



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

Not reportable

Case no: 2378/2022

In the matter between:

THOMAS THUSANG

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

AND

Case no: **1223/2023**

In the matter between:

MORWA JEANETTE MOKOENA

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

Neutral citation: *Thusang v Road Accident Fund* (2378/2022); *Mokoena v Road Accident Fund* (1223/2023) [2026] ZAFSHC 279 (7 May 2026)

Coram: JP DAFFUE J

Heard: 16 April 2026

Delivered: This reasons were 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 16h00 on 7 May 2026.

Summary: Two unopposed Uniform Rule of Court 30A applications to seek further discovery in terms of Rule 35(3) – prior notices and applications sent by email to RAF attorneys – court not satisfied that proper service has taken place – furthermore, no

explanation for delay – documents sought not relevant to the proceedings and/or clearly privileged – applications dismissed.

REASONS

Daffue J

Introduction

[1] On 16 April 2026, I dismissed two similar unopposed interlocutory applications brought under the aforesaid case numbers by the same firm of attorneys on behalf of different clients against the Road Accident Fund (RAF). The applications are mirror images of each other and therefore, one set of reasons is provided.

The relief sought

[2] The applicants in both instances are the plaintiffs in the main actions. In these applications, they sought the same relief. The elaborate costs order is conspicuous. I quote *verbatim*:

‘1. That the Respondent be ordered to Reply to the Applicant’s Notice in terms of Rule 35(3) within 10 (ten) days from the date of the service of the Order upon the Respondent compelling it to do so;

2. That the Respondent’s defense in the main action be ipso facto struck out for failure to comply with an Order in paragraph 1 above;

3. That the Respondent be ordered to pay the costs of this application on an attorney/client scale, such costs including, but not limited to:

3.1 Legal costs of all proven and taxed costs incurred by the Applicant in engaging the services provided by courier services in this matter;

3.2 Costs of preparation of the bundles;

3.3 Consultation costs with the Advocate;

3.4 Consultation costs with the client;

3.5 Counsel’s costs of travel, accommodation, and meals;

and

3.6 Preparation and attendance fees for Applicant’s Counsel;

4. Granting further and or alternative relief.’

[3] When I dismissed the two applications. I stated that my reasons for the orders would follow in due course as I did not want to disrupt the motion court proceedings. The

litigation history is to a certain extent the same, although there is a marked difference in respect of the status of the litigation. Therefore, I shall deal with the facts in each application separately, starting with the oldest case, whereafter I shall provide my reasons for the orders.

Thomas Thusang v Road Accident Fund, case number 2378/2022

[4] On 23 May 2022, Mr Thusang's attorneys of record instituted action against the RAF to claim damages in the amount of R3.3 million arising from injuries allegedly sustained on 1 December 2018 in a motor vehicle collision between two vehicles on the R64 road near Bloemfontein. He was a passenger in one of the vehicles.

[5] The RAF defended the action. Ms Megan Booysen (Ms Booysen), who was employed as an in-house attorney at the Bloemfontein Office of the RAF at the time, filed a special plea as well as a plea on the merits whereupon Mr Thusang's attorneys filed a replication to the special plea on 24 August 2023. Consequently, the pleadings were closed in August 2023, more than two and a half years before the hearing of this application. When the RAF came on record, Ms Booysen provided her email address for purposes of service of further documents in terms of Uniform Rule of Court 4A, to wit meghanb@raf.co.za.

[6] On 1 December 2023, Mr Thusang's discovery affidavit was filed. The RAF did likewise on 4 April 2024. In essence, the parties discovered the same documents. The RAF discovered the following documents:

- (a) all pleadings, notices and applications under case number 2378/2022;
- (b) lodgement documents under link number 4805175; and
- (c) correspondence between plaintiff and defendant.

