



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

CASE NO:0860/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE: 23/3/2026

SIGNATURE

[Redacted Signature]

In the matter between:-

ARDE ERIC ROSS

Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN
COUNCIL**

Respondent

REASONS FOR ORDER MADE IN STRIKE- OUT APPLICATION

- [1] The applicant, as plaintiff in the main action, instituted proceedings against the respondent, cited as defendant, claiming damages for injuries allegedly sustained when the applicant fell into an open manhole while walking along the pavement.
- [2] The respondent defended the action and filed its plea. It later sought and was granted leave to amend its plea, to allege that it owed no duty of care to the applicant as the manhole where the incident occurred belongs to Telkom SA SOC Limited (Telkom). The amendment was not effected.
- [3] On 10 June 2022, the respondent delivered its discovery affidavit and on 8 July 2024, the applicant delivered a notice in terms of Rules 35(3) and (6), requiring the respondent to deliver specified documents listed in the notice, which the applicant believes are in the possession of the respondent and are relevant to the dispute between the parties.
- [4] On 14 October 2024, the respondent served a supplementary discovery affidavit dated 10 October 2024, adding two documents to its initial discovery affidavit: an "internal JRA report" and "photographs of the manhole."
- [5] After the respondent failed to make the requested documents available, the applicant brought an application in terms of Rule 35(7) to compel the respondent to deliver those documents within 10 days of the granting of the order. The respondent did not oppose the application, and on 24 October 2024, Mabesele J granted an order compelling delivery of the specified documents within 10 days.
- [6] When the respondent failed to comply with the order of Mabesele J, compelling delivery of the said documents within the stipulated time, the applicant delivered an application to have the respondent's defence struck out in accordance with Rule 35(7) and a cost order against the respondent.

- [7] The applicant contends that it is prejudiced by the respondent's tardiness, as the applicant considers the requested documents to be material to its case and the issue of liability.
- [8] The respondent opposed the application. In its answering affidavit, the deponent avers that the application is ill-conceived and legally untenable, *inter alia*, because the applicant withheld relevant information from the court, which would influence the granting of the order sought, and misled the court. While the information ostensibly withheld by the applicant is not specified, from what could be gleaned from the answering affidavit, this relates *inter alia*, to the filing of the supplementary discovery affidavit, ostensibly, in response to the Rule 35(3) notice and the amendment to the plea. This information is set out in the founding affidavit and features prominently in the record of this matter.
- [9] Incorporated in the answering affidavit is an application for condonation, in which the deponent cites work pressure and inability to hold meetings with the relevant employees of the respondent as a reason why a 'reply' to the applicant's rule 35(3) notice was delivered 60 days later. Notwithstanding, the deponent states that a meeting aimed at addressing the applicant's Rule 35(3) notice was held on 22 July 2024, 4 days after the notice was served. On 5 September 2024, the respondent commissioned an investigation to establish the whereabouts of the documents, the report of which was provided to the respondent the following day.
- [10] The deponent to the respondent's discovery affidavit avers that on 14 September 2024, after a diligent search, it was established that the documents requested by the applicant could not be found.
- [11] It was only a month later, on 14 October 2024, that the supplementary discovery affidavit was delivered, which, according to the respondent, was in reply to the applicant's notice.

- [12] The respondent avers that the delay of 60 days in filing the supplementary discovery affidavit was not due to its fault, as it conducted a diligent search but could not find the documents. Interestingly, the respondent avers that the compelling order by Mabesele J issued on 24 October 2024 should not have been granted as the respondent had already delivered its supplementary discovery affidavit in which it stated that it was not in possession of the documents requested by the applicant, and the court was therefore aware of this.
- [13] In addressing its prospects of success, the respondent contends that it “has prospects of success in this application, and in the main action” ... and from the plea it is clear that the applicant (respondent in the main application) has the prospects of success”(sic).
- [14] As to prejudice, the respondent asserts that the applicant would not suffer any prejudice if condonation is granted, while the respondent would suffer prejudice as it has no alternative remedy and its constitutional right to have access to courts would be compromised.
- [15] An applicant for condonation seeks indulgence from the court and is therefore required to show good cause for the delay. Such an applicant must set out comprehensively the reasons for its non-compliance, providing a reasonable and acceptable explanation for each period of delay. Condonation is therefore not granted for the mere asking.
- [16] The respondent has not done this. It glibly skates over the extent of the delay in complying with the Rules, the reasons therefor and the prejudice occasioned by it. The same thread runs through the entire affidavit, providing no cogent reasons why it believes that it enjoys good prospects of success, save for what is stated in its amended plea. This falls short of the requirements for an application for condonation. The court is thus left to perform guesswork as to what the basis for the respondent's assertion is. This cannot be. The fact of the

