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REPUBLIC OF SOUTH AFRICA



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

Case Number: 033483/2022

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

18/08/2026

DATE

SIGNATURE

In the matter between:

M[...] J[...] M[...]

Plaintiff

and

WEYERS AND LOMBARD INCORPORATED

Defendant

JUDGMENT

LENYAI J

Introduction

- [1] Before me are three interlocutory applications arising from the main action between the Plaintiff, M[...] J[...] M[...] (“the Plaintiff”), and the Defendant, Weyers and Lombard Inc. (“the Defendant”). The first is an application in terms of Rule 35(7)¹ of the Uniform Rules of Court (“the Rules”) to compel the Defendant to make further and better discovery. The second is an application in terms of Rule 30 in which the Defendant seeks to set aside certain steps taken by the Plaintiff in relation to her replying affidavit as irregular. The third is an application for condonation concerning the late filing of the Plaintiff’s replying affidavit.
- [2] The interlocutory applications arise against the background of the Plaintiff’s claim concerning the payment of funds following the sale of property pursuant to a divorce settlement agreement. The disputes before me are principally procedural, but they require consideration of the proper balance between compliance with the Rules, the efficient administration of justice, and the avoidance of procedural technicalities which do not materially prejudice a litigant.

FACTUAL BACKGROUND:

- [3] The Plaintiff and B[...] M[...] were divorced on 28 February 2019. Their Settlement Agreement was made an order of court. In terms of the agreement, a property in Randpark Ridge was to be sold, with the proceeds applied towards the settlement of the bonds over the Randpark Ridge and Buccleuch properties.
- [4] After the Randpark Ridge bond was settled, R848 490.72 remained. The Defendant, which was responsible for the transfer and distribution of the proceeds, received fraudulent banking details purporting to be those of the Plaintiff and Mr M[...] and paid R424 245.36 into each of two accounts. Neither party received the funds, and the Buccleuch bond was consequently not

¹ the Uniform Rules of Court.

settled. The Plaintiff alleges that the Defendant was negligent in effecting the payments.

- [5] During the main proceedings, the Plaintiff delivered a Rule 35(3) notice seeking further and better discovery in respect of 19 categories of documents. The Defendant resisted the request, contending that the documents were irrelevant, constituted a fishing expedition and, in certain instances, were protected by privilege or confidentiality. The Plaintiff consequently brought the Rule 35(7) application.
- [6] The Defendant subsequently brought a Rule 30 application concerning the Plaintiff's delivery of different versions of her replying affidavit. The Plaintiff also sought condonation for the late filing of the final signed replying affidavit. The Defendant challenges both the procedural regularity of the affidavits and the commissioning of the affidavit supporting the condonation application.

Issues for determination:

- [7] As it appears from the Joint Practice Note dated 30 July 2026, the issues for determination are the following:

Rule 35(7) Application

- (a) Whether a Rule 30A notice was required before the Plaintiff could invoke Rule 35(7).
- (b) Whether the documents sought in items 1 to 19 of the Rule 35(3) notice are material and relevant to the main action.
- (c) Whether the Defendant has properly raised privilege and/or confidentiality regarding any of the requested documents.
- (d) Whether the application is premature, moot, abusive or otherwise unsustainable.

Rule 30 Application

- (e) Whether the delivery of an unsigned and uncommissioned version of the replying affidavit constituted an irregular step.
- (f) Whether the subsequent delivery of the signed version and final replying affidavit renders the filing irregular in the absence of withdrawal, leave to amend or prior condonation.
- (g) Whether any established irregularity caused prejudice of the kind contemplated in Rule 30.
- (h) Whether the Rule 30 application was competent and appropriate, or whether it is overly technical and dilatory.

Condonation Application

- (i) Whether the founding affidavit in the condonation application was properly commissioned or, alternatively, commissioned in substantial compliance with the applicable regulations.
- (j) Whether the Plaintiff has sufficiently identified the replying affidavit for which condonation is sought.
- (k) Whether the explanation for the delay is adequate.
- (l) Whether the Defendant suffered prejudice as a result of the one-day delay.
- (m) Whether condonation ought to be granted having regard to the delay, explanation, prejudice and prospects of success in the underlying discovery application.

ISSUE 1: WHETHER A RULE 30A NOTICE WAS REQUIRED BEFORE THE PLAINTIFF COULD INVOKE RULE 35(7)?

[8] The Plaintiff seeks an order in terms of Rule 35(7) compelling the Defendant to make further and better discovery pursuant to the Plaintiff's Rule 35(3) notice. The application requires me to determine, first, whether Rule 30A constituted a prerequisite to the application; second, whether the documents identified in items 1 to 19 are relevant to a matter in question in the main action; third, whether the Defendant has established any basis for withholding documents on the grounds of privilege or confidentiality; and fourth, whether the application is premature, moot, abusive or otherwise unsustainable. I deal with those questions cumulatively because they determine whether the Plaintiff is entitled to the relief contemplated by Rule 35(7).

[9] Rule 35(3) is specifically directed at a situation in which a party is dissatisfied with the discovery already made. It permits that party to require further documents which may be relevant to any matter in question. Rule 35(7), in turn, provides the mechanism by which the Court may compel compliance where the opposing party fails to give the required discovery.

[10] Rule 30A read as follows:

“Non-compliance with Rules

(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

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

[11] The applicability of Rule 30A was discussed by this court in the matter of *M and M Quantity Surveyors CC v Orvall Corporate Designs (Pty) Ltd* (84202/19)

[2021] ZAGPPHC 343 (27 May 2021),² where the learned judge accepted that the principle that Rule 30A is not required where the Rules themselves provide an appropriate remedy for the particular non-compliance.

[12] In its finding the Court relied on the matter of *Minister of Police v Bacela* (275/2019) [2020] ZAECBHC 19 (8 September 2020),³ where the court stated the following:

“[18] In *ABSA Bank Ltd v The Farm Klippan* 490 CC 5 the Court made it clear that if a provision in the rules provides a specific remedy for non-compliance with the rule, a party need only follow the specific rule and need not give notice in terms of, or follow, Rule 30A.

[19] Harms, Civil Procedure in the Supreme Court: LexisNexis provides that: “The rule applies only if compliance with the rules is sought and then only if the relevant rule does not have its own inbuilt procedure such as rule 21(4), which provides for an enforcement procedure in the event of a failure to provide particulars for trial.

...

Under rule 30A, a party making a request, or giving a notice, to which there is no response by the other party, may through a further notice to the other party warn that after the lapse of 10 days, application will be made for an order that the notice or request be complied with, or that the claim or defence be struck out, as the case may be. Failing compliance within the 10 days mentioned, application may then be made to court, and the court may make an appropriate order.”

[20] This makes complete sense as the remedies provide for non-compliance with the rules which have their own requirements, benefits and disadvantages which should then be utilised.”

[13] The significance of that reasoning is not merely procedural. Where Rule 35(7) is specifically designed to deal with a failure to comply with discovery obligations, requiring a litigant additionally to invoke Rule 30A would introduce

² M and M Quantity Surveyors CC v Orvall Corporate Designs (Pty) Ltd (84202/19) [2021] ZAGPPHC 343 (27 May 2021) at para 24.