[7] On 5 September 2024, Mr Thusang brought an application in the unopposed motion court. He intended to have an alleged settlement agreement in respect of liability made an order of court. The application was allegedly served by sending same to the email address of Ms Booysen. Cronje AJ removed the matter from the roll, with no order to costs. A few days later Mr Thusang's attorneys set the matter down for hearing on 10 October 2024, intending to claim exactly the same relief. A day before the hearing in the unopposed motion court, Mr Thusang's attorneys filed a notice to remove the matter from

the roll. Consequently, Opperman J removed the matter from the roll on 10 October 2024 and ordered the costs to stand down for later adjudication. It is unnecessary to deal with the merits of the application brought before my two colleagues. I merely mention that the merits are still in dispute, unlike the case of Ms Mokoena to which I shall refer hereunder.

[8] On 13 September 2023, about seven months prior to the filing of the RAF's discovery affidavit, Mr Thusang's attorneys allegedly sent a notice by email to Ms Booysen in terms of rule 35(6), the purpose of which was to require the RAF to make available for inspection all documents and tape recordings disclosed in the discovery affidavit. This is a nonsensical notice bearing in mind the absence of a discovery affidavit at that stage. On 18, 19 and 20 November 2025 letters of demand were allegedly sent to Ms Booysen's aforesaid email address.

[9] On 27 October 2025, a notice in terms of rule 30A(1) was allegedly sent by email to Ms Booysen, notifying the RAF that Mr Thusang intended to apply for an order to compel the RAF to respond to the notice in terms of rule 35(6) filed as long ago as 19 September 2023.

[10] Eventually, an application in terms of rule 30A was set down for hearing in the unopposed motion court of 19 March 2026 to compel the RAF. This was the first of two Rule 30A applications. This application was again allegedly sent to the aforesaid email address of Ms Booysen. Still, as in all the other cases, no read-receipt was obtained and/or any other evidence presented to the court to show that effective service occurred. On 19 March 2026, one of my colleagues made the following order in the unopposed motion court in the absence of any appearance on behalf of the RAF:

- '1. The Respondent shall respond to the Applicant's notice in terms of rule 35(6) within 5 (five) days of service of the Court order upon the Respondent.
2. The Respondent shall pay the costs of this application on party and party scale A including costs of counsel.'

In all fairness to my colleague, he was probably never informed that the Rule 35(6) notice was served some seven months prior to the filing of the RAF's discovery affidavit.

[11] The founding affidavit in support of the first rule 30A application was deposed to on 27 January 2026 by an attorney of MG Mali Attorneys in Florida, Gauteng, to wit Mr

Thobekani Khanyile (Mr Khanyile). I do not deem it necessary to deal with any of the further allegations made on behalf of Mr Thusang in that application, save to say that I find the attorney's version questionable. According to him, he was uncertain whether the pleadings and notices discovered by the RAF corresponded with those in his possession. He claimed that he was uncertain whether all these documents were 'either electronically or physically' served on his office. Consequently, he stated that Mr Thusang was prejudiced by the RAF's failure and/or refusal to allow inspection as he was unable to prepare for trial. This said, the order stands and no further comment is required.

[12] A notice in terms of rule 35(3) was filed as long ago as 24 April 2024. In that notice Mr Thusang insisted that the following documents be made available for inspection within ten days and that if these were not in possession of the RAF, it should state their whereabouts, if known:

- '1. Outcome of the criminal proceedings;
2. Photographs depicting damages to the insured vehicle;
3. Photographs depicting scene of the accident;
4. Photographs depicting plaintiff's injuries;
5. Transcript of the criminal proceedings;
6. Witness statements;
7. Forensic Investigator's report;
8. Assessors' report.'

[13] In my view, the rule 35(3) notice is yet again a nonsensical notice. There is no indication that criminal proceedings had been instituted, and if so, that a transcript thereof was available. Nothing has been said about photographs of the injured vehicle. Surely, Mr Thusang would be in possession of photographs depicting his injuries. No case has been made out that the RAF had taken any photographs of him, or might be in possession of other photographs, save those which might have been presented by him to the RAF. Clearly, Mr Thusang is not entitled to inspection of the RAF's witness statements and its Forensic Investigator's report which are privileged. Again, as was the case in respect of the rule 35(6) notice, another notice to compel was allegedly served in terms of rule 30A(1) on 27 October 2025.

