main issue in this application is to determine whether:

- (i) *The applicant has made a justified case for the striking out application due to non-discovery of the payment certificate.*
- (ii) *The notice of bar was irregular.*
- (iii) *The respondent's claim in the main action is embarrassing to such an extent that the applicant is unable to plead without the provision of the payment certificate.*

Discussion

- [7] The applicant seeks the discovery of the payment certificate in defence of the claim against him in the main action. I must express that striking out an application constitutes finality of the matter which renders further applications

moot and of academic nature. Similarly, it may also be prejudicial to the claimant who will be faced with no further option to institute the action. Effectively, the striking out of the defence renders the matter of no legal substance. Therefore, I am considering the parallel application of the notice of bar with the striking out of the defence itself.

- [8] The application to bar a litigant in proceedings requires this Court to establish the “failure to deliver the pleading within the stipulated timeframes that requires delivery within five days after the day upon which the notice was delivered or the agreed timeframes and the default in filing the pleading [the party] shall be *ipso facto* barred as envisaged in Rule 26 (1) of the Uniform Rules of Court”. However, Rule 26(1) could not be read or interpreted independently of Rule 27(1) which provides that:

‘In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.’

- [9] The interrelationship of these rules empowers this Court with wide discretion to determine whether there is any justification in terms of Rule 27 for the applicant’s failure to comply with the required time frames as envisaged in terms of Rule 26. In essence, the main objective is to establish whether the proffered reasons are justifiable in granting the removal or retention of the notice of bar because the sole application of Rule 26 will shut the door without establishing whether there was a good cause that could have resulted in the failure to file the pleading. It is acknowledged that Rule 26 validates the notice of bar if pleadings are not filed within the stipulated times of five days on receipt thereof.

[10] It is the respondent's submission that he complied with Rule 35(12) and 14 application and filed his pleading on the 02nd of May 2025 because he was supposed to have done so on the 29th of April 2025. He further contends that the late submission was due to his "diligent search" which wielded no positive results. It meant, as the respondent stated, the late filing was "mere two days" due to his search for the payment certificate. However, the applicant was not satisfied with the discovery without the payment certificate. Subsequent to the dissatisfaction, the applicant filed this application on 10 June 2025 with a counter application from the respondent on 11 June 2025 for a notice of bar. In turn, the applicant filed a further application to set aside the notice of bar as an irregular step. Let me broadly state that the parties challenged the rationality of each other's applications and the reliefs they sought.

[11] In this application, the late filing of Rule 35(12) and (14) pleading is of no relevance because the applicant did not attach weight to it. Similarly, this Court does not view the two days late filing excessive that may justify the dismissal of the substance of this application. The centrality of filing the pleading within the stipulated timeframe which may have an impact on condonation was contextualized by Madondo AJP in *Kobusch v Whitehead*¹ who stated in the affirmative and held that:

*'The peremptory filing of the notice by the excipient within 10 days of receipt of the combined summons, affording his or her opponent an opportunity to remove the cause of complaint, is a condition precedent to the taking of an exception that a pleading is vague and embarrassing. Failure to comply with such peremptory requirements, in the absence of an application for condonation for the non-compliance with the 10-day period constitutes an irregular step.'*²

¹ *Kobusch v Whitehead* [2022] ZAKZPHC 83.

² *Ibid* para 42.

Similarly, Eksteen J in *Dlodlo v Omega Construction and Building (Pty) Ltd*³ held that:

'The consequence of a bar is that a defendant is not entitled to appear either personally or by counsel (save in matrimonial disputes). However, the court retains a discretion to permit a party to appear to make a statement. A party that has been barred may apply to court for the upliftment of the bar on good cause shown and the court retains an inherent jurisdiction to raise the bar',⁴ (emphasis mine).

- [12] Eksteen J qualified the barring of a party in litigation by his affirmation that an application could be made to show good cause for the uplifting of the bar. In this case, the barring of the applicant was subject of contestation and should not be considered abstract. It entails the proffering of justifiable reasons that will enable the court to determine whether a good cause has been shown to condone compliance with the rules. As expressed by Barnes AJ in *Barnes v Kushite Investment Holdings (Pty) Ltd*⁵ held that:

*'As such [the barring] is a construction which favours form over substance. It bears emphasis that the rules of court exist to facilitate the ventilation of disputes and not to make substantive law,'*⁶ (emphasis mine).

Thereafter, Barnes AJ cited with approval Rogers J in *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd*⁷ who held that:

'The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of

³ *Dlodlo v Omega Construction and Building (Pty) Ltd* [2022] ZAECKMHC 1.

