

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 44776/2021

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

28/08/2026
DATE


SIGNATURE

In the matter between:

**BUFFELSDRIFT WILD AND NATURE
RESERVE (PTY) LTD**

Applicant

And

MAGALIES WATER

Respondent

Delivered: This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on Caselines. The date and time of hand-down is deemed to be 28 August 2026.

JUDGMENT

TEFFO J

Introduction

[1] This is an opposed application in terms of rule 35(7) of the Uniform Rules of Court. The applicant is the defendant in a pending action instituted against it by the respondent in September 2021. The parties in this application will be referred to as they are cited in the action. In the notice of motion delivered on 22 November 2024 the defendant sought the dismissal of the plaintiff's claim with costs. In an amended notice of motion delivered on 12 December 2025 pursuant to a notice of intention to amend to which no objection appears from the papers, the defendant now also seeks the striking out of the plaintiff's defence to its counterclaim, together with the costs of the action and of this application.¹

[2] The application is the sequel to an order of Meaden AJ of 10 June 2024 compelling the plaintiff to comply with the defendant's notice in terms of rule 35(3) of the Uniform Rules of Court, and to his judgment of 19 November 2024 refusing condonation for, and dismissing, the plaintiff's application for leave to appeal against that order. Two interlocutory questions travel with the main application. The first relates to the plaintiff's application for condonation of the late delivery of its answering affidavit, which the defendant opposes, and the second relates to the plaintiff's contention that the application was launched prematurely.

The legal framework

[3] Rule 35(3) of the Uniform Rules of Court entitles a party who believes that documents relevant to any matter in question, in addition to those already disclosed, are in the possession of an opposing party, to give notice requiring that party to make them available for inspection or to state on oath, within 10 days, that such documents are not in its possession. In which event, the party making the disclosure shall state their whereabouts, if known. Rule 35(7) of the Uniform Rules of Court empowers the Court, on application of the party desiring

¹ Amended notice of motion, CaseLines 000022-1; notice of intention to amend, 28 November 2025, CaseLines 000021-1 to 2.

discovery, to order compliance with the rule and, failing such compliance, to dismiss the claim or strike out the defence.²

[4] The effect of a sworn statement of non-possession is settled. It is ordinarily the answer the subrule contemplates, and a court does not lightly go behind it. In *Bank of Transkei Ltd v Mfana*,³ where such an affidavit followed an order compelling compliance, Pakade J declined to strike out the defence and stated the following, “The rule requires him to say so. What else is he expected to say? Nothing.”

The whereabouts of the documents need be stated only if known. A party may supplement its discovery by successive affidavits; equally, where reasonable grounds exist for supposing that relevant documents are in a party’s possession, the court may direct that party to respond comprehensively. The principle presupposes, however, a genuine and *bona fide* response. A court is not obliged to accept at face value a statement of non-possession which is contradicted by the party’s own prior statements, or which on its face is not a real answer to what was asked.⁴

[5] The sanction in Uniform Rule 35(7) is drastic, and the discretion to impose it must be exercised judicially. In *MEC for the Department of Public Works v Ikamva Architects*,⁵ on which both parties rely, the full court emphasised that section 34 of the Constitution of the Republic of South Africa (“the Constitution”) is engaged, because the sanction may bring an end to a claim or a defence without a hearing on the merits; that the rules provide flexible remedies giving the court the opportunity to make the sanction fit the breach; and that the power is to be exercised only after the defaulting party has been heard. The Court’s inherent power under section 173 of the Constitution to protect and regulate its

² Rule 35(3) and rule 35(7) of Uniform Rules of Court, with the commentary in Erasmus: Superior Court Practice, JutaStat e-publications CD Rom & Intranet: ISSN 1561-7467 Internet: ISSN 1561-7475 at RS 20, 2022, D1-477, referred to in the applicant’s heads, at paras 11.1–11.2, CaseLines 000011-11 to 12.

³ [2003] JOL 12198 (Tk) at paras 17– 18; *Lot 38 Bizana Properties CC v Tiador* 119 CC [2024] ZAECHGHC 2 at para 13; *Biermann v Eastern Cape Development Corporation* [2017] JOL 37733 (EL).