³ *Minister of Police v Bacela* (275/2019) [2020] ZAECBHC 19 (8 September 2020) at paras 18-20.

a procedural step which is not contained in Rule 35 itself. That would defeat the purpose of having a specific enforcement mechanism.

[14] This court in the matter of *Mphatlane N.O and Others v Randvest Capital Investments (Pty) Ltd and Others* (017896/2022) [2025] ZAGPPHC 95 (5 February 2025),⁴ demonstrated how Rule 35(3) and Rule 35(7) are intended to operate together by stating the following:

“[13] Subrule (3) of rule 35 provides a procedure for a party dissatisfied with the discovery of another party. The intention of the subrule is to provide for a procedure to supplement discovery which has already taken place, but which is alleged to be inadequate. If the defaulting party does not comply with the notice given under this subrule, the party requiring discovery is entitled to bring an application under the provisions of subrule (7) to take the matter further.”

[15] The Court in *Mphatlane*,⁵ then explained that “the rules allows a litigant to approach court in terms of rule 35(7) for an order to compel the defaulting party to produce the documents sought in subrule (3).” The significance of the judgment is that Rule 35(7) is not an extraordinary or collateral remedy, but it is the mechanism expressly provided by the Rules for enforcing the obligation arising from Rule 35(3).

[16] Applying that principle here, the Plaintiff did precisely what Rule 35 contemplates. She served a Rule 35(3) notice requiring further documents. The Defendant did not provide the further discovery sought and disputed the Plaintiff's entitlement to some or all of the categories. The Plaintiff thereafter invoked Rule 35(7).

[17] I therefore find no basis for requiring an additional Rule 30A notice. The Defendant's objection confuses the general remedy for procedural non-compliance with the specific remedy created by Rule 35(7) for a failure to comply with discovery.

⁴ *Mphatlane N.O and Others v Randvest Capital Investments (Pty) Ltd and Others* (017896/2022) [2025] ZAGPPHC 95 (5 February 2025) at para 13.

⁵ See *Mphatlane* judgement n 4 above at para 21.

[18] I accordingly conclude that Rule 30A is not a prerequisite to the Plaintiff's Rule 35(7) application.

Whether items 1 to 19 are relevant and material?

[19] The principal dispute concerns relevance. The starting point is the wording of Rule 35(3): the documents must be capable of being relevant to a "matter in question" in the action. The expression cannot be divorced from the pleadings because the pleadings define the issues which the parties have placed before the Court.

[20] In the matter of *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA),⁶ the Supreme Court of Appeal stated that—

"The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available.'

In Erasmus Superior Court Practice the following, with reference to case law, is stated:

"Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth Properly employed where its use is called for, it can be and often is a devastating tool."

. . .

"But it must not be abused or called in aid lightly in situations for which it was not designed, or it will lose its edge and become debased."

[21] Although the case concerned Rule 35(12), the SCA dealt extensively with the underlying purpose of discovery.

[22] The Plaintiff's claim arises from the Defendant's conduct in receiving and acting upon fraudulent banking details and making payments which the Plaintiff says ought not to have been made. The relevant enquiry therefore includes what the

⁶ *Democratic Alliance and Others v Mkhwebane and Another* 2021 (3) SA 403 (SCA) at para 23.

Defendant knew, what information it received, what verification it undertook and whether its conduct in effecting the payments was consistent with the duty alleged in the main action.

[23] Documents recording the banking details received by the Defendant, communications relating to those details, instructions concerning the payments, verification undertaken before payment, and communications with the relevant financial institutions concerning the circumstances immediately preceding the payments are consequently capable of having direct evidentiary value.

[24] The Defendant's argument that documents created after the payment are necessarily irrelevant cannot be accepted in that absolute form. The date of a document is not the legal test. The question remains whether its contents may bear upon a matter already in issue.

[25] For example, suppose a document created after the payment records that the Defendant had, before payment, received a warning concerning the authenticity of the banking details. Although the document itself was created later, its contents could directly illuminate the Defendant's earlier knowledge and conduct. Such a document could plainly be relevant.

[26] Conversely, a document created after the payment solely recording an attempt to recover the stolen money, without containing information capable of bearing upon the Defendant's conduct before or at the time of payment, would ordinarily not be relevant to the pleaded negligence.

[27] The distinction is therefore not simply between "pre-payment" and "post-payment" documents. It is between documents which bear upon an issue in the pleadings and documents which merely concern events occurring after the cause of action had allegedly arisen.

[28] This distinction is supported by *Mphatlane*⁷ where the Court stated the following:

"[29] It is thus clear that the documents that ought to be regarded as relevant to the issues in the matter, as gleaned from the pleadings, are those that fall within the

⁷ See *Mphatlane* judgement n 4 above at para 29.

period between 28 October 2019 and 21 July 2021. All the other documents that the Applicants seek by virtue of rule 35(3) that do not fall within the aforementioned period, are for purposes of this matter irrelevant, as they do not relate to any issues that are raised in the pleadings.”

[29] The Court excluded documents outside the relevant period because they did not relate to the issues raised in the pleadings. The lesson for the present matter is that temporal distance may be relevant evidence of irrelevance, but it is not an independent rule that every subsequent document is excluded

[30] I do not accept either proposition in its absolute form. The Plaintiff is correct that the mere fact that a document was created after the disputed payment does not, without more, render it irrelevant. Equally, the Defendant is correct that discovery must remain confined to documents bearing upon matters properly in issue in the pleadings. The question is therefore whether the particular document sought has a sufficient connection to the issues raised in the main action

[31] The correct order must consequently distinguish between the categories. A category is discoverable where the documents falling within it are sufficiently connected to the pleaded issues concerning the Defendant's receipt, verification and payment of the disputed funds. A category is not discoverable merely because it relates generally to the fraud, the loss or subsequent recovery efforts.

Privilege and Confidentiality

[32] I turn to the Defendant's claim that certain documents, particularly communications with the SAPS, banks, insurers and legal representatives concerning recovery of the stolen funds, are protected by litigation privilege and are confidential

[33] Litigation privilege and confidentiality are distinct concepts and must not be conflated. Privilege concerns whether a document is legally protected from disclosure notwithstanding its relevance. Confidentiality, by contrast, does not ordinarily render an otherwise relevant and discoverable document immune from discovery. The latter generally concerns the manner in which the Court should regulate access to, and use of, confidential information.

[34] In the matter of *Competition Commission of South Africa v ArcelorMittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA),⁸ the Supreme Court of Appeal stated that—

“[20] Litigation privilege is one of two components of legal professional privilege, the other being the privilege that attaches to communications between a client and his attorney for the purpose of obtaining and giving legal advice. Litigation privilege, with which we are concerned in this case, protects communications between a litigant or his legal advisor and third parties, if such communications are made for the purpose of pending or contemplated litigation. It applies typically to witness statements prepared at a litigant's instance for this purpose. The privilege belongs to the litigant, not the witness, and may be waived only by the litigant. “

[21] Litigation privilege has two established requirements: The first is that the document must have been obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and second that litigation was pending or contemplated as likely at the time.”

