



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No:17310/2015

In the matter between:

EPA DEVELOPMENT (PTY)LTD

Plaintiff

and

**THE ATTORNEYS,NOTARIES AND
CONVEYANCERS FIDELITY FUND**

First Defendant

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Defendant

Coram: Magona-Dano AJ

Heard: 29 January 2026

Delivered: 07 May 2026

Summary: Irregular proceedings-Rule 30 applicability to a Rule 35(3) notice-
The Defendant's Rule 30 application succeeds-Plaintiff's Rule 35(3) notice
constituted an irregular step- documents not properly discoverable-no relevance

or proper factual basis shown-consequently the Plaintiff's entitlement to compel compliance therewith falls away.

ORDER

[1] In the premises , it is ordered as follows:

- a. The First Defendant 's application succeeds.
- b. The Plaintiff's notice in terms of Rule 35(3) is declared an irregular step and is set aside.
- c. The Plaintiff's counter-application to compel discovery is dismissed.
- d. The Plaintiff is ordered to pay the costs of the application and the counter-application, including the costs of counsel on Scale C.

JUDGMENT

Magona-Dano, AJ:

INTRODUCTION

[2] This is an application in which the Applicant/First Defendant seeks an order that the Respondent's/Plaintiff's notice in terms of Rule 35(3) of the Uniform Rules of Court dated 5 July 2021, be set aside as an irregular step in accordance with Rule 30 of the Uniform Rules of Court. The Plaintiff opposes the application and has, in turn, brought a counter-application seeking to compel discovery pursuant to the impugned notice.

[3] For consistency, I will continue to refer to the parties as Plaintiff and First Defendant , as set out in the application before us. Although the Second Defendant was joined at a later stage, they are not involved in this application.

HISTORICAL BACKGROUND.

[4] These applications are being brought pending the main action between the parties. In the main action, Plaintiff is seeking payment of an amount of R6 600 000,00 (the amount) from the First Defendant together with interests and costs. This comes out of the First Defendant being a public body established in terms of section 8 of the Practitioner's Fidelity Fund, Act 19 of 1941 read together with section 25 of the Attorneys Act, 53 of 1979(now repealed).

[5] The main action came out of the following facts :

- a. In August 2010 the Plaintiff with TurnBull & Associates a former firm of incorporated Attorneys (Turnbull) concluded an oral, alternatively a tacit, further alternatively implied agreements whereby Turnbull agreed to retain a total of the amount mentioned above in their trust account to be paid out and to deal with it in accordance with Plaintiff's instructions and mandate. Turnbull, through its agent, paid out the monies without a valid instruction from the Plaintiff, therefore stealing the funds.
- b. On 26 April 2012, Plaintiff caused an application to be launched against Turnbull under case number 12/15214 seeking an order for the payment of the amount and interest; the application was referred for trial.

c. On 05 March 2014, judgment was granted in favour of the Plaintiff together with interests and costs.

d. Turnbull, however, is no longer in practice, and its directors are at large.

[6] In between, before the judgment on 31 October 2013, Plaintiff caused a claim to be lodged against the First Defendant regarding Turnbull and the theft of the total amount held.

[7] On 4 September 2014, the First Defendant communicated its election to reject liability of the Plaintiff's claim on the basis, amongst others, that section 48(1)(a) of the Attorneys Act 53 of 1979 (the Act) was not complied with.

[8] The First Defendant has raised several special pleas to the Plaintiff's claim, which include, amongst other allegations that the institution of the action is time barred as contemplated under section 48 (1)(a) of the Act.

[9] Plaintiff has replied to the special pleas raised by the First Defendant in response to all and in particular to the time bar special plea.

[10] In its reply, Plaintiff contends that section 48(1)(a) of the Act is unconstitutional because it is unjustifiably impinging upon litigants' rights under section 34 of the Constitution¹. The issue now raised was a constitutional challenge.

¹ Act 108 of 1996

[11] In support of its constitutional challenge, Plaintiff indicated that it intends to lead evidence of an expert witness to show that the evidence, and what is brought by the expert, will strike at the heart of section 48(1)(a) of the Act. In particular, its relevance in determining whether the acts ‘infringement upon litigants’ rights under section 34 of the Constitution is justifiable.