⁵2022 (6) SA 275 (ECB); *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC); *Changuete v Minister of Home Affairs* 1990 (2) SA 836 (W).

own process, and to prevent its abuse, points the same way. The rules exist for the courts, and their primary function is the attainment of justice. A litigant deprived of documents which it requires in order to plead or to defend is the very mischief at which compelled discovery is aimed.⁶

[6] The principles governing condonation are equally settled. The Court exercises a discretion judicially upon a consideration of all the facts. In essence it is a matter of fairness to both sides, the degree of lateness, the explanation, the prospects of success and the importance of the case being inter-related and none individually decisive. Condonation is not to be had for the mere asking: a party must give a full and reasonable explanation for the non-compliance, and the ultimate criterion is the interests of justice, as supported in *Melane v Santam Insurance Co Ltd*.⁷

[7] Section 18(1) of the Superior Courts Act,⁸ provides that, subject to subsections (2) and (3), and unless the court orders otherwise under exceptional circumstances, the operation and execution of a decision which is the subject of an application for leave to appeal, or of an appeal, is suspended pending the decision of the application or appeal.

The background facts

[8] The plaintiff, a water board established under the Water Services Act⁹, is the primary supplier of potable water to the defendant's nature reserve. On 6 September 2021 it sued the defendant for payment of R 724 022.11 with interest, an order restricting or suspending the water supply pending payment, and costs, founded on a written agreement of 30 April 1997.¹⁰

⁶ *MEC for the Department of Public Works v Ikamva Architects* 2022 (6) SA 275 (ECB); *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC); *Changuete v Minister of Home Affairs* 1990 (2) SA 836 (W).

⁷ 1962 (4) SA 531 (A) at 532C–F; *Brummer v Gorfil Brothers Investments (Pty) Ltd*; *Grootboom v National Prosecuting Authority*, quoted with approval in *Steenkamp v Edcon Ltd*.

⁸ 10 of 2013.

⁹ 108 of 1997

¹⁰ Meaden AJ, at paras 1– 4, CaseLines 000-3; plaintiff's answering affidavit in the compel application, at paras 3–6, CaseLines 003-2 to 3.

[9] The defendant admits the agreement but denies the debt. Its pleaded case is that the plaintiff never installed a meter at the supply point on the boundary of the property; that it relies instead on a meter some 1.2 kilometres away; that the existing connection was temporary, pending a permanent connection first adjacent to the Wallmansthal Road and later on the Downbern side; that maintenance of the pipeline up to the supply point was the plaintiff's obligation; and that leaks downstream of the metering point caused it to be billed for water it never received. It counterclaims R1 504 452.95 for overpayment and R 146 492.42 for repairs, being a total of R 1 650 945.37. The plaintiff joins issue on each score. As Meaden AJ observed, the disputes range well beyond non-payment: they embrace the scope of the parties' agreements, the location of the temporary and permanent supply points, the metering point, maintenance of the supply line, volumes supplied and consumed, and the competing money claims.¹¹

[10] The plaintiff delivered its discovery affidavit on 10 February 2023. On 20 February 2023 the defendant's attorney recorded its deficiencies in correspondence and served a rule 35(3) Notice in terms of the Uniform Rules of Court, identifying fifteen categories of documents. Nine are material here. Items 1, 3, 4, 6, 7, 10, 11, 12 and 13. The plaintiff's planning of the Downbern area water network; its correspondence with the local authority regarding the defendant's development; its correspondence with, and written instructions to, its own appointed engineers concerning the network and its connection to the development; reports on the availability of water within the supply area; correspondence with the Department of Roads and/or municipalities regarding servitudes and road works; and the documents and correspondence concerning the original subdivision application and the town planners.¹²

[11] On 22 May 2023 the plaintiff answered on oath (the first version). For items 1, 4, 6, 7, 10, 11, 12 and 13 the response was that the documents "are irrelevant to any pleaded issue in dispute between the parties. Accordingly, the

¹¹ Meaden AJ, at paras 5– 11 and 23, CaseLines 000-3 to 5 and 000-7.