[35] the Supreme Court of Appeal in *ArcelorMittal*⁹ judgement further stated that that the purpose is not necessarily to be determined by reference to the author of the document but by reference to the person under whose authority it was procured. The enquiry is accordingly directed at the purpose for which the document was brought into existence.

[36] Applying that principle to the present matter, it is not sufficient for the Defendant merely to state that correspondence with the banks, SAPS, insurers or other third parties concerned the recovery of the stolen funds. The Defendant must

⁸ *Competition Commission of South Africa v ArcelorMittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) at paras 20-21.

⁹ See *ArcelorMittal* judgement n 8 above at para 27.

establish that the particular communication or document falls within the requirements of litigation privilege. A factual communication generated in the ordinary course of investigating the transaction does not become privileged merely because the Defendant's attorneys were involved.

[37] I turn separately to confidentiality.

[38] In *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (219/2021) [2022] ZASCA 24; [2022] 2 All SA 299 (SCA) (9 March 2022),¹⁰ the SCA in its reasoning stated the following:

“[78] There is one final issue relating to the principal relief sought by Caxton to address in this judgment. That issue concerns the contention advanced by Novus in resisting the interlocutory application, namely that the documents required contain sensitive commercial information that should not be disclosed, especially to a business rival and competitor like Caxton. The disclosure of sensitive commercial information by way of discovery is not novel. In countering Novus' contention, Caxton submitted in its heads of argument that the inspection of confidential documents may be circumscribed to protect the commercial interests of the party asserting confidentiality. In so doing, a court will strive to strike a fine balance between the competing interests of the litigants. A court will, in exercising its discretion, not adopt a predisposition either in favour of or against permitting production of the documents concerned. This was recognised in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others*. There, the court stated that a conflict will occasionally arise between the necessity to protect one party's confidential information on the one hand, and 'the need to ensure that a litigant is entitled to present his case without unfair halts' on the other. And all of this will be considered against the backdrop of the importance of the role fulfilled by discovery in the resolution of legal disputes. In order to resolve this conundrum, Schutz AJ in *Crown Cork* held that a court could impose 'appropriate limits' on the right of a litigant to have sight of the adversary's confidential documents.”

[39] The significance of *Caxton*¹¹ is that confidentiality is not equivalent to privilege. Where documents are relevant but confidential, the Court retains a discretion to regulate their inspection rather than simply refusing discovery.

¹⁰ *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (219/2021) [2022] ZASCA 24; [2022] 2 All SA 299 (SCA) (9 March 2022) at para 78.

- [40] The SCA in *Caxton*¹² adopted the principle that the Court may impose “appropriate limits” upon a litigant's inspection of confidential documents where necessary to prevent an unlawful appropriation or misuse of confidential information.
- [41] A party cannot simply invoke “confidentiality” as a blanket description covering an entire category of documents and thereby avoid the discovery obligation. The Court must first be able to identify the documents concerned and then determine whether their contents and circumstances justify protection.
- [42] I therefore distinguish between the two objections. If privilege is established, the document is protected from disclosure in accordance with the applicable rules of privilege. If confidentiality alone is established, the Court must ordinarily consider whether the document should nevertheless be produced and, if so, whether appropriate restrictions should regulate its inspection or use.
- [43] Applying these principles to the present matter, the Defendant's reliance upon litigation privilege in respect of communications with banks, SAPS, insurers or other third parties must be assessed according to the test in *ArcelorMittal*. The Defendant must establish that the documents were brought into existence for the requisite purpose of pending or contemplated litigation. The mere fact that attorneys were involved or that the communications concerned recovery of the funds is insufficient.
- [44] In respect of documents said to be confidential, the Defendant faces a different enquiry. If the documents are relevant and discoverable, confidentiality does not automatically justify their exclusion. In accordance with *Caxton*, I may instead consider whether appropriate safeguards can adequately protect the Defendant's legitimate confidentiality interests while preserving the Plaintiff's right to obtain relevant evidence.
- [45] This may be particularly appropriate where the alleged confidentiality concerns banking information, insurance information or communications with third parties. The Court can, where circumstances justify it, regulate the manner in

¹¹ See *Caxton* judgement n 10 above.

¹² See *Caxton* judgement n 10 above at para 79.

which such information is inspected or used rather than depriving the Plaintiff entirely of access to relevant material.

[46] I accordingly reject any suggestion that privilege and confidentiality constitute a single and interchangeable basis for resisting discovery. They raise different legal questions and require different remedies.

[47] I conclude that the Defendant has not established a general entitlement to withhold all documents falling within the disputed categories merely because they concern the recovery of the fraudulent payments or contain confidential information.

[48] Documents protected by litigation privilege may properly be withheld where the requirements identified in *ArcelorMittal* have been established.

[49] In respect of confidential documents which are otherwise relevant and discoverable, *Caxton* establishes that confidentiality does not necessarily defeat discovery. The Court may impose appropriate limitations upon inspection or use in order to balance the protection of confidential information against the litigant's right to a fair opportunity to present its case.

[50] I therefore find that the Defendant's objections based upon confidentiality must be considered on a document-specific or properly defined category-specific basis. Where privilege is established, the document need not be produced. Where only confidentiality is established, the proper enquiry is whether controlled disclosure or another protective measure can adequately safeguard the Defendant's interests while giving effect to the Plaintiff's right to relevant discovery.

[51] I turn now to the individual categories of documents identified in the Plaintiff's Rule 35(3) notice. I do so because the question of relevance cannot properly be determined by treating the 19 categories as a single undifferentiated request. Each category must be considered against the issues arising from the pleadings, the Plaintiff's pleaded case concerning the Defendant's alleged negligence in effecting the payments, and the Defendant's response to that case.

[52] In respect of item 1, being the FNB trust account bank statement relating to account number 6[...], I am satisfied that the document is relevant and discoverable. It concerns the receipt of the purchase price by the Defendant and therefore relates directly to the transaction from which the Plaintiff's claim arises. It may establish when and in what amount the funds were received and may further illuminate their subsequent disbursement. Significantly, the Defendant does not contend that this category is irrelevant. I accordingly find that item 1 falls within the scope of proper discovery.

[53] Item 2, being Mr M[...]'s bank verification letter, is likewise discoverable. The Plaintiff's case places in issue the manner in which the Defendant verified the banking details before making payment. The document therefore has a direct connection with the alleged failure to exercise reasonable care in verifying the intended recipient's banking details. It is not a document sought merely to investigate the Defendant's conduct generally; it bears directly upon an issue raised by the pleadings.

[54] The same conclusion applies to item 3, being proof of payment of R424 245.36 intended for Mr M[...]. The document establishes the payment which forms part of the factual foundation of the Plaintiff's claim. It is capable of establishing the date, amount and destination of the payment and is consequently directly relevant to the pleaded dispute. It must therefore be discovered.

