



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

CASE NO: A229/2025

In the matter between:

MA-AFRIKA HOTELS (PTY) LTD

Appellant

and

AVEMORE PROPERTIES (PTY) LTD

Respondent

Date heard : 26 March 2026, Parties allowed to file note on 17 April 2026-no note filed.

Date delivered : 20 August 2026

Summary : Civil Procedure - Discovery - Rule 23(3) and Rule 23(8) of the Magistrates' Courts Rules - Failure to comply with discovery order - Striking out of defence - Appellate interference with discretionary decision - Costs.

JUDGMENT

O'Brien AJ.

Introduction

1. This appeal arises from an interlocutory application in which the Additional Magistrate, Stellenbosch, struck out the appellant's defence in terms of rule 23(8) of the Magistrates' Courts Rules and ordered the appellant to pay costs on the attorney-and-own-client scale. The order followed a finding that the appellant had failed fully to comply with an earlier order compelling discovery.
2. Although the litigation concerns unpaid rent and damages arising from a lease agreement during the Covid-19 period, the appeal concerns solely the propriety of the procedural sanction imposed by the court a quo.
3. The issue is not whether the appellant's pleaded defence of rental remission is good or bad. Nor is it whether the documents sought by the respondent are relevant. The issue is whether, in the circumstances of this matter, the drastic sanction of striking out the defence constituted a proper exercise of the discretion conferred by rule 23(8).

Background

4. The respondent instituted action against the appellant for payment of rentals allegedly due from May 2020 to January 2021 and damages arising from the appellant's continued occupation thereafter.

5. The appellant pleaded that it was entitled to a remission of rent due to the impact of the Covid-19 pandemic and the associated lockdown regulations. The quantification of the remission was pleaded with reference to actual occupancy figures compared with projected occupancy figures derived from historical data.
6. In June 2022, the respondent delivered a notice under rule 23(3) requiring the production of various categories of documents. The categories material to this appeal were:
 - 6.1. Documents relating to the compensation received by the appellant from Santam in respect of its business interruption claim and documents relating to the computation thereof; and
 - 6.2. Source documents underlying the occupancy figures relied upon by the appellant in support of its rental-remission defence.
7. The appellant did not furnish the requested discovery to the respondent's satisfaction. In particular, the appellant did not provide documents relating to the computation of the Santam business interruption insurance claim, nor did it produce the underlying source documents supporting its occupancy figures as required under items 4 and 5 of the respondent's Rule 23(3) notice.

8. The respondent consequently launched an application under Rule 23(8) to compel compliance.
9. On 24 August 2023, the parties settled that application. An order by consent between the parties was granted, in terms of which the appellant was directed to comply with the respondent's Rule 23(3) notice and to pay the costs of the application.
10. Pursuant to the aforesaid order, the appellant delivered a supplementary affidavit and furnished further documentation.
11. The respondent nevertheless remained dissatisfied and contended that compliance with items 4 and 5 of the Rule 23(3) notice remained incomplete.
12. The respondent then launched the present application seeking, primarily, the striking out of the appellant's defence.

The magistrate's reasons

13. The magistrate concluded that the appellant had not complied with the consent order insofar as items 4 and 5 of the Rule 23(3) notice were concerned.

14. The magistrate found that documents relating to the computation of the Santam claim and source documents underlying occupancy figures had not been properly discovered.
15. Based on this, the magistrate struck out the appellant's defence and ordered punitive costs.

The issues

16. Three issues arise:
 - 16.1. Whether the magistrate correctly found non-compliance;
 - 16.2. If so, whether striking out the defence was a proportionate and appropriate sanction; and
 - 16.3. Whether the cost order should stand.

The legal principles

17. Discovery is a fundamental component of civil litigation. Its purpose is to ensure that litigants are appraised of relevant documentary material and to facilitate the fair resolution of litigation. See *Protea Assurance Co Inc Ltd v Waverley*

Agencies CC 1994 (3) SA 247 (C); Replication Technology Group and Others v Gallo Africa Ltd 2009 (5) SA 531 (GSJ).

18. Rule 23(8) empowers a court to compel compliance with discovery obligations and, where compliance is not forthcoming, to dismiss a claim or strike out a defence.
19. Rule 23 (8) reads: “If any party fails to give discovery as aforesaid or, having been served with a notice under sub-rule (6) (a), omits to give notice of a time for inspection as provided for in sub-rule (6) (b) or fails to give inspection as required by that sub-rule, 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.”
20. The striking out of a defence is, however, among the most severe procedural sanctions available to a court¹. Its effect is ordinarily to deprive a litigant of the opportunity to have its case adjudicated on the merits.
21. Although a court possesses the power to impose such a sanction, the power must be exercised sparingly, proportionately and only where the interests of justice require it.