[12] On 5 July 2021, Plaintiff filed a notice in terms of Rule 35(3) of the Uniform Rules for discovery of other documents which are listed and attached to the notice and to make them available for inspection in terms of Rule 35(6) or state under oath that such documents are not in its possession, and to state their whereabouts if known to it.

[13] On 11 August 2021, after having filed a notice to remove the cause of complaint, the First Defendant and in terms of Rule 30 filed the irregular proceedings application against Plaintiff’s Rule 35(3) notice. This is the application that is before this Court.

Applicant’s/First Defendant ’ Case:

[14] First Defendant avers that the Plaintiff’s Rule 35(3) notice constituted an irregular step. The documents sought thereon bear no relevance , direct or indirect, to the issues between the parties and cannot advance the Plaintiff’s case nor damage First Defendant ’s case.

[15] Plaintiff seeks delivery of various documents listed as follows:

- a. Any and all reports compiled by First Defendant recording the details of claims lodged against it in respect of the period 1 March 2013 to date.

- b. Any and all reports compiled by First Defendant recording the details of claims lodged against it and approved in respect of the period 1 March 2013 to date.
- c. Any and all reports compiled by First Defendant recording the details of claims lodged against it and rejected in respect of the period 1 March 2013 to date.
- d. Any and all reports compiled by First Defendant recording the socio-economic details of claimants against it in respect of the period 1 March 2013 to date.
- e. First Defendant 's annual reports, in respect of the period 1 March 2013 to date.
- f. First Defendant 's audited financial statements, in respect of the period from 1 March 2013 to date.

[16] The documents sought for inspection by the Plaintiff were never discovered; this is an irregular demand for inspection.

[17] That the constitutional issue raised by Plaintiff (in reply to the special plea) is purely a matter of law and none of the documents in which discovery is sought can have any relevance to the aforesaid Constitutional issue.

[18] First Defendant avers that subparagraph “a to c” above each claim is determined according to peculiar facts of each claimant and is dealt with by a claims handler with background facts of that particular claimant where the claim is accepted, looked into and decided on by two members of the Legal Practitioners’ Fidelity Fund Board who have been duly delegated by the said board to make such determination either approving payment on the claim or declining payment of the claim.

[19] Each case has different claimants and is dealt with according to its facts and it has nothing to do with the issues between the parties in *casu*. It cannot directly or indirectly bear any relevance to the determination of the issues between the parties, nor can it advance the Plaintiff's case or damage the First Defendant 's case here.

[20] In relation to all reports that are described in subparagraph “d” such documents do not exist because the First Defendant has never compiled these, even if they existed, they would not have had any relevance to the determination of the issues between the parties here or advance the Plaintiff's case and or cannot damage the First Defendant 's case herein.

[21] Information relating to the subparagraphs “e to f” mentioned above the annual reports for the years 2015 to 2020 contain the information requested and are public documents which are freely available on the website of the First Defendant the links have been provided.

[22] The issues between the parties are determined by the peculiar facts pertaining to the Plaintiff's claim and based on those peculiar facts whether the claim fell within the ambit of the applicable laws and whether all the necessary documents have been provided.

[23] Therefore, the content of annual reports of a particular period that is referred to with various claimants and various decisions made for or against them cannot directly or indirectly bear any relevance to the determination of the issues between the parties as pleaded and cannot advance the Plaintiff's case herein or damage the First Defendant 's case.

[24] It is on that basis that the documents in respect of which the Plaintiff seeks further discovery should be declared irrelevant and not subject to discovery or production as requested. The Rule 35(3) notice ought to be set aside as irregular.

Respondent's/ Plaintiff's case

[25] Plaintiff filed its answering affidavit to the irregular proceedings application proceedings and stated that the First Defendant's application to have the notice set aside is without merit and falls to be dismissed, as will emerge, the documents that are sought in terms of rule 35(3) are keenly relevant to matters in question in the action.

[26] These documents may either directly or indirectly enable the Plaintiff to advance its own cause or damage the case of the First Defendant .