[55] Item 4, being the Plaintiff's bank verification letter, should also be discovered. The Plaintiff seeks the document to establish what banking information relating to her was available and what information was, or ought to have been, verified before payment. Given that the alleged negligence concerns the payment of funds into an account which did not belong to the intended recipient, the document is sufficiently connected to the pleaded issues.

[56] Item 5, being proof of payment of R424 245.36 intended for the Plaintiff, is similarly discoverable. The document concerns the very payment which the Plaintiff alleges was improperly made and is therefore directly relevant to the cause of action. I accordingly find that the Defendant must discover item 5.

[57] Item 6 concerns the email communications exchanged between the Defendant's employees and Mr M[...] between 9 and 31 October 2019. I regard this category as relevant. The correspondence potentially establishes the communications preceding the disputed payment, including the banking details supplied to the Defendant, the requests made for those details, and the steps taken by the Defendant in relation to their verification. These matters fall squarely within the factual enquiry concerning whether the Defendant exercised reasonable care before effecting payment. Item 6 must accordingly be discovered.

[58] I reach a different conclusion concerning item 7, being the entire transfer file relating to the Dale Lace Road property. The Plaintiff is entitled to documents within that file which concern the receipt of the purchase price, the banking details, verification of those details, payment instructions, authorisation of payment and the disbursement of the funds. However, Rule 35(3) does not entitle a party, merely by describing a request as an "entire file", to obtain every document contained in a file irrespective of its relevance. Documents such as unrelated administrative correspondence, municipal clearance documents, estate-agent material or other documents having no bearing on the pleaded issues need not be discovered. Item 7 therefore succeeds only to the extent that the documents contained in the transfer file fall within the categories identified above.

[59] Item 8 concerns third-party insurance claims relating to the stolen funds. I am not persuaded that the category, as formulated, has been shown to be sufficiently relevant to the pleaded cause of action. The Plaintiff's claim concerns the alleged failure of the Defendant to exercise reasonable care in verifying the banking details and making payment. Whether the Defendant subsequently lodged an insurance claim or sought indemnification does not, without more, establish what the Defendant knew or ought reasonably to have known when the payment was made. The request for item 8 is accordingly refused. This conclusion makes it unnecessary to determine the Defendant's claim of litigation privilege in relation to every document falling within this broad category.

[60] Item 9 concerns proof of payment of R487 882.16 referred to in paragraph 12 of the Defendant's plea. The position here is different. The Defendant itself relies upon the payment in its pleaded defence. The document therefore relates to a fact placed directly in issue by the pleadings and is not sought merely on the basis of speculation. I accordingly find item 9 to be relevant and discoverable.

[61] In respect of item 10, being the civil litigation records in case number 17408/2020, I am not satisfied that the Plaintiff has established a sufficient connection between the requested records and the pleaded issues in the present action. The mere fact that those proceedings arose from the same underlying fraud does not make every document in those proceedings relevant to the question whether the Defendant was negligent when it effected the disputed payment. Nor does the Plaintiff's reliance on a possible "train of enquiry" dispense with the requirement that the enquiry remain connected to the issues in the pleadings. Item 10 is accordingly refused in its present form.

[62] Item 11 concerns the report submitted by the Defendant to the Legal Practice Council (LPC). The Plaintiff contends that the report describes the events giving rise to the present dispute. I do not, however, consider that this is sufficient to establish relevance. The Plaintiff has not pleaded a case based upon the Defendant's regulatory compliance before the LPC. Nor has she identified a specific issue in the pleadings to which the report relates. Unless a particular document can be shown to contain an admission or information bearing directly upon the Defendant's conduct in verifying the banking details and effecting payment, the category constitutes an impermissible attempt to investigate matters beyond the pleaded dispute. Item 11 is therefore refused.

[63] The same considerations apply to item 12, being the LPIIF claim and appeal documents for the period 2022 to 2023. Whether the Defendant sought indemnification from the Legal Practitioners Indemnity Insurance Fund, and whether such indemnification was granted or refused, does not determine whether the Defendant was negligent when the payment was made. The documents concern a subsequent indemnity process rather than the pleaded conduct giving rise to liability. Item 12 is accordingly not discoverable.

[64] Item 13 concerns reports made by the Defendant to the SAPS in criminal case 521/10/2019. I am likewise not satisfied that these documents are relevant to the pleaded issues. The fact that the Defendant reported the fraud, and the contents of a subsequent criminal report, do not in themselves establish whether the Defendant exercised reasonable care before making the payment. The criminal conduct of the third-party fraudsters is not the issue presently before this Court. Item 13 is therefore refused.

[65] Item 14, being all communications and documents exchanged between the Defendant and the SAPS concerning the criminal investigation, is even broader. Apart from the absence of a sufficient connection with the pleaded negligence, the request for "all communications" lacks the degree of specificity required of a proper discovery request. It would require the Defendant to search and produce an extensive body of material without the Plaintiff identifying the documents sought or the particular pleaded issue to which they relate. Item 14 is accordingly refused.

[66] I reach a similar conclusion concerning item 15, being the ABSA fraud and forensic records, and item 16, being the corresponding Nedbank fraud and forensic records. These categories principally concern investigations and recovery efforts undertaken after the disputed payments had already been made. The Plaintiff's contention that these documents may assist in tracing the stolen funds is insufficient, without more, to establish their relevance to the question whether the Defendant was negligent at the time of payment. The requests are therefore refused in their present form.

[67] I nevertheless emphasise that the refusal of items 15 and 16 does not mean that every document generated after the payment is necessarily irrelevant. If, for example, a particular document generated during a subsequent investigation contains an admission by the Defendant concerning the banking verification undertaken before payment, that document may stand on a different footing. The present finding is directed at the categories as formulated in the Rule 35(3) notice and not at a hypothetical document whose relevance has not been established.

[68] Item 17 concerns the specific bank report regarding the "missing" funds referred to in the Defendant's email of 13 November 2019. Unlike the broad categories in items 15 and 16, this request identifies a particular report. The Defendant itself accepts that information identifying the destination of the funds may bear upon the issues in the action, subject to its content and any proper claim of privilege. I am satisfied that the report is sufficiently connected to the transaction and the loss alleged by the Plaintiff. If the report has not already been discovered, and if no valid claim of privilege is established in respect of it, it must be discovered.

[69] Item 18 concerns the urgent application papers relating to the proposed or issued proceedings to compel ABSA and Capitec to release frozen funds. To the extent that the documents comprise draft pleadings, confidential instructions to legal representatives, legal opinions or communications created for the dominant purpose of contemplated or pending recovery litigation, they may attract litigation privilege. The Plaintiff has not established a basis for compelling disclosure of such privileged material. Item 18 is therefore refused to the extent that it seeks privileged litigation material. Any final court documents forming part of the public record stand on a different footing and cannot be withheld merely by describing them as litigation documents.

[70] Finally, item 19 concerns correspondence and documents relating to the Commercial Crimes Court proceedings against the recipient of the fraudulent payment. I am not satisfied that the category, as formulated, bears sufficiently upon the pleaded negligence of the Defendant. The criminal proceedings concern the conduct of the alleged fraudster, whereas the issue in the present action is whether the Defendant itself acted negligently in verifying the banking details and effecting payment. The Plaintiff's assertion that the documents may assist in the recovery of the funds does not establish the requisite connection with the pleaded issues. Item 19 is accordingly refused.