¹ MEC, Department of Public Works v Ikamva Architects 2022 (6) SA 275 (ECB) paras 18-21

22. The authorities² recognise that non-compliance with discovery obligations does not automatically justify the striking out of a defence. The court must consider the gravity of the default, the reasons for it, the prejudice suffered by the opposing party, the efficacy of less drastic remedies and the interests of justice generally.
23. The sanction must be directed not merely at punishment but at securing the proper administration of justice.

The relevance of the documents

24. The appellant contended before us that the Santam documentation lacked relevance because the rental-remission defence was pleaded with reference to occupancy figures rather than insurance recoveries. However, the Santam documents were relevant because they bore directly on the circumstances, giving rise to the appellant's asserted losses and the basis on which such losses were quantified. The respondent was entitled to examine whether the information provided to the insurer aligned with the factual foundation of the rental remission claim, particularly where both claims arose from the impact of Covid-19 and the resultant occupancy levels. In addition, any inconsistency between the facts put

² Makhurah v Road Accident Fund 2026 (3) SA 602 (GJ)

to the insurer and those relied upon in the current proceedings would be plainly material to the issues in dispute. There is no merit in that contention.

25. The respondent was entitled to investigate whether the factual assumptions underlying the Santam claim were consistent with those underlying the rental-remission defence.
26. Similarly, the respondent was entitled to test the source material underpinning the occupancy figures relied upon by the appellant.
27. The magistrate was therefore correct in concluding that the categories of documents sought were relevant.

Whether striking out was justified

28. The crucial question is whether the established non-compliance justified the ultimate sanction imposed.
29. Several features of the matter are significant. First, this was not a case in which the appellant refused to engage with the discovery process at all. Extensive discovery had already been made.

30. Following the consent order, supplementary discovery was delivered.
31. Further documents were produced during November 2023 and thereafter.
32. The remaining dispute was not whether the appellant had discovered nothing. It was whether what had been discovered amounted to proper and complete compliance with items 4 and 5 of the Rule 23(3) notice.
33. The very existence of the present dispute demonstrates that the issue was not entirely straightforward. The appellant contended that the relevant Santam documentation had been produced. It likewise contended that the SEMPER night reports constituted the primary source documents upon which occupancy calculations were based. The Semper Night Repots is a workbook generated nightly at approximately 24h00 or shortly thereafter relating to whether a room was occupied or not.
34. Those contentions may ultimately prove to be incorrect. However, they demonstrate that the dispute concerned the adequacy of compliance rather than outright refusal.
35. Secondly, the respondents sought alternative relief.

36. In the notice of motion, the respondent sought an order directing proper compliance with the consent order as an alternative to striking out the defence.
37. The existence of that alternative remedy is important.
38. The magistrate's judgment contains no meaningful consideration of why the alternative remedy would not adequately protect the respondent's interests.
39. The judgment proceeds directly from a finding of non-compliance to the striking out of the defence.
40. The failure expressly to consider whether a less drastic remedy would suffice constitutes a material misdirection.
41. Fourthly, the action itself raises substantial issues concerning the effect of the Covid-19 lockdown regulations upon the appellant's contractual obligations.
42. The defence cannot be characterised as frivolous or manifestly unsustainable.
43. Striking out the defence effectively determines the action without a trial on the merits.

44. Such a result should ordinarily be reserved for cases where continued non-compliance renders a fair trial impossible or demonstrates deliberate and persistent disregard of the court's authority such that no lesser remedy will suffice.
45. While the appellant's conduct was unsatisfactory and deserving of censure, I am not persuaded that the record establishes that threshold. We were referred to **Kansai Plascon (Pty) Ltd v Redec Services (Pty) Ltd and Others (2020/29803) [2025] ZAGPJHC 152 (18 February 2025)**, a case where the defendants' defence were struck out. The facts of that case are different. Furthermore, the defendants in that case were extremely dilatory. The defendants filed a notice of intention to oppose. They failed to file a plea, and a notice of bar followed from the plaintiff. They filed an exception that the cause of action was vague and a day late. The plaintiff then amended their claim. The plaintiff filed a second notice of bar. The defendant filed its plea a day late. The court dealt with a summary judgment application whereas in this case the defence of the appellant is known, the matter is trial ready and the dispute between the parties appears to be narrow.
46. In my view, the interests of justice would have been better served by a peremptory order compelling final compliance, coupled with an appropriate cost order and a provision permitting the respondent to seek further relief should non-compliance continue.