[14] Also on 27 January 2026, as was the case with the first Rule 30A application, Mr Khanyile deposed to an affidavit in support of a second Rule 30A application pertaining

to non-compliance with rule 35(3). This application eventually served before me in the unopposed motion court of 16 April 2026. The same problems pertaining to service mentioned above is apparent from the present application.

[15] *Ex facie* the papers in the court file, Mr Thusang's attorneys requested Ms Booysen on 19 September 2023 to attend a pre-trial conference. Nothing further occurred in this regard. No minutes of a pre-trial conference were filed. It is also apparent from the court file that the matter was not referred for case management in terms of rule 37A.

[16] It should be common cause that Ms Booysen has left the RAF's offices in Bloemfontein on 30 June 2025. This information had been officially conveyed to me months ago and again repeated two weeks ago.

Mokoena v Road Accident Fund, case number 1223/2023

[17] On 10 March 2023, Ms Mokoena's attorneys of record instituted action against the RAF to claim damages in the amount of R3.7 million. On 1 April 2018 she was allegedly injured in a motor vehicle collision when the driver of the insured vehicle lost control and the vehicle overturned. She was a passenger in that vehicle.

[18] The RAF defended the action and on 19 April 2023 filed its plea. Consequently, the pleadings were closed in May 2023, more than two and a half years before the hearing of this application. When the RAF came on record, Ms Charlene Bornman (Ms Bornman) provided her email address for purposes of service of all further documents in terms of Uniform Rule of Court 4A, to wit charleneb@raf.co.za. It should be common cause that this attorney has resigned on 31 March 2026 and started employment with a private firm of attorneys, to wit Wolmarans Inc, Bloemfontein. She personally confirmed this to me two weeks ago in a different matter conducted by her new employer.

[19] On 18 May 2023, the plaintiff's discovery affidavit was filed. The RAF did likewise on 31 July 2023. In essence, the parties discovered the same documents, which was not unexpected. The RAF discovered the following:

- (d) all pleadings, notices and applications under case number 1223/2023;
- (e) lodgement documents under link number 4470589; and
- (f) correspondence between plaintiff and defendant.

[20] On 12 September 2024, Daniso J granted the following order:

- '1. The Respondent has conceded liability on a 100% basis in favour of the Applicant.
2. The Respondent tenders an Undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 for future medical and related expenses, its activation and case management.
3. The Respondent shall pay the Applicant's costs of suit to date on the party and party High Court scale A.'

[21] On 12 June 2025, Opperman J ordered the RAF to 'complete the pre-trial agenda or participate in a pre-trial conference within 10 days after service of this Court order upon the Respondent.' The court further ordered that in the event of the RAF failing to comply with the order, the RAF's defence in the main action would be struck out and Ms Mokoena be allowed to approach the court for default judgment. The RAF was ordered to pay the costs of suit.

[22] On 26 March 2026, another colleague made the following order in the unopposed motion court in the first rule 30A application brought on behalf of Ms Mokoena:

- '1. The Respondent shall reply to the Applicant's notice in terms of rule 35(6) within 10 (ten) days from the date of service of this order upon the Respondent.
2. The Respondent shall pay the costs of this application on party and party costs scale A including costs of counsel.'

[23] As in the case of Mr Thusang, Mr Khanyile deposed to an affidavit on behalf of Ms Mokoena on 27 January 2026 at Florida, Gauteng. The two affidavits are mirror images of each other.

[24] Also on 27 January 2026, as was the case with the first rule 30A application, Mr Khanyile deposed to an affidavit in support of a second rule 30A application pertaining to non-compliance with Rule 35(3). The very same documents identified in Mr Thusang's Rule 35(3) notice appear in Ms Mokoena's notice dated 1 August 2023. Clearly, a copy-and-paste procedure was followed. The notice of set down of this application was allegedly served on Ms Bornman by way of an email dated 30 March 2026, the second last day of her employment with the RAF, while the paginated index was allegedly sent to her electronically on 7 April 2026. The application eventually served before me in the unopposed motion court of 16 April 2026. The same problems pertaining to service

mentioned above is apparent from the present application.