Whether the Application is abusive or a Fishing expedition?

[71] The Defendant characterises the Plaintiff's Rule 35(3) notice as a fishing expedition. I accept that discovery cannot be used to search indiscriminately for evidence in the hope of discovering a case which has not been pleaded.

[72] In *Democratic Alliance and Others v Mkhwebane and Another* (1370/2019) [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) (11 March 2021),¹³ the Supreme Court of Appeal stated that—

“[23] Rule 35(12) is part of a set of rules regulating discovery, inspection and production of documents in relation to litigation. The object of discovery is described in *Durbach v Fairway Hotel* 1949 (3) 1081 (SR) at 1083 as follows:

‘The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available.’

In *Erasmus Superior Court Practice*² the following, with reference to case law, is stated: “Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth . . . Properly employed where its use is called for, it can be, and often is a devastating tool . . .

. . .

But it must not be abused or called in aid lightly in situations for which it was not designed, or it will lose its edge and become debased.”

This case is about whether rule 35(12) has properly been called in aid by the appellants.”

[73] The mere fact that the Plaintiff requests 19 categories does not establish abuse. What matters is whether the categories are sufficiently connected to the issues in the main action. If a category seeks every communication, investigation, report or document concerning the fraud without limitation, it would be impermissibly broad. If, however, the category is directed at communications or documents capable of illuminating the Defendant's conduct in relation to the disputed payments, it falls within the legitimate purpose of discovery.

¹³ *Democratic Alliance and Others v Mkhwebane and Another* (1370/2019) [2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) (11 March 2021) at para 23.

[74] I accordingly do not find the application abusive merely because it is extensive. Its sustainability depends upon the relevance of each category and the validity of any privilege or confidentiality asserted over documents falling within those categories.

[75] Having considered the Rule 35(7) application as a whole, I find that the Plaintiff was entitled to invoke Rule 35(7) without first serving a Rule 30A notice. The Plaintiff has established that the documents sought must be assessed according to their connection with the issues raised in the main action. The fact that certain documents were created after the disputed payments does not, by itself, render them irrelevant; however, documents having no sufficient connection with the pleaded issues are not discoverable.

[76] The Defendant has likewise not established a blanket basis for withholding documents on the grounds of privilege or confidentiality. Any claim of privilege must be properly established in respect of the particular documents concerned, while confidentiality alone does not necessarily defeat an entitlement to discovery. The application should accordingly succeed only in respect of documents which are relevant to the pleaded issues and over which no valid privilege has been established.

[77] I accordingly find that the Rule 35(7) application succeeds in part, to the extent that the documents sought are relevant to the issues in the main action and are not protected by a valid claim of privilege.

ISSUE 2: RULE 30 APPLICATION — REMOVAL OF IRREGULAR STEP

[78] The Defendant's Rule 30 application concerns the Plaintiff's delivery of different versions of her replying affidavit in the Rule 35(7) proceedings. The Defendant contends that the initial affidavit was unsigned and uncommissioned, that a signed version was delivered only on the following day, and that a further final version was subsequently delivered without the Plaintiff first withdrawing the

earlier versions or obtaining leave to amend. The issues are therefore whether the delivery of the initial affidavit constituted an irregular step; whether the subsequent versions could properly be delivered in those circumstances; whether any irregularity caused prejudice contemplated by Rule 30; and, ultimately, whether the Defendant's Rule 30 application is competent and ought to be upheld.

The Nature and Purpose Of Rule 30

[79] Rule 30(1) provides that a party wishing to challenge an irregular step must do so by notice, and Rule 30(2)(b) requires the aggrieved party to afford the opponent an opportunity to remove the cause of complaint. Rule 30(3) then permits the Court, upon application, to set aside the irregular step where the requirements of the Rule have been satisfied.

[80] The purpose of Rule 30 is not to punish a party for every departure from the Rules. It is directed at an irregularity which interferes with the proper conduct of the litigation. The enquiry must therefore distinguish between a genuine procedural irregularity and a defect which is merely technical and causes no meaningful prejudice.

[81] In *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O)*,¹⁴ the Court described rule 30 application as follows:

“I have no doubt that Rule 30 (1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed. A party who takes a procedural step which advances the finalization of the case may not, unless he is unaware of the irregularity, ask for the setting aside of the relevant irregularity. It may even be correct to infer that the situations which have been regarded as beyond the scope of Rule 30 (1) were instances where the relevant objection could be

¹⁴ *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O)* at 333H -334A.

adequately raised at an appropriate stage whilst the cause of objection constituted no hindrance to the ordinary course of the litigation process.”

[82] The rule is therefore concerned with the orderly progress of proceedings rather than the vindication of procedural formalism for its own sake.

[83] The question before me is accordingly not simply whether the Plaintiff departed from the prescribed procedure. I must determine whether what she did amounted to an irregular step within the meaning and purpose of Rule 30 and, if so, whether the irregularity justified the drastic consequence of setting aside the relevant procedural step.

Whether the Unsigned and Uncommissioned Affidavit Was an Irregular step?

[84] The first complaint concerns the Plaintiff's initial replying affidavit, which was delivered unsigned and uncommissioned.

[85] An affidavit is not simply an ordinary pleading or correspondence between the parties. Its evidential character derives from the fact that the deponent swears to or affirms the truth of its contents in accordance with the applicable formalities. The signature and commissioning requirements are therefore not wholly insignificant.

[86] At the same time, the Court must distinguish between an affidavit that is substantively defective as evidence and a document which was temporarily transmitted in an incomplete form but was corrected immediately thereafter.

[87] In the matter of *First Rand Bank Limited t/a RMB Private Bank and as FNB v Doola* (13723/2020) [2023] ZAGPJHC 456 (11 May 2023),¹⁵ the court stated that—

“It cannot be overstated that rule 30, which confers upon the aggrieved person the right to set aside the irregular step, is concerned with the forms and not the substance of the matter. The party against whom the relief is sought is first and foremost afforded an opportunity to remove and cure the cause of complaint. An

¹⁵ *First Rand Bank Limited t/a RMB Private Bank and as FNB v Doola* (13723/2020) [2023] ZAGPJHC 456 (11 May 2023) at para 3.

application in terms of rule 30 will be granted only where the irregular step causes prejudice to the person seeking to set it aside. It follows that there is no prejudice if the further conduct of the case is not affected by the irregular step.”

[88] In *First Mile Properties Ikhayaletu (Pty) Ltd and Others v SA Retail Properties (Pty) Ltd and Another* (2024/112906) [2026] ZAGPJHC 186 (2 March 2026),¹⁶ the court also emphasized that Rule 30 is not intended to encourage technical obstruction of litigation, and the applicant must demonstrate prejudice where it stated the following:

“[9] The respondent delivered the supplementary affidavit after the applicants had filed a Rule 6(5)(d)(iii) notice raising points of law. The affidavit was not accompanied by an application for leave nor by a formal application for condonation. Strictly speaking, that constitutes a procedural irregularity. Nevertheless, not every irregularity justifies the setting aside of a step under Rule 30. However, the nature and effect of the affidavit are critical. This is determined having regard to the prejudice upon the applicant by the supplementary affidavit.”