matter is that there is no amended plea. I do not intend to venture further in this discourse as it is beyond the scope of these reasons.

- [17] Similarly, the respondent's citation of the Constitution does not take the matter much further. Mere reference to constitutional provisions does not bring them into existence or breathe life into an otherwise meritless application. Besides, the respondent's right to access the courts has not been impacted in any way, as alleged by the respondent.
- [18] The respondent provides no cogent explanation for the delay, first, for the period of over a month following the meeting held on 22 July 2024 to address the applicant's Rule 35(3) notice. Secondly, after the supplementary discovery affidavit was deposed to, which, according to the respondent, was on 14 September 2024, the same affidavit would only be delivered a month later. Thirdly, there is no explanation why the respondent considered it necessary to conduct a search of the documents, which seemingly lasted a good three months, and conduct an investigation for the same reason, if it already knew that it was not in possession of the documents.
- [19] By its own admission, the respondent knew as early as 22 July 2024 that it was not in possession of the requested documents. There can thus be no merit to the condonation application.
- [20] Importantly, the respondent avers that by filing the supplementary discovery affidavit, it complied with the applicant's request and indicated that it is not in possession of the documents requested by the applicant, and does not know their whereabouts. Thus, it contends that the court is not empowered, in terms of the Rules, to strike out its defence.
- [21] Rule 35(3) states:
- “ If any party believes that there are, in addition to documents or tape recordings disclosed ... 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 sub-rule(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.

- [22] The supplementary discovery affidavit does not specify which documents could not be found. Save for specifying two additional documents in the possession of the respondent, it is a replica of the initial discovery affidavit. In paragraph 4 thereof, the deponent states:

“ To the best of my knowledge and belief, the Defendant has not now and never had in its possession, custody or power or in the possession, custody or power of his attorneys or agents or any other person acting on his behalf, any documents or tape recordings or copy of or extract from any document or tape recording relating to any matters in question in this suit, other than the documents and tape recordings set forth in the first and second parts of the schedule hereto.”

- [23] The applicant requested certain documents, which he listed in his Rule 35(3) notice. The respondent did not reply to this notice as envisaged in Rule 35(3). As previously noted, the respondent instead discovered further documents in its supplementary discovery affidavit, which are not the same as those sought in the applicant's 35(3) notice. Quite apart from its form, the substance of that document falls far short of complying with the applicant's Rule 35(3) notice and cannot be regarded as a reply, let alone an adequate one in accordance with the subrule or Rule 35 in general.
- [24] The effect of the respondent's conduct is that it remains non-compliant with the order of Mabesele J, compelling compliance with the applicant's Rule 35(3) notice. For as long as that order, which remains effective, has not been complied with, the strike-out application and the concomitant order were warranted. The respondent's contention that the 'compelling order' ought not to have been granted is misplaced, as there has been, and continues to be, no compliance with the compelling order.
- [25] In the result, I ordered that the respondent's defence be struck out, with the respondent to pay the costs.




S MFENYANA
Judge of the High Court

Date order granted : 16 September 2025
Date reasons provided : 23 March 2026

These reasons were handed down electronically by circulation to the parties' representatives via email. The date and time for the hand-down is deemed to be **23 March 2026**.

Appearances

For the applicant:

Counsel: P van Niekerk

Instructed by Swartz Attorneys

For the respondent

Counsel: S Dlali

Instructed by: K Matji & Partners Attorneys