[27] The First Defendant in the main action has raised several special pleas to the Plaintiff's claim, one of these include that the institution of the action is time barred as contemplated under section 48(1)(a) of the Act. The Plaintiff has replicated to the special plea.

[28] In response to the time-barred allegations, Plaintiff contends that the aforesaid section is unconstitutional because it unjustifiably impinges upon litigants' rights under section 34 of the Constitution.

[29] Plaintiff intends to lead evidence of expert witnesses to set out, amongst others; the socio-economic profile of the persons who ordinarily initiate claims against the First Defendant , the socio-economic profile of the persons whose

claims against the First Defendant are ordinarily rejected as a result of the time-bar provided under the relevant section.

[30] The socio-economic effect that the rejection of such claims has on affected persons. The broader social impact of the time-bar imposed by the section is in question. Therefore, in this matter and the court will be called to exercise the balancing exercise when considering the constitutionality of the impugned provision. This exercise is to be conducted through the prism of the limitation of rights provisions of Section 36 of the Constitution.

[31] It is for the above reasons that the expert evidence referred to will be relevant to the dispute between the parties as it strikes at the heart of s48(1)(a) of the act and will be particularly relevant in determining whether the act's infringements upon litigants' rights under section 34 of the Constitution is justifiable.

[32] The required documents are crucial, and the expert evidence described above will also be necessary evidence to shed light on the purpose and scope of the act constitutionally.

[33] The impugned law cannot be considered in a vacuum but must be considered within the context of its practical effect in the real world. The First Defendant 's application to have the notice set aside is therefore without merit and should be dismissed.

[34] The First Defendant has shown it has no intention of producing the Documents willingly and its failure to do so is prejudicial to the Plaintiff.

[35] This impedes and delays the ventilation of the issues in the trial. The Plaintiff has been forced to incur additional legal costs in opposing this application; the First Defendant 's conduct is obstructive and unreasonable, hence the counter-application to compel, which is sought by the Plaintiff against the First Defendant .

[36] The Plaintiff therefore is also seeking that this court grant the relief as is stipulated in its counter application's notice of motion dated 5 July 2021.

[37] The First Defendant has failed or refused to comply with the Rule 35(3) notice and the Plaintiff's counter application to compel compliance with the Rule 35(3) notice should be granted. The First Defendant 's application to set aside the rule 35(3) notice be dismissed with costs

[38] **THE ISSUES FOR DETERMINATION**

- a. Whether the Plaintiff's notice in terms of Rule 35(3) constitutes an irregular step as contemplated in Rule 30 of the Uniform Rules of Court.
- b. If so, whether the said notice falls to be set aside, if not
- c. Whether the Plaintiff has satisfied the requirements for an order compelling discovery in terms of Rule 35(3).
- d. Whether the documents sought by the Plaintiff are relevant to the issues in dispute and within the possession or control of the First Defendant .

- e. Whether the First Defendant has furnished an adequate response to the Rule 35(3) notice.
- f. Whether the Plaintiff is entitled to the relief sought in the counter-application to compel discovery.
- g. The appropriate order as to costs.

LEGAL POSITION

Irregular step

[39] The relevant provision of Rule 30 provides that:-

“(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 10 (ten) days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 (ten) days;

(c) the application is delivered within 15 (fifteen) days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in

terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.”

Rule 35(3) reads as follows:

[40] “(3)..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.”

[41] Rule 35(3) does not confer a party relying on the rule with an unrestricted entitlement to compel further disclosure of documents following discovery that has already taken place. The scope of the rule is limited by three main requirements. The first is that there must be a proper identification of the documents sought, the second requirement is specificity in the documents so identified and the third is the relevance of the documents themselves. The purpose of the rule was explained as follows in *The MV Urgup: Owners of The MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others*²:

“These subrules are both intended to cater for the situation where a party knows or, at the very least, believes that there are documents (or tape recordings) in his opponent's possession or under his control which may be relevant to the issues and which he is able to specify with some degree

²1999 (3) SA 500 (C) at 515C-E

of precision. In the case of Rule 35(3) the intention is to supplement discovery which has already taken place, but which is alleged to be inadequate. Rules 35(3) and (14) do not afford a litigant a licence to fish in the hope of catching something useful.”