¹² Letter of 20 February 2023, CaseLines 000007-29 to 30; rule 35(3) notice, CaseLines 000007-31 to 35; Meaden AJ, at para 16, CaseLines 000-5.

disclosure sought is refused.” For item 3, the answer was that the request was so broad that the plaintiff cannot reasonably be expected to identify those documents which are relevant and those that are not, as the defendant does not make mention of which local authority they refer to. The covering advice of the plaintiff’s attorney, of the same day, is significant. It states that, “Kindly be advised that our client was having difficulties with obtaining all the documentation requested due to the length of time that has passed since they were generated.”¹³

[12] The defendant applied to compel. In its answering affidavit in that application (the second version), the plaintiff did not, for most categories, deny possession. It contended that reticulation falls within the mandate of the City of Tshwane (the City) and the information sought would better be requested from the City; that the letter of 12 June 1997 provides a clear picture of the parties’ intention; that the requests were fishing and an abuse of process; that the availability of water has never been in dispute; that it was not involved in the subdivision; and that the City’s town planners ought to be approached. It did say, for item 3, that it did not correspond with the local authority in concluding the contract, and, for item 10, that it never had any correspondence with the Department of Transport.¹⁴

[13] On 10 June 2024 Meaden AJ ordered the plaintiff to properly comply with the defendant’s Notice in terms of rule 35(3) of the Uniform Rules of Court and within 10 days of this Order; by delivering the documents called for in respect of the nine items. Paragraph 3 of the order provided that, should the plaintiff fail to comply, the defendant shall be entitled to approach the above Honourable Court on the duly supplemented papers for further relief and costs were ordered on Scale B. In his written reasons of 16 July 2024, Meaden AJ analysed each category against the pleaded disputes and concluded that the plaintiff’s refusals were “best described as being bald, incomplete and unsustainable”.¹⁵

¹³ Meaden AJ, at paras 17– 21, CaseLines 000-6; the attorney’s advice, quoted in the replying affidavit, at para 6.3.1, CaseLines 000007-10, and in the applicant’s heads, CaseLines 000011-19.

¹⁴ Plaintiff’s answering affidavit in the compel application, at paras 38–59, CaseLines 003-10 to 15.

¹⁵ Order, CaseLines 000-1 to 2; reasons, at paras 22 and 24–25, CaseLines 000-6 to 13.

[14] The plaintiff requested for written reasons on 18 June 2024 and received them on 17 July 2024. Its application for leave to appeal was uploaded only on 3 September 2024, about a month out of time and without condonation; a condonation application followed on 15 November 2024, on the direction of Meaden AJ. On 19 November 2024, Meaden AJ refused condonation and dismissed the application, with costs on attorney and own client scale, finding that in the interim, the Plaintiff has not abided and given effect to the above court order, thus placing itself in contempt thereof, and that it “is abusing court process and timelines ... while perpetuating its contempt of the Court Order handed down back on 10 June 2024”. Moreover, paragraph 3 of the resulting order records that the order of 10 June 2024 remains of full force and effect and repeats the defendant’s entitlement to approach the Court on duly supplemented papers.¹⁶

[15] Three days later, on 22 November 2024, the defendant delivered this application. The founding affidavit is brief. It records the order, states that the plaintiff has failed to deliver any of the documents referred to in the order, invokes paragraph 3, and claims dismissal of the claim. The plaintiff noted its opposition the same day.¹⁷

[16] On 3 December 2024 the plaintiff served a supplementary affidavit in response to a rule 35(3) notice, deposed to by its legal advisor, Mr Petros Morwane (the third version). It records that the earlier affidavit discovered for paragraph 1, 8, 9 and 14 of the Notice, and then answers the compelled items seriatim. For item 1: It states that, “The Plaintiff is not in possession of any written advises, opinion, correspondence from the inception of Defendant’s development ... to date. The Plaintiff has no knowledge of the required documents.” The answers to items 3 and 4 are identical to one another, each denying possession of any correspondence between the plaintiff and a local authority. For every remaining items 6, 7, 10, 11, 12 and 13, the answer is one

¹⁶ Judgment of 19 November 2024, at paras 2–6, 11 and 15 and the order, CaseLines 0003-3 to 5; order issued 22 November 2024, CaseLines 000-3.

¹⁷ Founding affidavit, at paras 3.1–4.1, CaseLines 000003-5 to 6; notice of intention to oppose, CaseLines 000005-1.

formula and is the following: “The Plaintiff is not in possession of the documents sought in paragraph of the notice. Plaintiff has no knowledge of the required documents.” No answer states the whereabouts of any document; nor does any describe the search, record system, archive or custodian.¹⁸

[17] The plaintiff’s answering affidavit in this application, also deposed to by Mr Morwane, was deposed to in January 2025, served by email on 20 January 2025 and uploaded on 14 February 2025. It raises two defences. The first being prematurity, as the application was launched before the 10 days running, on the plaintiff’s approach, from 19 November 2024 had expired. The plaintiff responded within 10 days as per paragraph 3 of the order; the application is immature and ill fated. The second being compliance, as the supplementary affidavit, annexed as “MGB1”, outlined the steps that the plaintiff took after the 19 November 2024 to search for documents and the documents not in its possession; the plaintiff has therefore complied with the rule and the order, and there is no jurisdictional factor for the application.¹⁹