[89] This court in *West Dunes Properties 92 (Pty) Ltd and Others v Kruger NO 2025 JDR 0259 (GP)*,¹⁷ also emphasised that the Court retains a discretion and is not obliged to set aside an irregular step merely because an irregularity has been established when it stated that—

“Rule 30 envisages that any irregular step complained of must cause prejudice to the party seeking to set it aside. It is accepted though, that even if a procedural step may be found to be irregular but if it presents no prejudice in the further conduct of the case to the party complaining thereof, there would be no need to set it aside. See *Trans-African Insurance Co Limited v Maluleka* **1956 (2) SA 273** (A) at 276F-H. In *Maluleka*’s case Schreiner JA held that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

¹⁶ *First Mile Properties Ikhayaletu (Pty) Ltd and Others v SA Retail Properties (Pty) Ltd and Another* (2024/112906) [2026] ZAGPJHC 186 (2 March 2026) at para 9.

¹⁷ *West Dunes Properties 92 (Pty) Ltd and Others v Kruger NO 2025 JDR 0259 (GP)* at para 28.

[90] This court in *West Dunes Properties*¹⁸ further stated that—

“In an application under Rule 30, a court will set aside the complained-of irregular step only if it would cause prejudice to the complaining party. On the other hand, even if a case is made out for the relief sought, a court has a discretion not to yield to the aggrieved party’s request.”

[91] In my view, those principles are directly applicable to the present matter. Even if the delivery of the initial unsigned and uncommissioned affidavit constituted a procedural irregularity, the enquiry does not end there. The Court must consider the effect of the irregularity, the fact that a signed version was delivered the following day, whether the subsequent version materially altered the Plaintiff’s case, and, most importantly, whether the Defendant suffered prejudice affecting the future conduct of the litigation.

[92] The fact that the Plaintiff initially delivered a defective document cannot simply be ignored. However, the appropriate remedy must be proportionate to the procedural defect. Where the defect is capable of being cured and has in fact been cured without introducing a new case or depriving the opposing party of an opportunity to respond, the Court should be slow to impose the drastic consequence of setting aside the entire replying affidavit.

[93] Having considered the Rule 30 application in its entirety, I find that the delivery of the initial unsigned and uncommissioned version of the replying affidavit, followed by further versions without formally withdrawing the earlier versions or obtaining leave, constituted procedural non-compliance. The Plaintiff ought to have ensured that the affidavit relied upon in the proceedings was properly executed and that any substantive replacement or amendment was effected in accordance with the Rules.

[94] I nevertheless find that the Defendant has not established prejudice of the nature required to justify setting aside the Plaintiff’s replying affidavit. The defective version was followed by a signed and commissioned version on the following day, and the Defendant has not demonstrated that the subsequent

¹⁸ See *West Dunes Properties* judgement n 17 above at para 29.

versions introduced a new case or deprived it of a fair opportunity to respond. The Rule 30 application accordingly fails and is dismissed.

ISSUE 3: CONDONATION APPLICATION — WHETHER CONDONATION FOR THE LATE FILING OF THE REPLYING AFFIDAVIT SHOULD BE GRANTED?

[95] The third application concerns the Plaintiff's application for condonation for the late filing of her replying affidavit in the Rule 35(7) application. The replying affidavit was due on 4 November 2025, but the final signed version was delivered on 5 November 2025, resulting in a delay of one day. The Defendant opposes condonation and, in addition to challenging the explanation for the delay, takes issue with the founding affidavit supporting the condonation application on the basis that it was commissioned virtually. The issues for determination are therefore whether the founding affidavit was properly commissioned or substantially compliant; whether the Plaintiff has identified the affidavit for which condonation is sought; whether the explanation for the one-day delay is adequate; whether the Defendant suffered prejudice; and whether, having regard to all the circumstances, condonation should be granted.

Whether the founding affidavit in the condonation application was properly commissioned?

[96] I first consider the Defendant's objection to the commissioning of the founding affidavit. Regulation 3(1)¹⁹ of the Regulations Governing the Administration of an Oath or Affirmation provides that the deponent shall sign the declaration "in the presence of the commissioner of oaths."

¹⁹ Regulations Governing the Administering of an Oath or Affirmation, (ZA) GNR.1258 of 21 July 1972.

[97] The significance of this requirement has recently been considered by the Supreme Court of Appeal in *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Constitutional Development* 2026 (3) SA 71 (SCA).²⁰

[98] In *LexisNexis* case, the SCA considered an application seeking a declaration that the words “in the presence of” in regulation 3 should include the administration of an oath by means of live audio-visual communication.

[99] The Court in *LexisNexis* considered the existing authorities concerning virtual commissioning and recorded that—

“As matters stand, there is legal certainty: Briedenhann interpreted ‘in the presence of’ to mean in the physical presence of the commissioner of oaths. This interpretation is compatible with the approach adopted in other High Court judgments: *Knuttel NO v Bhana*,²¹ and *ED Foods SRL v Africa’s Best (Pty) Ltd*.²² In these cases, it has been held that, while reg 3 requires physical presence, the requirement may be satisfied if there is substantial compliance. What LNSA wants to achieve is not legal certainty, which already exists, but rather a different legal certainty. Essentially, the application for declaratory relief is an attempt at a back-door appeal against Briedenhann, in circumstances where LNSA was not a party to that dispute. This is not a permissible basis on which to engage a court’s power to grant declaratory relief.”

[100] In *Knuttel* case,²³ the court stated that—

“[53] Non-compliance with the regulations does not per se invalidate an affidavit. The Full Court in *S v Munn* confirmed at 734H that the regulations are directory only and that non-compliance with the regulations would not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent’s signature to an affidavit.”

[101] In *Africa’s Best*,²⁴ the deponent was in Italy, and the commissioner of oaths was in the Republic of South Africa and zoom video call was used to administer

²⁰ *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Constitutional Development* 2026 (3) SA 71 (SCA) (hereinafter referred to as *LexisNexis* case) at para 16.

²¹ *Knuttel N.O. and Others v Bhana and Others* (38683/2020) [2021] ZAGPJHC 874; [2022] 2 All SA 201 (GJ) (26 August 2021) (hereinafter referred to as *Knuttel* case).

²² *ED Food SRL v Africa’s Best (Pty) Ltd* [2024] ZAGPJHC 1619 ([2024] JOL 63714) (hereinafter referred to as *Africa’s Best* case).

²³ *Knuttel* case n 21 above at para 53.

²⁴ *Africa’s Best* n 22 above at para 5.

the oath. The court in *Africa's Best*²⁵ after considering evidence before it stated the following:

"30. I find that based on the affidavit of Mr Kemp there has been substantial compliance.