[42] It was held in *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa and Others*³ that the Plaintiff is entitled only to discovery of documents relevant to issues in pleadings. It was further held that an applicant is required to identify portions thereof on which reliance is placed and indicate the case which is sought to be made on the strength thereof.

[43] The discovery process is premised on honesty, good faith and requires parties obliged to make discovery to do so on oath. Where a party deposes to an affidavit stating that he or she does not have additional documents in his possession other than what has been discovered, such an affidavit is generally regarded as conclusive.

DISCUSSION AND EVALUATION

Submissions for the First Defendant

[44] To support its application, Mr. Gary Oliver, appearing for the First Defendant, submitted that the First Defendant made no discovery of the documents in respect of which Plaintiff demands production and inspection in term of Rule 35(3). The requirements of Rule 35(6) of the Uniform Rules therefore have not been met.

³ 1999 (2) SA 279 (T)

[45] The rule clearly relates to the inspection of documents that the other party has disclosed. Just for that reason alone, the Plaintiff's demand for inspection is an irregular step.

[46] It has been held that if the documents in respect of which discovery is sought are not relevant to any matter in question which is determined in the pleadings and issue of relevancy, then a court will not compel discovery. As was also held in the *Swissborough* diamond mines case.

[47] The documentation sought by the Plaintiff to be discovered as listed in its Rule 35(3) notice is not relevant to any matter in question between the parties. A court will likewise not compel inspection of any document or portion of a document that is irrelevant to the issues in question, provided that there has been an affidavit by the party opposing inspection denying the relevance of the document, portion of the document in question, as there has been in this case.

[48] In this matter, the issues between the parties are clear and can be determined from the particulars of claim in the main action and the First Defendant's plea. The issues include whether Plaintiff's claim is time-barred in terms of section 48(1)(a) of the Act; whether section 48(1)(a) is unconstitutional; whether there was theft as defined in section 26 of the Act; whether the alleged theft occurred during the course and scope of the practice of an attorney; Lack of entrustment; whether S47(1)(g) of the Act is applicable.

[49] Plaintiff's demand of documents relating to any and all reports compiled by the First Defendant with details of claims lodged against it; that were approved; or rejected in respect of the period 01 March 2013 to date (1st-3rd category of documents); any and all reports compiled by the First Defendant recording the socio-economic details of claimants against it, in respect of the

same period(4th category); the annual reports and financial statements in respect of the same period (the 5th category) and the First Defendant 's audited financial statements(6th category). These documents have no relevance to the issues between the parties and are not subject to discovery or production as stipulated in the Rule 30 application.

[50] The Constitutional issue raised by Plaintiff against First Defendant (and Second defendant) is a purely matter of law and none of the documents sought for discovery can have any relevance to such an issue.

[51] The special plea raised focused on many objections, one of which related to non-compliance with whether Plaintiff's claim was time-barred by virtue of section 48(1)(a) of the Act. This provision is used in this irregular proceedings application by the Applicant as one of the basis to show the irregularity.

[52] Further submissions were that the issues in this case need to be dealt with and determined by the peculiar facts relating to the Plaintiff's claim. Based on those peculiar facts, whether the claim falls within the ambit of the applicable law(s) and whether all the necessary documents were provided.

[53] The special pleas were then filed for the reason to prove that the relief sought by the Plaintiff was not warranted.

[54] The content of the documents sought for inspection is irrelevant to the matters at issue between the parties, and they never formed part of the pleaded case.

[55] The documents sought cannot directly or indirectly bear any relevance to the determination of the issues between the parties hereto, they cannot advance a Plaintiff's case herein and cannot damage First Defendant 's case.

[56] First Defendant prays that the order upholding its application that the Rule 35(3) dated 5 July 2021 be set aside as an irregular step in accordance with the provisions of Rule 30 of the Uniform Rules of Court.

[57] With regards to the counter application, Mr. Oliver submitted further that if the First Defendant 's application in terms of Rule 30 succeeds, then logically Plaintiff's counter application must of necessity fail and the court must order the dismissal of that application with costs.