Evaluation of the applications

[25] It is accepted that delivery of documents in litigation may be sent by electronic mail to the respective addresses provided by the parties in the litigation.¹ Chapter III, Part 2 of the Electronic Communications on Transactions Act 25 of 2002 (ECTA) is applicable to service in such instance.² I also accept that s 26 of ECTA stipulates that acknowledgement of receipt of a data message such as an email is not necessary to give effect to that message. The absence of a read-receipt or proof that the data message was in fact delivered to the addressee may have serious consequences. Courts should be careful in accepting that data messages were in fact received by the addressees when the objective evidence tends to reflect the opposite or uncertainty. I could not find any reported judgments on s 26 of ECTA, but for convenience of the reader, I quote the section:

'26 Acknowledgement of receipt of data message

(1) An acknowledgement of receipt of a data message is not necessary to give legal effect to that message.

(2) An acknowledgement of receipt may be given by-

(a) any communication by the addressee, whether automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.' (Emphasis added.)

[26] There is no indication that either Ms Booysen or Ms Bornman received any of the notices or applications referred to above. On the probabilities, in the case of Ms Booysen, she would not have operated her email account since 1 July 2025. The same applies to Ms Bornman from 1 April 2026. There is no indication that data messages intended for their two email addresses were relayed to addresses of other RAF employees. The mere fact that an originator of a data message indicates that such message was sent to the addressee does not mean that it was received and/or read by such person. The greater use of electronic communication exacerbates the risk of potential abuse and prejudice to parties in the litigation process. Presiding officers should be wary of this.

¹ Uniform Rule of Court 4A(1)(c).

² Uniform Rule of Court 4A(3).

[27] Bearing in mind the serious consequences of successful applications, I decided to dismiss both applications for lack of proof of service. Even accepting that proper service has taken place, I would still be inclined to dismiss the applications as they are an abuse of the court processes. I shall now provide my reasons for this stance.

[28] The applicants' reliance on rule 35(3) must be considered in accordance with rules 35(6) and (7), read with Form 13 of the Uniform Rules of Court. Therefore, it is apposite to quote these three sub-rules:

'(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.

(6) 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)..... 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.

(7) 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. (Emphasis added.)

[29] The party to whom the notice in terms of rule 35(3) is addressed, is required to respond within 10 days. Clearly, the emphasis is on disclosing and making available for inspection the documents already discovered under oath in terms of rule 35(2) as well as the additional documents referred to in rule 35(3). Rule 35(3) is clear. Any party who believes that there are in addition to already disclosed documents, such further documents in the possession of the other party thereto which may be relevant to any matter in question, may give notice to the latter requiring them to make the same available for inspection in accordance with rule 35(6), or to state that such documents are not in such party's possession.

[30] It is trite that discovery ranks with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised. This is apparent from the judgment in *MV URGUP*.³ In *ST v CT*⁴ the Supreme Court of Appeal pointed out that discovery is not dictated by a litigant's view of what is relevant, but it is a matter for the court to consider with reference to the pleadings, and not extraneously therefrom.

[31] A discovery affidavit is taken to be *prima facie* conclusive as to both the possession of the documents and their relevance. Generally, a court should not go behind a party's affidavit, but such affidavit is, nevertheless, as far as the court is concerned, not conclusive. It is possible that a court may conclude, bearing in mind the totality of the facts presented to it, that there are other relevant and disclosable documents in possession of a party or under its power. In such a case it may order further and better discovery or production in conflict with the claim in the discovery affidavit.

[32] The requirement of relevance has been dealt with in several judgments. It is not necessary for the party relying on rule 35(3) to prove that the additional documents are relevant, but only that these may be relevant to any matter in dispute. The documents required by an applicant to be discovered and/or produced may, as authority has it, lead to a so-called 'train of enquiry' to establish the truth.⁵ The court should apply logic and common sense pertaining to an applicant's requests and it is not necessary to rely on certainty. It must be emphasised that an applicant shall not be allowed to proceed on a fishing expedition, although care should be taken not to place undue or unnecessary limitation on a party's right to a fair trial.

