



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 2024-111022

DELETE WHICHEVER IS NOT APPLICABLE
(1)REPORTABLE: NO
(2)OF INTEREST TO OTHERS JUDGES: NO
(3)REVISED: YES

In the matter between:

MEC OF HEALTH: GAUTENG PROVINCE

Applicant/Defendant

and

KHOTSO NCUBE

Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 10:00 on 26 August 2026.*

JUDGMENT

INTRODUCTION:

- [1] The application is launched in terms of Rule 42. It seeks to rescind an order granted by this court on 4 November 2025 when the defence of Applicant was struck.
- [2] In the main action, Respondent sues Applicant for damages resulting from medical negligence in the sum of approximately R6,500 000.00.
- [3] After pleadings had closed, Respondent served a notice seeking discovery on 27 January 2025. When Applicant failed to comply, Respondent obtained an order to compel discovery on 30 July 2025. The order stipulated 10 days for compliance. It was hand delivered to the State Attorney on 14 August 2025.
- [4] Various letters were thereafter addressed by Respondent's attorney to remind the State Attorney of Applicant's failure to discover and that a striking out-application would follow. All to no avail.
- [5] On 15 September 2025, Respondent served an application to strike Applicant's defence due to non-compliance with the order of 30 July 2025. Such application was served by hand on the State Attorney.
- [6] On 22 October 2025, Applicant served an unsigned Discovery Affidavit, together with hospital records which formed part of the discovered items.
- [7] On 4 November 2025, the application to strike out Applicant's defence was heard and granted (the "Mnyovu-order"). Such order was served on the State Attorney on 10 November 2025.
- [8] Only on 11 February 2026 was the signed Discovery Affidavit served. The current application for rescission was launched on 19 February 2026. In essence, Applicant contends that Judge Mnyovu ought to have been alerted

to the fact that an unsigned Discovery Affidavit had been served; that Respondent should not have served the striking out-application by hand; and that the Mnyovu-order was thus erroneously granted.

BASIS OF OPPOSITION:

[9] Respondent opposes the application essentially on the following grounds:

- The application was launched approximately 100 days after granting of the Mnyovu-order, which is not a reasonable time.
- The order was not erroneously granted, because an unsigned Discovery Affidavit amounts to a nullity.
- Applicant failed to demonstrate a *bona fide* defence.
- Rescission is not in the interest of justice.

DISCUSSION:

[10] One can only have sympathy with the plight of the Applicant. The tardiness of the State Attorney manifested itself repeatedly. To mention but a few instances:

- 10.1 The State Attorney failed to respond to a request at the outset of the proceedings to consent to electronic service. This compelled Respondent to serve the striking-application by hand. It cannot be criticised for doing so as it was entitled to do so in terms of the rules.
- 10.2 It took Applicant from 27 January 2025 until 11 February 2026 to serve a proper Discovery Affidavit after having been called upon to do so.

10.3 After service of the order on 10 November 2025, it took Applicant until 19 February 2026 to serve the current application.

[11] Since Rule 35(1) entitles Respondent to call for discovery “on oath” an unsigned Discovery Affidavit clearly does not comply with the rules. It is however a different question whether Applicant’s defective discovery (served on 22 January 2026) should have been brought to Judge Mnyovu’s attention on 4 November 2025 when the matter was heard. In my view, it ought to have been done to allow the judge to make an informed decision. It seems improbable that the judge would simply have struck the defence – had he been aware of the service of the incomplete document. Although Applicant certainly had not complied with the letter of the law, its attempt at discovery (coupled with copies of the hospital records) would probably have averted the striking of its defence – which is a relatively severe remedy. It is conceivable that the judge would have given a further order compelling service of a signed discovery or he would have stood the matter down pending compliance.

[12] I appreciate the possibility that granting this application may create the impression that “*some animals are more equal than others*”, i.e. the State Attorney is treated with more lenience than other litigants. One is careful not to strengthen such impression.

[13] However, the interests of justice compel me to grant the application, primarily in view of the following factors:

13.1 Judge Mnyovu did not have the full facts at his disposal on 4 November 2025 when he struck the defence.

13.2 The amount in issue in the main action is large and will be paid from State resources should default judgment be granted - pursuant to Applicant’s defence having been struck.

13.3 Striking the defence ordinarily implies that Applicant will be denied the opportunity of having the case decided on its merits and ventilating its defence.

13.4 Therefore, although the application was certainly not brought with the expedience one would have expected from the State, this does not appear to me to be an appropriate case to close the doors of the court to Applicant, without a proper hearing on the merits.

PUNITIVE COSTS:

[14] I have pointed out the lackadaisical attitude displayed by Applicant's attorney towards the rules of court and court orders. This sort of attitude can never be countenanced. Punitive costs are therefore warranted.

[15] In the result, I make the following order:

- (1) The order granted on 4 November 2025 – striking out Applicant's defence – is rescinded.
- (2) Applicant is ordered to pay the costs of the application on an attorney and client scale.


F J ERASMUS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Electronically delivered and signed.

APPEARANCES:

FOR APPLICANT: Adv Mokatsane

INSTRUCTED BY: State Attorney, Pretoria

FOR RESPONDENT: Mr Mashisi

INSTRUCTED BY: Mashishi Attorneys