[58] Even if the court were to go against the First Defendant in the rule 30 application, Plaintiff failed to set forth all the requirements that are needed for it to succeed, as was held so in the *Swissborough, Caravan Cinemas*⁴ case, Plaintiff has failed.

[59] Based on that failure to comply with the necessary requirement stated in various case law, Plaintiff accordingly cannot succeed in its application to compel discovery in terms of Rule 35(3), and the application ought to be dismissed with costs.

Submissions for the Plaintiff

⁴ *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W)

[60] Mr Stylianou on behalf of the Plaintiff submitted that the First Defendant's special plea that Plaintiff's action is time-barred was made under section 49(2) of the Attorneys Act (one-year prescription period) and not S48(1)(a) as now argued by the First Defendant .

[61] Plaintiff challenges the constitutionality of this time-bar, arguing it infringes the right of access to courts under section 34 of the Constitution and is not reasonable or justifiable under section 36.

[62] The constitutionality of section 49(2) is the central issue, justifying the request for broader documentary evidence.

[63] The documents are needed to present 'Brandeis Brief' evidence—social, economic, and statistical data relevant to the constitutional challenge, not just the specific facts of Plaintiff's case.

[64] The First Defendant's contention that the documents are irrelevant to the specific dispute is wrong, they are crucial for the constitutional inquiry.

[65] The First Defendant's application to set aside the Rule 35(3) notice should be dismissed.

[66] An order be granted compelling the Fund to provide the requested documents (categories 1-4) except for annual reports and audited statements (categories 5-6), where the First Defendant has provided links to access these online. This, however, still does not take away the contention by the Plaintiff regarding the lack of justifiability of access to court right that is being interfered with.

[67] Mr Stylianou further submitted that the First Defendant's board should have condoned the late filing of their claim instead of just rejecting the claim.

ANALYSIS

Irregular proceedings application

[68] The First Defendant moves to set aside the Plaintiff's notice under Rule 35(3), claiming it is an irregular step as defined by Rule 30 of the Uniform Rules of Court.

[69] The impugned notice is founded upon a constitutional issue raised by the Plaintiff in its replication to the First Defendant's special plea, together with the delivery of a notice in terms of Rule 16A. The Plaintiff further relies, in this context, on the decision in *Mohlomi v Minister of Defence*⁵.

[70] It is trite that discovery is confined to documents relevant to the issues as defined in the pleadings. In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*, the Court held that a party is entitled to discovery of documents relating to any matter in question in the action, as determined with reference to the pleadings. A party is not permitted, under the guise of discovery, to extend the ambit of the dispute beyond the pleaded issues.

[71] The starting point is therefore whether the constitutional issue relied upon by the Plaintiff properly forms part of the pleadings. A replication is intended to

⁵ 1997 (1) SA 124 (CC)

answer a plea and does not ordinarily permit the introduction of a new cause of action or a discrete legal challenge.

[72] In *Minister of Safety and Security v Slabbert*⁶, the Court reaffirmed that a party may not raise a new matter in replication that should properly have been introduced by way of amendment.

[73] In the present matter, the constitutional point advanced by the Plaintiff does not arise as a mere answer to the special plea but introduces a distinct and substantive challenge to the First Defendant's position. A challenge to legislation as being unconstitutional is quite substantive and ought to have been pleaded in the first place.

[74] The filing of a notice in terms of Rule 16A did not cure this defect. While such notice serves to give public notification of a constitutional issue, it does not constitute a pleading, nor does it properly introduce a cause of action into the proceedings.

[75] Further, the Plaintiff's reliance on *Mohlomi v Minister of Defence*⁷ is misplaced. That decision concerns the constitutional validity of statutory limitations on access to courts. It does not dispense with the requirement that a litigant's case must be properly pleaded, nor does it permit the introduction of new matter in replication or the use of discovery to formulate or construct a case not properly articulated on the pleadings. Therefore, the invocation of constitutional considerations in this context does not justify an expansion of discovery beyond the confines of the pleaded issues.