⁴ *Ibid* para 6 (footnotes omitted).

⁵ *Barnes v Kushite Investment Holdings (Pty) Ltd* [2022] ZAGPPHC 491.

⁶ *Ibid* para 18.

⁷ *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd* [2013] ZAWCHC 169.

procedure; they cannot make or alter substantive law. The court is, moreover, not a slave to the rules of court. As has often been said, the rules exist for the courts, not the courts for the rules.⁸ (emphasis mine).

- [13] It is deduced from Rogers that the notice of bar warrants the justification for the striking out application to give content to the applicable rule. Makgoka JA in *Ingosstrackh v Global Aviation Investments (Pty) Ltd*⁹ substantiated the circumstances upon which the notice to plead may be justified alternatively condoned in terms of Rule 27 and held that:

*'Deals with the extension of time, removal of bar and condonation. In terms of rule 27(3) the court may, on good cause shown, condone any non-compliance with the rules. Thus, to succeed in this regard, [the applicant] would be expected to show good cause why condonation should be granted for its failure to deliver its plea. Generally, the concept of 'good cause' entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation.'*¹⁰

- [14] In this application, this Court is of the view that barring the applicant will not be in the interest of justice. It must be expressly stated that this is a liquid claim of R1 334 905.05 and the application of Rule 32(1)(b) of the Uniform Rules of Court is of direct relevance because it involves the justification for the payment of money. In the circumstances, the payment of a liquid claim without its substantive determinant will constitute uncertainty in managing the public's financial resources. It has the potential to drain the applicant's public resources. The applicant, as a public functionary as defined as an organ of state in terms of

⁸ *Ibid* para 12 (footnotes omitted).

⁹ *Ingosstrackh v Global Aviation Investments (Pty) Ltd* [2021] ZASCA 69.

¹⁰ *Ibid* para 21, (footnotes omitted).

section 239 of the Constitution, is under a “watchful eye” regarding the way in which it administers the public funds. It would therefore be in the public interest to ensure the reasonableness and transparency in which it executes its financial administrative accountability.

[15] The barring of the applicant will also affect public confidence and will not be linked to any legitimate purpose of ensuring proper financial responsibility and administration in the local sphere of governance. This Court, with the wide discretionary powers bestowed in it, is of the view that the lifting of the bar is justified in the circumstances that will enable the ventilation of the matter in the main action. In essence, the notice of bar could have closed the doors for the proper determination of the substance of the claim at the main action.

[16] This Court is now faced with the contentious issue of striking out relating to the discovery of the payment certificate following the court order granted against the respondent. The applicant further alleged that respondent’s submission of an invoice does not constitute the discovery of a payment certificate. This is foundational in determining whether the striking out of the application will be justifiable in the circumstances.

[17] This application is grounded in Rule 30A of the Uniform Rules of Court which provides that:

‘(2) Where a party fails to comply within the period of 10 days contemplated in sub-rule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.’

However, Rule 30A(2) cannot be read without the background as envisaged in Rule 30 which deals with irregularities in civil proceedings that have direct effect on rules of compliance. Rule 30 on irregular proceedings reads as follows:

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if:*
- (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;*
 - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).'*

[18] The application of these rules is interdependent with each other. They constitute a balance of the interpretation of competing interests in an application to strike out due to the non-discovery of a document.

[19] This Court does not consider the non-discovery of the payment certificate as a “failure”. This is because of the distinct nature of this application in that it does not entail the avoidance of the payment of the amount due. Its centrality is on the discovery of the payment certificate which does not render the payment itself nullity with the consequent result in striking out defence in the main action. This discovery is not to be interpreted in isolation of the contents of the Memorandum of Agreement (MoA). The respondent simplified the application of Clause 5.3 of the MoA which reads as follows:

'The Employer will not affect payment to the Cessionary on any invoice, debit note, or similar document purportedly issued by the Cedent and submitted to the Employer by the Cessionary, unless the Employer receives satisfactory certification or endorsement from the Cedent as to the authenticity of such invoice, debit note or similar document ...'

- [20] The respondent further stated in his founding affidavit that the payment certificate is not in his possession which could either be with the applicant or the engineer. He stated as follows:

'Neither the Plaintiff nor I have in our respective possession the main contractor's claim for the work permitted by the Plaintiff for the work performed by the Plaintiff and approved by the engineer. In accordance with clause 3.1.3 of the memorandum, that documentation ought to have been submitted by the cedent to the Defendant. The Defendant accordingly ought to be in possession of the possession of the document it requests. In the event of the Defendant not being in possession of the documentation in question, it seems likely to me that the documentation which the Defendant requires is either in the possession of the cedent or of the engineer or both or that either the cedent or engineer or both are possessed of copies of the documentation which the Defendant seeks.'