[18] The defendant’s replying affidavit of 29 January 2025 takes *in limine* the point that the answering affidavit, due by 13 December 2024, was late and unaccompanied an application for condonation. On the merits it disputes that the supplementary affidavit constitutes compliance, denies that it outlines any steps taken to search, and points to no less than three different versions, under oath, of why the plaintiff does not want to comply with the rule 35(3) Notice.²⁰

[19] The plaintiff’s condonation application followed on 21 February 2025 after the default had been raised in reply and again in the defendant’s heads of argument of 19 February 2025 and it was opposed. Answering and replying

¹⁸ CaseLines 00007-1 to 7; service e-mail of 3 December 2024, CaseLines 00007-8 and annexure “A2”, CaseLines 00007-28.

¹⁹ Answering affidavit, at paras 2.2–3.4, CaseLines 00006-3 to 5; service e-mail, annexure “A1”, CaseLines 00007-14; as to the deposition date, CaseLines 00016-14, at para 15.1.

²⁰ Replying affidavit, at paras 3.1–3.7, 4.10, 6.2–6.3 and 11.1–11.4, CaseLines 00007-4 to 13.

affidavits were exchanged in March 2025. The amendment of the notice of motion followed in November and December 2025, as set out above.²¹

Condonation

[20] The plaintiff elected to deliver its notice of intention to oppose on 22 November 2024, the day on which the application was served. On the defendant's computation, the answering affidavit fell due on 13 December 2024. The plaintiff's own founding affidavit fixes 15 December 2024. Nothing turns on the difference: on either approach the affidavit was due in mid-December 2024 and was served only on 20 January 2025, and the condonation application came only on 21 February 2025 more than two months after the due date, a month after the affidavit itself, and only after the defect had twice been pointed out.²²

[21] The explanation is that the attorney is said to have been engaged, until 3 December 2024. On the supplementary affidavit, the attorneys' offices closed from 13 December 2024 to 6 January 2025. The deponent was on leave from 20 January to 7 February 2025. The first leg occupies only the period before the affidavit fell due, and the period 4 to 13 December 2024 is not explained at all. The closure commenced on the very day the affidavit was due. The leave commenced on the day it was served. There is no confirmatory affidavit from the attorney. And the submission that, had the notice of intention to oppose been delivered on the last permissible day, the affidavit would in any event have been due only on 20 January 2025, does not assist the plaintiff. The period in rule 6(5)(d)(ii) of the Uniform Rules of Court runs from the date the notice was delivered, and a litigant cannot claim the benefit of a default it did not commit.²³

[22] Against this: the delay is measured in weeks, over the December recess. The defendant delivered a comprehensive reply. The application was, in my

²¹ Condonation notice of motion and founding affidavit, CaseLines 000014-1 to 10; the sequence, CaseLines 000016-4 to 5, at para 3.3; answering and replying affidavits, CaseLines 000016 and 000017.

²² Replying affidavit, at paras 3.1–3.4, CaseLines 000007-4 to 5; condonation founding affidavit, at paras 16–21, CaseLines 000014-7 to 8.

²³ Condonation founding affidavit, at paras 19–23, CaseLines 000014-8 to 9; the criticisms, CaseLines 000016-13 to 16, at paras 14 –17.

view, fully ventilated, and the prejudice of the delay itself is limited; and the affidavit raises the very questions on which the application turns. Both parties, indeed, invited this Court to determine whether the supplementary affidavit complies with the order. It would be an unsatisfactory exercise of the discretion to decide an application carrying the consequences this one carry while shutting out the affidavit that articulates the answer to it. The interests of justice favour a decision on full papers. Condonation is granted. It is the plaintiff which sought an indulgence made necessary by its own conduct, on a materially deficient explanation. It is only fair for the plaintiff to pay the costs of the condonation application.

