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

Case Number: **2025-177461**

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

DATE

SIGNATURE

In the matter between:

N[...] : C[...] M[...]

Applicant

and

N[...] : N[...]

Respondent

JUDGMENT

NDLOKOVANE, AJ

Introduction

[1] This is an interlocutory application brought by the Applicant, Mr C[...] M[...] N[...], in terms of rule 35(7) of the Uniform Rules of Court, to compel the

Respondent, Ms N[...] N[...], to comply with a notice in terms of rule 35(3) dated 6 May 2026.

- [2] The application arises from pending divorce proceedings instituted by the Respondent against the Applicant under case number 2025/177461. The parties were married in community of property on 28 April 2022. Mr N[...] is a Defendant in those proceedings, and Ms N[...] is the Plaintiff. For ease of reference, Mr N[...] will hereinafter be referred to as the Applicant and Ms N[...], the Respondent.
- [3] The present application concerns the proper scope of discovery and the Respondent's alleged failure to make proper discovery in terms of the Uniform Rules. The Applicant contends that the Respondent's discovery affidavit, belatedly delivered on 6 May 2026, is manifestly deficient and that the Respondent has failed to comply with the Applicant's Rule 35(3) notice calling for further discovery.

Background

- [4] The Respondent instituted divorce proceedings against the Applicant on 30 September 2025. Pleadings have closed. The matter is at the discovery stage.
- [5] On 18 February 2026, the Applicant served a notice in terms of rule 35(1), requiring delivery of a discovery affidavit within twenty (20) court days. The period expired on 18 March 2026 without delivery and without any communication from the Respondent.
- [6] On 19 March 2026, the Applicant served a notice in terms of rule 30A(1), affording the Respondent a further ten (10) court days to remedy the default. That period expired on 7 April 2026, again without delivery and without any communication.
- [7] On 7 April 2026, the Applicant issued and served an application in terms of rule 30A (2) read with rule 35(1) to compel delivery of the Respondent's

discovery affidavit. That application was set down on the unopposed motion roll for 27 May 2026.

- [8] On 6 May 2026, approximately seven weeks after the Rule 35(1) due date, and just twenty-one (21) days before the hearing of the compelling application, the Respondent caused a discovery affidavit to be electronically filed. A true copy is marked annexure “MN-A”.
- [9] Upon receipt of the discovery affidavit, the Applicant became aware that the discovery was manifestly deficient. On the same date, 6 May 2026, the Applicant served a notice in terms of rule 35(3) calling for further documents. A true copy is marked annexure “MN-B”.
- [10] The rule 35(3) notice expressly notified the Respondent that the documents were required to be produced for inspection and copying within ten (10) court days, failing which the Applicant would apply for an order compelling compliance.
- [11] Calculated from 6 May 2026, the ten (10) court days prescribed by rule 35(3) expired on Wednesday, 20 May 2026.
- [12] As at the date of the Applicant's founding affidavit (22 May 2026), the Respondent had not:
 - 12.1 produced any of the documents or recordings called for in the rule 35(3) notice;
 - 12.2 delivered an affidavit in terms of the second leg of rule 35(3);
 - 12.3 delivered any notice or affidavit objecting to the rule 35(3) notice;
 - 12.4 requested an extension of time; or
 - 12.5 made any communication whatsoever in response to the rule 35(3) notice.
- [13] The Applicant thereafter launched the present rule 35(7) application on 22 May 2026.

The Respondent's Answering Affidavit

- [14] The Respondent filed an answering affidavit on 29 July 2026. The affidavit is late, having been filed approximately two months after the period prescribed for answering affidavits under rule 6(5)(d)(ii) had expired.
- [15] The Respondent seeks condonation for the late filing. She explains that she has been subjected to “incessant litigation” brought by the Applicant, including a Rule 43 application (dismissed on 31 March 2026) and an urgent application (struck off the roll on 14 April 2026). She states that she is not in a financial position to keep fielding these applications.
- [16] The Respondent raises two points in *limine*:
- 16.1 *Lis pendens*: The Applicant has an earlier application pending before this Court, dated 31 March 2026, in which he seeks substantially the same relief relating to rental income from the immovable property. That application was struck off the roll for lack of urgency on 16 April 2026 but remains pending. The Respondent contends that the present application cannot proceed in the face of the pending application.
- 16.2 *Res judicata*: The Applicant brought a Rule 43 application on 25 November 2025, which was dismissed by Acting Judge Smit on 31 March 2026. The court found that the issues raised by the Applicant were matters to be dealt with at the trial. The Respondent contends that the relief sought herein is *res judicata*.
- [17] Both parties are unrepresented in these proceedings. The Court has had regard to the fact that both parties are lay litigants and has approached the matter with due allowance for their respective positions.