47. The magistrate, therefore, exercised the discretion under Rule 23(8) on an incorrect basis by failing properly to consider whether the alternative remedy sought by the respondent would adequately address the prejudice complained of.
48. Neither party has an absolute right to discovery. The court has a discretion whether to order compliance with the rule. See **Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd 1971 (4) SA 589 (W)** This discretion must, however, be exercised with due regard to well-known principles of law. See **Rainsford v African Banking Corporation Ltd 1912 CPD 729**.

Costs

49. That conclusion does not absolve the appellant of responsibility for the procedural history which gave rise to the application.
50. The respondents' complaints did not arise in a vacuum.
51. The appellant failed to satisfy the respondent's Rule 23(3) notice.
52. It opposed the application to compel.
53. It ultimately consented to an order compelling compliance.

54. Even thereafter, disputes concerning the adequacy of discovery persisted for a considerable period.
55. The appeal succeeds because the sanction imposed was disproportionate, not because the appellant's conduct was satisfactory.
56. The respondent was substantially justified in seeking judicial intervention. The respondent's opposition to the appeal is no answer to the appellant's conduct in non-compliance with a court order requiring discovery.
57. The appellant's conduct materially contributed to the interlocutory litigation and to the appeal itself.
58. In those circumstances, fairness dictates that the respondent should recover the costs of the appeal notwithstanding the success of the appeal on the merits.
59. Such an order reflects the well-established principle that a successful litigant may nevertheless be deprived of costs, or ordered to pay costs, where its conduct has unnecessarily occasioned litigation or expense. See, for example, **LAWSA Vol 3 Civil Procedure para 473**, and **Ferreira v Levin NO and Others 1996 (2) SA 621 (CC) at 624F–G**, which recognise the court's discretion to deprive a party of costs or order costs against them in such circumstances.

60. As to the punitive costs ordered by the court a quo, while Section 80 (1) of the Magistrates' Courts Act 1944 determines that costs in any civil proceedings shall, as between party and party, be payable in accordance with the scales prescribed by the rules, whilst section 48 provides that the court, may as a result of the trial of an action grant:
61. "(d) Such judgment as to costs (including costs as between attorney and client as may be just."
62. Both counsels were at one that the cost order issued by the magistrate cannot stand as the order for punitive costs is incompetent.
63. Ordinarily, the Magistrate's Court may grant an order of costs on attorney and client scale as set out in section 48(d). However, in **War Systems Technology CC v United Computer Systems** 2004 (1) All SA 457, the court held that, as creatures of statute, the Magistrates' Court lacked legal authority to grant attorney-and-own client costs (a scale higher than that of attorney and client costs) as this was beyond what was permitted by section 48 in the absence of an agreement between the parties. (my emphasis).
64. In considering whether the circumstances of the present matter call for an award of punitive costs, it necessary to recap the basic principles set out **In re Alluvial Creek Ltd** 1929 CPD 532:

“Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I also think that order may also be granted without reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious, there are people who enter litigation the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other party ought not to bear, That I think is the position in the present matter.”

More recently, in *Public Protector v South African Reserve Bank* 2019 (6) 253 (CC) at para [8], Moegoeng CJ restated the principles relating to costs on attorney and client scale, and said the following:

65. “[C]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct that amounts to an abuse of the court process.”

66. In ***Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of South Africa and Others* [2016] 37 ILJ (LAC) 2815 para [46]**, wherein the Labour Appeal Court stated thus:

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is

exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

67. In the matter at hand, I do not find the defendant’s conduct to be clearly indubitably vexatious and reprehensible. Thus, in my view, the punitive costs order imposed by the magistrate was unjustified and must be set aside .

Order

68. In the circumstances, following order is order is made:

- a. The appeal succeeds.
- b. Paragraph (a) of the order of the court a quo striking out the appellant’s defence is set aside and substituted with the following:

“The defendant is directed, within 20 days of service of this order, to comply fully with items 4 and 5 of the plaintiff’s rule 23(3) notice dated 21 June 2022 by delivering a supplementary discovery affidavit identifying and making available for inspection all documents falling within those categories and presently in its possession or under its control, alternatively stating on oath that no

such documents exist or are within its possession and explaining the basis for such statement.”

- c. The punitive costs order granted by the court a quo is set aside and replaced with the following:

“The defendant shall pay the plaintiff’s costs of the application on the party-and-party scale, including the costs of counsel where so employed.”

- d. The appellant shall pay the respondent’s costs of the appeal, including the costs of counsel where so employed.

S C O’BRIEN AJ
Acting Judge of the High Court, Cape Town

I agree, and it is so ordered.

T Ndita
Judge of the High Court, Cape Town

Appearances

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