[33] Although discovery is not intended to be used as a weapon in preliminary skirmishes, one of the purposes thereof is to obtain the production of documents that can be used during interrogation of witnesses. If this is what the applicants' attorney had in mind, he should have made that clear. His vague allegation that his clients are prejudiced as they are unable to prepare for their trials is rejected as being without substance.

³ *MV URGUP Owners of the MV URGUP v Western Bulk Carriers (Australia) (Pty) Ltd & others* 1999 (3) SA 500 (CPD) at 513H.

⁴ *ST v CT* [2018] ZASCA 73; 2018 (5) SA 479 (SCA) para 19.

⁵ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A.

[34] A court should consider whether an applicant is attempting to make use of ulterior means to prove their case or disprove the other party's version. It is the court's duty to prevent abuse of process. I am reminded about a *dictum* in *Hudson v Hudson and Another*⁶ pertaining to the duty of the court to prevent abuse. I quote:

'Where . . . the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the duty of the court to prevent such abuse.'

The following warning by Mahomed CJ in *Beinash v Wixley*⁷ is also apposite:

'It can be said in general terms, however, that an abuse of process takes place where procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.'⁸

[35] Even accepting for the moment that the documents required by Ms Mokoena in terms of rule 35(3) might have had a bearing on the merits and thus the liability of the RAF, save for photographs depicting her injuries, there is absolutely no reason why these documents might be relevant to the *quantum* of her claim. There is no evidence that the RAF subjected Ms Mokoena to medical examinations and/or that she was photographed. As mentioned, the merits in respect of Mr Thusang's claim still need to be adjudicated. Even so, as mentioned with reference to authorities, no case has been made out why I shall go beyond the RAF's discovery affidavit in his case. In essence, the same applies to Ms Mokoena. Both applicants have not shown that, bearing in mind the pleadings, the totality of the facts, admissions made and the nature of the two cases, that there are reasonable grounds for supposing that the identified documents, insofar as they are not privileged, should be discovered and made available for inspection. Furthermore, documents such as the witness statements and reports sought to be discovered and made available for inspection are privileged. The applicants are not entitled thereto.

[36] Another aspect dictating the dismissal of the applications is the unreasonable delay in lodging the applications. The main actions could have been finalized by now if they were referred for case management in terms of rule 37A. The case management judge could have made pertinent orders pertaining to the making of discovery or any other aspects to achieve trial-readiness as set out in rules 37A(5) and (12). In my view, the applicants' attorney has embarked on an inappropriate process akin to 'milking' the RAF

⁶ *Hudson v Hudson and Another* 1927 AD 259 at 268.

⁷ *Beinash v Wixley* 1997 (3) SA 721 (SCA).

⁸ *Ibid* at 734F-G.

with costs that should have been avoided. No explanation for the delay has been tendered. The applicants' attorney must be blamed for the delay, but more importantly, he failed to explain why he could not have proceeded to obtain orders for trial-readiness. Such orders are granted when it is apparent that the other party, the RAF in this instance, constantly refuses or fails to comply with directions issued to them.

[37] In conclusion, it is apposite to make a final remark. The applicants relied on rule 30A for relief. It is not necessary to debate whether this rule should have been applied instead of rule 35(7). In my view the correct approach in a similar factual matrix is the following. If further discovery is not made as requested, the applicant must apply in accordance with rule 35(7) for an order to compel further discovery within a certain period, usually 10 days from date of service of the order. Failing such compliance, the court may dismiss the claim or strike out the defence, depending on whether the plaintiff or defendant is in default. Rule 35(7) provides for a specific remedy, whilst rule 30A provides a general remedy, although the result that an applicant intends to achieve remains the same.



J P DAFFUE
JUDGE OF THE HIGH COURT

Appearances:

For the applicants: MG Mali Attorneys Inc,
Bloemfontein.

For the respondent: No appearance.