- [21] It is evident that the payment could have been effected if the Cedent (Umso Civils) could have submitted and confirmed the amount to be paid by the applicant. The language used in this Clause is indicative of the fact that the respondent is not in possession of the payment certificate. Alternatively, the applicant or the cedent could have been in possession of the payment certificate or its copies. This language raises questions relating to the way in which the applicant keeps control of legal documents that are essential in good financial governance.

- [22] In this application, the respondent argues that the payment certificate could not be found despite the “diligent search”. Thus, what constitutes a “diligent search”? What would be the basis of the discovery when the key document is limited to “diligent search”? The speculation of who might be in possession of the payment certificate is limiting the judicial discretion in determining the rationality of this application. Does it also mean that the applicant must simply accept the “diligent search” without a concrete basis upon which public funds are subject of litigation? Alternatively, does it also mean that the respondent should not pursue the claim despite the extra effort in searching for the payment certificate that could have enabled the payment of the amount due?
- [23] This Court is not to second-guess the legality of an affidavit which is taken under oath to confirm the truthfulness of statements made by either party in litigation. Does it also mean the exhaustion of all the possible options in the search for the said document? Despite the authenticity of the affidavit, does it expressly outline the approach or how the search was conducted to determine beyond comprehension that the document could not be found except for a “diligent search”?
- [24] Let me revert to the subject of contestation in this application. The applicant argues that it is well-known that the cession of agreement within the built environment is common. Effectively, the applicant acknowledges that sub-contractors are legitimate business entities that have complied with the laws of the Republic. Any entity that does not meet the requirements of being service providers within the construction industry could not have been contracted to perform and ensure the completion of the project as agreed in the MoA. The ceding of the contract with Umso Civils is part of the agreement that was sub-contracted with the respondent. Therefore, in this case, I find it hard to believe that a claim that flows from the main agreement would be rendered unenforceable because of the non-discovery of the payment certificate despite the submission of an invoice. This Court is also not to dismiss the applicant’s

holding on to the quest for the discovery of the payment certificate because of its importance. Thus, there are no established facts that the invoice could have been “manufactured” to claim the amount that was not due to the respondent. There are many options that could have been used or may be available to verify its authenticity. This aspect is not before this Court and will be left with no further consideration.

[25] As noted above, Rogers J was affirmative that the law should not be overtaken by procedure because the courts are the determinant of the content of the rule whether its application would be at the prejudice of the other party. The non-discovery of a payment certificate in this matter should not serve as a yardstick against which to strike out the defence in the main action. Further, let me reiterate, the claim that flows from an original contract could not be waved as non-existent with the view that a subcontractor will not have the *locus standi* to claim the amount it is owed in the future.

[26] Striking out of defence is a drastic remedy in civil proceedings. In this application, I find Strydom J in *Gefen v De Wet*¹¹ persuasive as he held that “the court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order”.¹² Strydom J went on to state that “Rule 30A of the Uniform Rules of Court provides guidance to justify the claim for striking out the defence. He held that Rule 30(A) requires consideration of factors relating to (i) the reasons for non-compliance with the rules, request, notice, order or direction concerned and, whether the defaulting party has recklessly disregarded his obligations; (ii) whether the defaulting party’s case appears to be hopeless; (iii) whether the defaulting party does not seriously intend to proceed and (iv) prejudice to either party”.¹³ Kollapen J in *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA SOC*

¹¹ *Gefen v De Wet* 2022 (3) SA 465 (GJ).

¹² *Ibid* para 27.

¹³ *Ibid* para 28.

*Ltd*¹⁴ contextualised the purport of cautiousness in striking out the defence and held that:

‘A court must effectively dispose of the dispute that has come before it, and in doing so, it must act in accordance with its powers relative to the matter at hand. This is after all what provides the certainty and finality that parties seek when they bring a dispute to a court, ... [and] the right of access to courts found in section 34 of the Constitution is a right to have a justiciable dispute decided by a court. A judgment gives insight into the reasoning of the Court, how it dealt with the different and often competing submissions before it, and why it came to a particular conclusion. However, it is ultimately the court’s order that brings finality to the proceedings and says to the parties what is required of them or declares what their rights are.’¹⁵

[27] In this application, there are no established facts that the respondent was reckless by not discovering the payment certificate that could have resulted in striking out the defence. The respondent is a subcontractor to the original contract and could not have carried the work without a legitimate status within the built environment to be contracted as such. I must express that Rule 30A(2) encompasses the holistic consideration of all the relevant factors regarding striking out of defence. The respondent does not allege that the payment certificate is irrelevant. He acknowledges it except for the fact that he conducted a “diligent search” with no success. The application of Rule 30(A)(2) is the basis for the overall assessment and the test against which to determine the justification of the use of an invoice for the payment of the amount due.