⁶ 2010 (2) SACR 474 (SCA)

⁷ 1997 (1) SA 124 (CC)

[76] Turning to the requirement of relevance, even if regard is had to the First Defendant being a professional indemnity fund, the enquiry remains whether the documents sought are relevant to the issues as defined in the pleadings. In the absence of a properly pleaded constitutional challenge, no basis exists upon which relevance for purposes of Rule 35(3) can be established. Discovery cannot be used to obtain documents in order to establish or formulate a cause of action that has not been properly articulated.⁸

[77] To permit such an approach would be to allow discovery to precede and shape the pleadings, which is impermissible. Discovery is intended to support the proper ventilation of disputes already defined, not to enable a party to construct its case.

[78] To the extent that reliance is placed on section 49 in the special plea, in my view that issue does not arise for determination in the present application, which is confined to the procedural validity of the Rule 35(3) notice.

[79] It bears emphasising that section 48(1)(a) imposes a peremptory notice requirement as a precondition to the validity of a claim, whereas section 49 constitutes a distinct statutory mechanism regulating either the institution of proceedings or the circumstances in which non-compliance may be condoned. The latter does not operate as a sequential step following compliance with the former, but as a separate provision which does not displace the requirement of compliance with section 48(1)(a).

⁸ Swissborough case *supra*

[80] The submissions for the Plaintiff relying on section 49 instead of section 48(1)(a) of the Act constitute a change in the statutory basis used to justify the procedural non-compliance. Section 48(1)(a) was the foundation of the Rule 30 complaint, and the introduction of section 49 seeks to reframe the issue as one of condonation rather than compliance. In my view, this does not alter the character of the original irregularity identified by the First Defendant .

[81] Therefore, the Plaintiff's reliance on section 49 does not displace the Rule 30 complaint founded on section 48(1)(a), which it was required to meet.

[82] The prejudice to the First Defendant is manifest. It is required to respond to a wide-ranging discovery request premised upon a constitutional challenge that is not properly before the Court, thereby compelling it to engage with a case it has not been properly called upon to meet. This, in turn, undermines the orderly conduct of proceedings, a concern emphasised in *Trans-African Insurance Co Ltd v Maluleka*⁹.

[83] I also considered the Plaintiff's further contention that, notwithstanding the lateness of its notice, the Board of the Fidelity Fund ought to have condoned such lateness having regard to the nature of the issues involved.

[84] In *Leysath v Legal Practitioners Fidelity Fund Board*¹⁰, the High Court considered the Board's discretion to extend the prescribed notice period. The Court confirmed that, while the Board may grant such an extension in terms of section 48(2) of the Attorneys Act, an applicant is required to establish good cause.

⁹ 1956 (2) SA 273 (A)

¹⁰ 2022 JDR 2135 (SCA)

[85] Condonation in terms of section 48(2) is therefore not automatic but must be properly sought and motivated. In the present matter, the Plaintiff did not apply to the Board for such condonation, nor did it place any facts before this Court to establish good cause for the late notice.

[86] In the circumstances, based on the aforementioned I find that the Plaintiff's notice in terms of Rule 35(3) is irregular and falls to be set aside.

The Counter-application

[87] It follows that the Plaintiff's counter-application to compel discovery, being premised upon the impugned notice, cannot be sustained and falls to be dismissed.

[88] Having made the above findings, I turn now to deal with the issue of costs.

COSTS

[89] It is trite though that the award of costs is at the discretion of the court.¹¹ Such a discretion must be exercised judicially.

[90] There is no reason to depart from the general principle that costs follow the result. The Plaintiff has been unsuccessful in both the Irregular step application and the counter-application to compel discovery.

¹¹Ferreira v Levin NO and Others 1996 (1) SA 984 (CC)

[91] Having regard to the nature and complexity of the matter, including the reliance placed on constitutional considerations in support of the Rule 35(3) notice, a costs order on Scale C, including the costs of counsel, is warranted.

CONCLUSION

[92] In the premises , it is ordered as follows:

- a. The First Defendant's application succeeds.
- b. The Plaintiff's notice in terms of Rule 35(3) is declared an irregular step and is set aside.
- c. The Plaintiff's counter-application to compel discovery is dismissed.
- d. The Plaintiff is ordered to pay the costs of the application and the counter-application, including the costs of counsel on Scale C.

MAGONA-DANO, AJ
Acting Judge of the High Court
of South Africa

Appearances

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