Prematurity and section 18(1)

[23] The plaintiff contends that the institution of the application on 22 November 2024 was premature, the application for leave to appeal suspended the order under section 18(1) of the Superior Courts Act, the dismissal of 19 November 2024 lifted the suspension, and the 10 days then ran afresh, expiring on 3 December 2024 the very day the supplementary affidavit was served. It relies on *Varnardo Investments (Pty) Ltd and Another v K2012150042 South Africa (Proprietary) Ltd*.²⁴ In response thereto, the defendant contends that the 10 days ran from the order and lapsed by no later than 26 June 2024, more than two months before the leave to appeal application existed; that an application delivered a month out of time, without condonation, could not revive an expired period; and that Meaden AJ found that the plaintiff was in contempt in the interim.²⁵

[24] There is merit in the defendant's answer, and whether a leave to appeal application delivered after both the compliance and the appeal periods had expired, unaccompanied by condonation, engages section 18(1) of the Superior Courts Act at all is at the least doubtful. It is unnecessary to decide it, for three reasons. Firstly, paragraph 3 of both orders entitles the defendant,

²⁴ [2023] JOL 57786 (WCC).

²⁵ Respondent's heads, at paras 2–5 and 20, CaseLines 000019-4 and 8; supplementary heads, at paras 2–4, CaseLines 000019-20 to 21; replying affidavit, at paras 4.2–4.4, CaseLines 000007-6; CaseLines 000016-10 to 11, at paras 9–10; judgment of 19 November 2024, at para 11, CaseLines 0003-4.

upon non-compliance, to approach the court on the duly supplemented papers. Pursuant to the hearing the papers were duly supplemented. The supplementary affidavit was placed before the court by the plaintiff itself, annexed to its answering affidavit, and fully traversed in reply. Secondly, even on the plaintiff's own computation everything turns on whether what was served on 3 December 2024 constitutes compliance: if it does, the application fails on the merits; if it does not, the default persisted at the hearing 14 months later, and the amended notice of motion of 12 December 2025 in any event post-dates any conceivable compliance period. Thirdly, to non-suit the defendant on prematurity alone would invite the immediate re-issue of an identical application on identical papers in an action pending since 2021. Prematurity is accordingly not a self-standing bar.

Compliance with the order of 10 June 2024

[25] The question, then, is whether the third version is the compliance the order required. In my view, it is not a proper and *bona fide* compliance, for reasons which are cumulative.

[26] First, the order did not merely call for an answer to a notice. It followed a fully contested application in which the plaintiff's grounds of refusal were adjudicated and rejected as bald, incomplete and unsustainable, and it directed the plaintiff to properly comply by delivering the documents called for. What was delivered was nothing accompanied by a ground of refusal never previously advanced. That invites the closest scrutiny.²⁶

[27] Secondly, the new ground contradicts the plaintiff's own prior statements. The first version refused production because the documents were irrelevant, an objection which presupposes that documents exist and were considered. Its attorney recorded, on the same day, difficulties with obtaining all the requested documentation due to the length of time that has passed since they were generated, the language of documents that exist but are old, not of documents of which the plaintiff has no knowledge. The second version did not deny

²⁶ Meaden AJ, at para 22 and the order, at para 2, CaseLines 000-6 and 000-13.

possession of the documents in items 1, 4, 6, 7, 11, 12 and 13. It said they were better sought from the City, that the requests were fishing, and that the 1997 letter told the whole story. In fairness, for items 3 and 10, the second version did deny the existence of the correspondence there sought, so a stance of non-possession on those two items is not new. For the rest, the plaintiff's own planning documents, its correspondence with and instructions to its own engineers, its own reports on water availability, and the subdivision and town-planning records, blanket non-possession and no knowledge surface for the first time 18 months after the notice, and only once production had been ordered.²⁷

[28] Thirdly, the affidavit is, on its face, not a conscientious response. The answer to item 4 correspondence with the plaintiff's own engineers, repeats, word for word the answer to item 3 concerning the local authority and does not address engineers' correspondence at all. Several answers speak of documents "sought in paragraph 4 of the notice", without saying which. No answer states whereabouts; none discloses what search was undertaken, by whom, of which records, or with what result. The plaintiff is an organ of state which sues on a supply relationship it has maintained since 1997. That the plaintiff should possess no planning documents, no engineering correspondence, no instructions to its engineers and no reports touching the very supply on which it sues, and that, beyond non-possession, should have no knowledge of any such documents is inherently improbable. Additionally, the affidavit offers nothing to render it probable.²⁸

[29] Fourthly, the plaintiff's own characterisation of the affidavit undermines it. The answering affidavit asserts that the supplementary affidavit "outlined the steps that the respondent took after the 19 November 2024 to search for documents". It outlines no step, no search and no enquiry. An untrue

²⁷ CaseLines 000-6, at paras 19 – 20; CaseLines 003-10 to 15, at paras 38–59; CaseLines 000007-10, at para 6.3.1; the analysis in the applicant's heads, at paras 13–18, CaseLines 000011-18 to 29.