31. I also seem it necessary to refer to the judgment of Satchwell J in *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern African v Perie 2017 (1) SA 236 GJ* when she states

"[27] in summary, courts cannot be ignorant of the needs of the societies and economies within which they operate. Legal procedures must comport to the exigencies of globalisation and the availability of witnesses as I have discussed above. Courts must adapt to the requirements of the modernities within which we operate and upon which we adjudicate...

...

[32] At the time that the rules of Court were first formulated, witnesses from beyond the jurisdiction of the then Transvaal Courts travelled by train from the coast and then by motorcar and then by aeroplane. They may even have arrived at the coast after week-long voyages by steamship from another continent. Urgent messages arrived at this Court by way of telegrams whose contents and authors were difficult to authenticate..."

[102] The court in *Africa's best*²⁶ also further stated that—

"I agree that the Courts must open themselves to the modern trend of technology. This does not mean that the Court can willy nilly accept non-compliance with acts and regulations, but must be aware of the requirement that there must be substantial compliance with such acts and regulations. As stated, in this case I am satisfied that there has been substantial compliance.

[103] In applying these principles to the present matter, I am mindful that LexisNexis is the most recent authority of the Supreme Court of Appeal and that it must be given due weight. The judgment makes it clear that the ordinary requirement under regulation 3(1) remains physical presence before the commissioner of

²⁵ *Africa's Best* 22 above at para 30-31.

²⁶ *Africa's Best* n 22 above at para 32.

oaths. The question, however, is not whether virtual commissioning has generally been authorised by the Regulations, but whether the particular non-compliance in this matter is fatal to the Plaintiff's condonation application.

[104] In this regard, I do not understand LexisNexis to have abolished the principle of substantial compliance recognised in *Knuttel* and applied in *Africa's Best*. Indeed, the passage from *LexisNexis* relied upon by the Defendant expressly records that *Knuttel* and *Africa's Best* accepted that, although regulation 3 requires physical presence, an affidavit may nevertheless be valid where there has been substantial compliance with the relevant formalities.

[105] The SCA's concern in *LexisNexis* was principally with the proposition that a court could, by interpretation, transform virtual presence into physical presence for purposes of regulation 3. That is different from determining the consequences of a particular instance of non-compliance in circumstances where the Court is asked to exercise its discretion in the interests of justice.

[106] The circumstances surrounding the Plaintiff's affidavit must accordingly be examined. The Plaintiff explains that the affidavit was commissioned virtually because she was suffering from flu and was unable to travel to appear physically before a commissioner. This is materially different from a case where a litigant elects virtual commissioning merely for convenience. The Court must also have regard to the safeguards that accompanied the virtual commissioning, including whether the Plaintiff's identity was established, whether the commissioner personally administered the oath, whether the Plaintiff signed the affidavit during the audio-visual process, and whether the commissioner was satisfied that the deponent understood and affirmed the contents of the affidavit.

[107] If those safeguards were present, the essential purpose of commissioning an affidavit was substantially achieved. The purpose of the Regulations is not simply to impose a formal requirement of physical proximity for its own sake. It is, amongst other things, to ensure that the person whose evidence is placed before the Court is properly identified, understands the nature and contents of the affidavit, and makes the oath or affirmation before a person authorised to

administer it. Where those safeguards have in fact been observed, the absence of physical presence remains a departure from regulation 3(1), but it does not necessarily follow that the affidavit must be treated as though it had never existed.

[108] I am reinforced in this conclusion by *Africa's Best*, where the Court was confronted with an even more pronounced geographical separation between the deponent in Italy and the commissioner in South Africa. Despite the absence of physical presence, the Court found that there had been substantial compliance. The Court cautioned that the Courts may not “willy nilly” disregard statutory requirements but emphasised that the Court must remain alive to technological developments and determine whether there has been substantial compliance. That approach does not render virtual commissioning generally lawful; rather, it recognises that the consequences of non-compliance must be considered against the particular facts.

[109] The present case is also distinguishable from a situation in which the deponent deliberately disregards the Regulations without explanation. The Plaintiff has placed before the Court an explanation based on illness. If accepted, that explanation constitutes an exceptional circumstance which materially affected her ability to comply with the ordinary physical-presence requirement. There is no suggestion that the Plaintiff sought to evade the safeguards associated with the oath, nor that the Defendant has identified any substantive falsity, misrepresentation or prejudice arising from the manner in which the affidavit was commissioned.

[110] The Defendant's reliance on *LexisNexis* is therefore correct to the extent that it establishes that physical presence is the ordinary requirement under regulation 3(1). It is, however, too broad if it is contended that LexisNexis requires the automatic rejection of every affidavit that was commissioned virtually, irrespective of the circumstances and irrespective of whether the requirements underlying the commissioning process were substantially observed. Such an interpretation would overlook the very authorities that the SCA itself considered and distinguished and would convert a procedural requirement into an inflexible rule of nullity.

[111] I accordingly find that the Plaintiff has demonstrated sufficient grounds for the Court to exercise its discretion in her favour. The illness relied upon constitutes an exceptional circumstance; the affidavit was nevertheless subjected to an oath or affirmation before an identified commissioner through an audio-visual process; and the essential purpose of the commissioning requirements was substantially fulfilled. In these circumstances, and particularly in the absence of demonstrated prejudice to the Defendant, I am satisfied that it would be disproportionate to refuse to consider the condonation application solely because the affidavit was not commissioned in the physical presence of the commissioner.

[112] I conclude that the founding affidavit was not strictly compliant with regulation 3(1), because the Plaintiff did not sign it in the physical presence of the commissioner of oaths. However, the non-compliance does not, in the circumstances of this matter, render the affidavit a nullity. The Plaintiff has established exceptional circumstances arising from her illness and has demonstrated substantial compliance with the essential purpose of the commissioning requirements.

[113] I therefore find that the Defendant's objection to the founding affidavit on the basis of its virtual commissioning fails. The founding affidavit will be received for purposes of determining the condonation application. This finding is confined to the particular facts before me and should not be understood as recognising virtual commissioning as a generally permissible substitute for the physical-presence requirement in regulation 3(1).

Whether the Plaintiff has sufficiently identified the affidavit for which condonation is sought?

[114] I turn to the second issue, namely whether the Plaintiff has sufficiently identified the affidavit in respect of which condonation is sought. The Defendant contends that the Plaintiff's conduct in delivering more than one version of the replying

affidavit creates uncertainty as to which affidavit she seeks to have admitted out of time. The Plaintiff, on the other hand, maintains that the condonation application concerns the final signed and commissioned replying affidavit delivered on 5 November 2025, and that the earlier unsigned version was merely provided as a courtesy.

[115] A condonation application must identify with sufficient clarity the procedural default which the applicant seeks to have excused. This is necessary because the Court must be able to determine the extent of the non-compliance, the period of delay, the explanation for that delay and the prejudice, if any, occasioned to the opposing party. Condonation cannot properly be granted in the abstract. It must relate to an identifiable procedural act or document.

[116] In the present matter, however, the fact that more than one version was transmitted does not necessarily mean that the condonation application is incapable of determination. The material question is whether, on a proper reading of the papers, the Plaintiff has made it sufficiently clear which document she intends to rely upon as her replying affidavit. The papers indicate that the version ultimately relied upon is the final signed and commissioned version delivered on 5 November 2025.