Analysis

Condonation for the Late Filing of the Answering Affidavit

- [18] The Respondent's answering affidavit is substantially out of time. The notice of motion was served on 18 May 2026. The period for delivering an answering affidavit expired on or about 1 June 2026 (fifteen court days after the expiry of the ten court days for the notice of intention to oppose). The answering affidavit was only filed on 29 July 2026, a delay of approximately two months.
- [19] The factors to be considered in an application for condonation are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the matter.¹ These factors are interrelated and must be considered cumulatively.²
- [20] The Respondent's explanation for the delay is that she lacked the funds to instruct her attorneys. Both parties are now unrepresented. The financial constraints she describes are not implausible. Moreover, the Respondent's answering affidavit does raise substantive arguments, even if they are largely procedural in nature (the *lis pendens* and *res judicata* points). The interests of justice are best served by permitting the Respondent to place her version before the Court and having the matter determined on its merits, rather than on procedural technicalities.
- [21] The prejudice to the Applicant is limited. The hearing of this matter has been delayed, but the Applicant has had the opportunity to file heads of argument and to respond to the Respondent's answering affidavit. In the circumstances, I grant condonation for the late filing of the answering affidavit.

Lis Pendens

- [22] The doctrine of *lis pendens* requires the same parties, the same cause of action, and the same subject matter.³ Even where these requisites are met, a

¹ In this regard, see *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F.

² In this regard, see *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at paras 22-23.

³ *Nestlé (South Africa) (Pty) Ltd v Mars Inc* [2001] ZASCA 76; 2001 (4) SA 542 (SCA) at para 16.

stay remains discretionary, governed by considerations of fairness and convenience.⁴

[23] The earlier application (dated 31 March 2026) sought urgent relief relating to rental income from the property. That application was struck off the roll for lack of urgency on 16 April 2026. The present application is brought under rule 35(7) and concerns discovery. The relief sought is different. The cause of action is different. The present application is not *lis pendens*.

[24] The earlier application is not "pending" in the sense required by the doctrine. It was struck off the roll. The Applicant is entitled, as Crutchfield J expressly confirmed in the leave judgment of 15 May 2026, to set the application down on the ordinary opposed roll. The present application is not an attempt to re-litigate the same issue; it is a separate application brought under a different Rule.

Res Judicata

[25] The doctrine of *res judicata* requires, among other things, that the issue in question was actually and finally determined by a competent court in prior proceedings between the same parties.⁵

[26] The rule 43 application was dismissed by Acting Judge Smit on 31 March 2026. The court held that the issues raised by the Applicant were matters to be dealt with at the trial. The court made no finding on the merits of the Applicant's claim to rental income. The court expressly stated:

"Therefore, I make no finding regarding the lawfulness or not of the wife's actions in instructing the tenants to pay the rental income to her... or whether the husband is or should be entitled to any part of this income from the joint property... These are matters for the trial Court."

[27] The *res judicata* plea must therefore fail. The issue was not decided on the merits. The court reserved the issue for the trial.

⁴ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite* 2000 CC [2013] ZASCA 129; 2013 (6) SA 499 (SCA) at paras 34-36.

⁵ *Prinsloo NO v Goldex 15 (Pty) Ltd* [2012] ZASCA 28; 2014 (5) SA 297 (SCA).

The Manifest Deficiency of the Discovery Affidavit

- [28] A discovery affidavit is prima facie conclusive as to its contents. The court will, however, go behind a discovery affidavit where it can be shown, from the discovery affidavit itself, the documents referred to, the pleadings, admissions made, or the nature of the case, that there are reasonable grounds for supposing that the party has other relevant documents in their possession.⁶
- [29] The Respondent's discovery affidavit lists only ten categories of documents, and contains a generic, formulaic claim of legal-professional privilege in Schedule B without identifying any specific document. The discovery is manifestly inadequate when measured against the Respondent's own pleadings and her own Financial Disclosure Form.
- [30] The Respondent pleads in her Particulars of Claim that the joint estate is indebted to one Reggie Paddy in the amount of R 900 000.00 and to one Makhosazana Khumalo in the amount of R 80 000.00. The documents discovered in respect of these alleged loans are not, on their face, loan agreements, acknowledgements of debt, or written instruments creating obligations. The documents discovered are:
- 30.1 In respect of the alleged R 80 000.00 loan from Makhosazana Khumalo: a Nedbank Personal Loan Pre-Agreement Statement in the name of Mrs Khumalo, evidencing a loan from Nedbank to Mrs Khumalo, not a loan from Mrs Khumalo to the joint estate.
- 30.2 In respect of the alleged R 900 000.00 loan from Reggie Paddy: a handwritten ledger and credit card statements in the name of Mr Paddy, not a loan agreement or acknowledgement of debt.
- [31] The Respondent has not discovered the documents called for in the rule 35(3) notice, including the written loan agreements, acknowledgements of debt,

⁶ *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 597H; also see *Mineral-Loy (Pty) Ltd v Highveld Steel & Vanadium and Another* [2018] ZAGPPHC 853 at para [19].

documentary proof of payment, and communications between the Respondent and the alleged creditors.