[28] Striking out of defence brings finality of the litigation which on the other hand, may create uncertainty in the determination of the substance of the law. Finality

¹⁴ *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA SOC Ltd [2023] ZACC 2.*

¹⁵ *Ibid* paras 28-29.

in litigation as stated by Windell J in *L.E.M v A.V.M*¹⁶ seeks to “ensure an orderly administration of justice [and the advancement of confidence in the judicial processes]”.¹⁷ However, striking out of the defence based on non-discovery leaves questions unanswered regarding the impact it must have in the interests of justice. Goliath J in *Transnet v MV Alina II*¹⁸ expressed that “even if a party may lawfully object to producing a document, he must still discover it ... [and] the relevance of the documentation is to be determined with reference to the pleadings and the issues raised by them”.¹⁹ The situation is distinct in this matter. The payment certificate could not be found after a “diligent search” and is not a matter of the exercise of the discretion by the respondent in objecting to discover it. Although it could not be found, this Court is constrained by the impact it would have regarding the fairness of the application in the main action. This Court is not to rigidly enforce the application of Rule 35(12) alternatively Rule 35(14). Striking out of defence eliminates the proper articulation of the principles of the interest of justice that may ultimately result in substantive conception of the finality of litigation.²⁰ In essence, striking out has negative consequences for the administration of justice itself.

- [29] Therefore, the interpretation of the non-discovery of the payment certificate must be taken within the context of broadening the scope of the public interests and justice and with no prejudice to either party in justifying each other’s claim in the main action. The applicant’s financial accounting *vis-à-vis* the respondent’s sub-contracting role must be interpreted in a way that will constitute certainty regarding the substantive regulation of sub-contractors within the broader framework of original contractual agreements. Striking out in the circumstances will not be in both public and interests of justice.

¹⁶ *L.E.M v A.V.M* [2025] ZAGPHC JHC 1244.

¹⁷ *Ibid* para 5.

¹⁸ *Transnet v MV Alina II* 2013 (6) SA 556 (WCC).

¹⁹ *Ibid* paras 24-25.

²⁰ *Philani Ma-Afrika v W.M. Mailula* [2009] ZASCA 115 para 20.

[30] The respondent's Counsel during oral argument was explicit about the "diligent search" of the payment certificate. He submitted that the applicant may have his own assumptions about the non-discovery of the payment certificate, the truth of the matter is that the document could not be found. He went on to state very strongly that the "applicant must pay must pay".

[31] This Court is mindful of the challenge faced by the respondent in discovering the payment certificate. The non-discovery on the other hand should not be based on what I refer to as "I will see it then approach" in defence of the case in the main trial. Thus, the procedural aspects relating to non-discovery *vis-à-vis* the striking out of the defence should not take precedence over the substance of the application at the main action. This application entails the balancing of competing rights which are essential for proper ventilation at the main action. Therefore, the striking out application is not justifiable because it is a drastic remedy that would render the further pursuance of this claim meaningless. It will also impact on both parties in the main action and does not constitute a concept of a "winner takes all" approach. The respondent's failure to discover the payment certificate does not justify striking out the defence. It is of further significance that the main action establishes certainty of the substantive contractual roles of the sub-contractors in cessionary agreements.

[32] In this regard, the Courts have consistently held that the costs should follow the result. On the other hand, the court must exercise its judicial discretion to justify any compelling reasons that may constitute a departure from this principle.

[33] In the circumstances, the following order is made:

[33.1] The application is dismissed with costs for application at the main action.

N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
MAKHANDA

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted to the parties /legal representatives. Its date of delivery is deemed 30 April 2026.*

Date Heard: 12 March 2026

Date Delivered: 30 April 2026

Appearances

Applicant: Advocate Thabiso Njokwana
Makhanda

Instructing Attorneys: Dyushu & Majebe Inc / NN Dullabbh & CO
East London

Respondent: Advocate M L. Beard and Advocate C Cordell
Makhanda

Instructing Attorneys: Cloete & Co
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