[117] The earlier unsigned version does not, without more, alter that conclusion. It was not presented as the final sworn version upon which the Plaintiff intended to rely, and the subsequent signed version identified the document ultimately relied upon. The Defendant may legitimately complain about the manner in which the different versions were delivered, particularly insofar as the earlier versions were not formally withdrawn. That complaint is more directly relevant to the Rule 30 application. It does not necessarily render the separate condonation application unintelligible.

[118] I accordingly find that the Plaintiff has sufficiently identified the replying affidavit in respect of which condonation is sought. The document is the final signed and commissioned replying affidavit delivered on 5 November 2025.

Whether the explanation for the delay is adequate?

[119] I next consider the explanation for the delay. The replying affidavit was due on 4 November 2025 but was delivered on 5 November 2025. The delay was therefore one day. The Plaintiff explains the delay by reference to the circumstances surrounding the preparation and commissioning of the affidavit, including illness.

[120] The approach to condonation is well established. Condonation is not granted merely because the period of delay is short. The Court must consider the explanation for the default together with the degree of lateness, prejudice, prospects of success and the interests of justice. The explanation must nevertheless be sufficiently full to enable the Court to understand why compliance did not occur within the prescribed period.

[121] In *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC),²⁷ the Constitutional Court in explaining the nature of the condonation application stated the following:

“[10] In *Bertie van Zyl* this court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it.”

[122] In the present case, the delay is minimal. There is no period of weeks or months that requires explanation. The Plaintiff was required to deliver her reply by 4 November 2025 and did so on the following day. The explanation advanced must nevertheless be considered against the surrounding circumstances, including the fact that an unsigned version had already been provided.

[123] In my view, the Plaintiff has provided a satisfactory explanation for a delay of one day. The circumstances relied upon are not so inadequate as to justify the refusal of condonation.

²⁷ *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at para 10.

Whether the Defendant suffered prejudice?

[124] The next consideration is prejudice. The Defendant contends that the Plaintiff's conduct caused procedural prejudice because it was confronted with different versions of the replying affidavit and was required to determine which version constituted the Plaintiff's proper response.

[125] I accept that procedural uncertainty may constitute prejudice in an appropriate case. Rule 30 is intended to protect the orderly conduct of litigation and not merely to punish technical non-compliance. The relevant question for present purposes, however, is whether the one-day late filing of the final replying affidavit caused prejudice sufficient to justify refusing condonation.

[126] The Defendant has not demonstrated substantive prejudice flowing from the one-day delay. There is no indication that the Defendant lost an opportunity to respond, that its preparation for the litigation was materially compromised. Any procedural complaint arising from the existence of multiple versions falls primarily to be considered under the Rule 30 application.

[127] The distinction is important. The Court must not conflate the question whether the Plaintiff's conduct constituted an irregular step with the separate question whether the one-day delay should be condoned. Even if the manner in which the affidavits were delivered was procedurally unsatisfactory, it does not follow that the Defendant suffered the type of prejudice that makes condonation inappropriate.

Prospects of success and interests of justice

[128] I turn finally to the prospects of success. The condonation application concerns the Plaintiff's replying affidavit in the Rule 35(7) application. The Court must therefore consider, at least to a limited extent, whether the underlying

application raises genuine issues deserving determination. It is not necessary at this stage to finally determine the merits of the discovery application.

[129] The Plaintiff's Rule 35(7) application raises substantive questions concerning the relevance and materiality of the documents sought, the alleged failure to make further and better discovery, and the Defendant's claims of privilege and confidentiality. These are not matters which can properly be characterised as entirely devoid of merit. They require determination on the substantive merits of the discovery application.

[130] In the circumstances, the interests of justice favour allowing the Plaintiff's replying affidavit to be considered. The delay was one day, the final version has been identified, the explanation is reasonable, and no material prejudice has been demonstrated. Refusing condonation would have the effect of preventing the Court from considering the substantive discovery dispute because of a minor procedural default.

[131] Having considered the commissioning of the founding affidavit, the identification of the replying affidavit, the explanation for the delay, the absence of material prejudice, and the prospects of success in the underlying Rule 35(7) application, I am satisfied that the Plaintiff has established sufficient grounds for condonation. The procedural default was limited to one day and the Defendant has not demonstrated prejudice of such a nature that the interests of justice require the replying affidavit to be excluded.

[132] The condonation application therefore succeeds. Condonation is granted for the late filing of the Plaintiff's final signed and commissioned replying affidavit delivered on 5 November 2025.

[133] Having considered the three interlocutory applications and the respective issues arising from each, I find that the Rule 35(7) application succeeds in part, to the extent that the Plaintiff has established that certain categories of documents sought are material and relevant to the issues in the main action and that further discovery is justified. The Defendant was not required to comply with a Rule 30A notice before the Plaintiff invoked Rule 35(7). The Defendant's claims of privilege and confidentiality must, however, be upheld in

respect of documents properly falling within the recognised scope of those protections. The application therefore does not justify an unrestricted order compelling disclosure of all 19 categories of documents.

[134] The Rule 30 application fails, as the irregularities concerning the different versions of the replying affidavit did not cause the type of prejudice contemplated by Rule 30 and, in the circumstances, do not warrant the setting aside of the Plaintiff's replying affidavit. The condonation application succeeds. Although the founding affidavit was not strictly compliant with the physical-presence requirement in regulation 3(1), there was substantial compliance in the particular circumstances, and the Plaintiff's one-day delay has been adequately explained. Having regard to the limited delay, the absence of material prejudice, and the existence of reasonable prospects in the underlying discovery application, it is in the interests of justice that condonation be granted.

Order

[135] Under the circumstances the following order is made:

1. Defendant's Rule 30 application is dismissed with costs on scale B.
2. Plaintiff's condonation application for the late filing of the replying affidavit in the application to compel further and better discovery is condoned with costs on scale B.
3. The Plaintiff's application in terms of Rule 35(7) is partially granted, with costs, and the Defendant is directed to make available for inspection and, where applicable, copying, the documents falling within the following items identified in the Plaintiff's Rule 35(3) and (6) notice dated 1 August 2025:

- (a) Items 1, 2, 3, 4, 5, 6, 9 and 17 are relevant and discoverable. The Defendant is directed to discover and make available for inspection and copying the documents falling within these categories, to the extent that they are in its possession, custody or control and have not already been discovered within 10 days of service of this order.
- (b) Item 7 is discoverable within 10 days of service of this order only to the extent that the documents contained in the transfer file relate to the receipt of the purchase price, banking details, verification of those details, payment instructions, authorisation of payment and disbursement of the funds. The Plaintiff's request for the entire transfer file is refused.

LENYAI J
JUDGE OF THE HIGH COURT
PRETORIA

Appearances:

For the Plaintiff: Adv. L.E Quilliam

instructed by: Lawtons Inc. p/a Lawtons Africa

For the Defendant: Adv. D.A Weyers

instructed by: Weyers and Lombard Incorporated

Date of Hearing: 03 August 2026

Date of Judgement: 18 August 2026