- [32] The Respondent operates a TymeBank account which is not disclosed in her sworn Financial Disclosure Form and which she has not discovered. The Applicant has provided proof of the existence of this account.
- [33] The Respondent has not discovered the municipal valuation notices, lease agreements, tenant payment records, or rental ledgers in respect of the immovable property, despite these being directly relevant to the disputed valuation and rental income.
- [34] The Respondent has not discovered any invoices, ledgers, accounting records, or SARS returns corroborating her self-employment disclosure.
- [35] The documents called for in the rule 35(3) notice are directly relevant to the pleaded disputes. The test for relevance is whether the document may, directly or indirectly, enable the party requiring discovery to advance his own case or to damage the case of his adversary.⁷
- [36] Every category of documents called for in the rule 35(3) notice is directly relevant to a pleaded matter in question. The Respondent has not delivered any affidavit in terms of the second leg of rule 35(3) and has therefore not placed before the Court any sworn denial of possession or control in respect of the documents sought.

Pattern of Non-Compliance

- [37] The procedural history of this matter reveals a pattern of non-compliance by the Respondent:

37.1 On 18 February 2026, the Applicant served a rule 35(1) notice. The Respondent failed to comply.

⁷ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA) at 63; also see *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T).

37.2 On 19 March 2026, the Applicant served a rule 30A(1) notice. The Respondent failed to comply.

37.3 The Respondent only delivered her discovery affidavit on 6 May 2026, approximately seven weeks late, and only when compelled by an imminent rule 30A application.

37.4 The Respondent has not responded to the rule 35(3) notice in any way.

[38] The Respondent's failure to respond to formal procedural notices is concerning. However, the Court is mindful that the Respondent has been unrepresented and may not have fully appreciated the consequences of her failure to engage with the discovery process.

Prejudice to the Applicant

[39] Both parties are unrepresented in this matter. The information asymmetry between the parties is substantial: virtually every record relevant to the disputed financial and accounting issues is exclusively within the Respondent's possession or under her control.

[40] Without the documents called for, the Applicant is unable to:

40.1 prepare properly for trial;

40.2 test the Respondent's pleaded version on its own documentary basis;

40.3 quantify or particularise his counterclaim for accounting of rental income; and

40.4 exercise his rights of discovery as contemplated by the Uniform Rules.

[41] The orderly conduct of the trial demands that this asymmetry be addressed at the discovery stage.

Conclusion

[42] The Respondent's answering affidavit is late, but condonation is granted in the interests of justice.

[43] The Respondent's points in *limine* of *lis pendens* and *res judicata* must fail. The earlier applications do not bar the present application.

[44] The Respondent's discovery is manifestly deficient. The documents called for in the rule 35(3) notice are directly relevant to the pleaded disputes. The Respondent has failed to produce the documents or to deliver an affidavit in terms of the second leg of rule 35(3).

[45] The Respondent's pattern of non-compliance with formal procedural notices is concerning. However, the Court is mindful that the Respondent is a lay litigant who has been subjected to a number of interlocutory applications. The Applicant is also a lay litigant who has been compelled to bring multiple interlocutory applications to secure basic discovery.

[46] In the circumstances, the Applicant is entitled to the relief sought.

Order

[47] In the result, the following order is made:

1. The Respondent's application for condonation for the late filing of the answering affidavit is granted.
2. The Respondent is ordered, within ten (10) court days of the date of this Order to:
 - 2.1 produce for the Applicant's inspection and copying, the documents and recordings called for in the Applicant's notice in terms of rule 35(3) dated 6 May 2026; alternatively
 - 2.2 deliver an affidavit in respect of each item set out in the said rule 35(3) notice that is not produced, stating on oath that the document or recording in question is not in her possession or under her control and, if known to her, stating the whereabouts thereof, in accordance with the second leg of Rule 35(3).
3. In the event that the Respondent fails to comply with paragraph 2 above within the prescribed period, the Applicant is granted leave to approach

this Honourable Court on the same papers, duly supplemented where necessary, for further relief in terms of rule 35(7), including, but not limited to, an order striking out the Respondent's claim in the main action and granting judgment in favour of the Applicant on his counterclaim.

4. Each party shall pay its own costs of this application.

N NDLOKOVANE
Acting Judge of the High Court
Gauteng Division
Johannesburg

APPEARANCES

For the Applicant : C[...] M[...] N[...] (in person)

For the Respondent : N[...] N[...] (in person)

Date of Hearing : 31 July 2026

Date of Judgement : 10 September 2026