²⁸ CaseLines 00007-4 to 6; the point on item 4, applicant's heads, at para 14.5, CaseLines 000011-22.

characterisation, on oath, of the very document relied upon as compliance does not bespeak *bona fides*.²⁹

[30] Fifthly, the authorities do not support the plaintiff's case. *Bank of Transkei* is distinguishable. In that case, the document principally in issue had in fact been furnished; the statement of non-possession was specific and uncontradicted; and there was no history of successive, inconsistent explanations. In the matter *in casu*, the opposite is true on each score. The point made in *Lot 38 Bizana Properties CC v Tiador 119CC (in liquidation) and Others*,³⁰ whereabouts only if known, does not rescue an affidavit which is otherwise not a genuine answer. Moreover, *Biermann v Eastern Cape Development Corporation*,³¹ cuts the other way where there are reasonable grounds for supposing possession. Nor does rule 35(4) of the Uniform Rules of Court assist. The rule protects the innocent party against ambush by precluding the defaulter's own use of undisclosed documents. It affords no remedy to a defendant deprived of documents needed to conduct its defence and prosecute its counterclaim. Subrule (7) exists precisely for this situation.³²

[31] This Court concludes that the plaintiff has not complied with the order of 10 June 2024, and that, viewed against this history, its non-compliance is deliberate.

The appropriate order

[32] Each consideration that restrains rule 35(7) of the Uniform Rules of Court sanction has here been satisfied or exhausted. The plaintiff has been heard at every stage in the compel application, in the leave to appeal, in the condonation application granted precisely so that its answer could be considered, and in argument. The graduated response the authorities' favour has run its course. The order of 10 June 2024 was itself the lesser remedy, and its paragraph 3,

²⁹ Answering affidavit, para 2.2, CaseLines 000006-3, compared with CaseLines 00007-1 to 7; the point taken at CaseLines 000016-12, at para 11.2.

³⁰ (2278/2022) [2024] ZAECHC 2.

³¹ [2017] JOL 37733 (EL).

³² Respondent's heads, at paras 37–42, CaseLines 000019-13 to 14; supplementary heads, at paras 6–11, CaseLines 000019-21 to 24.

repeated on 19 November 2024, built in a final opportunity on pain of further relief. Punitive costs have twice been ordered. A finding that the plaintiff placed itself in contempt has been made and repeated. Nineteen months produced a single affidavit which is not a *bona fide* response. The plaintiff is *dominus litis* in an action instituted in September 2021, and the defendant which must meet the claim and prosecute a counterclaim of R 1 650 945.37 arising from the same supply relationship, remains deprived of the very categories of documents a court has held to fall within the pleaded disputes. The prejudice is real and continuing. It is my view under the circumstances, that the claim of the plaintiff in the action falls to be dismissed.³³

[33] The striking out of the plaintiff's defence to the counterclaim is a yet more drastic remedy. It would expose the plaintiff, without trial, to judgment on R 1 650 945.37. The withheld documents bear on the counterclaim as directly as on the claim. As plaintiff, the respondent wields the process of the Court. As defendant in reconvention, it answers to it. It is just to afford it one further, final and closely defined opportunity on that limb. Proper compliance within 15 days. The documents, or an affidavit which, item by item, identifies the searches conducted, the record systems and archives examined, the persons who conducted them and the results, and the whereabouts, insofar as known, of any document once but no longer in its possession. A repetition of the formula of 3 December 2024 will not do. Failing that, the defendant may seek the striking out on these papers, duly supplemented.

[34] Regarding the costs, the plaintiff's conduct of persisting in defiance of an order, successive irreconcilable versions under oath, and the mischaracterisation of its own purported compliance, merits the Court's displeasure and is continuous with the conduct already twice visited in costs. I am persuaded that this application justifies costs on the scale as between attorney and client. The dismissal of the claim disposes of the action in convention, and the defendant is entitled to its costs of having defended it, on

³³ Orders, CaseLines 000-1 to 3; judgment of 19 November 2024, at paras 11 and 15– 16, CaseLines 0003-4 to 5; replying affidavit, at para 10.1, CaseLines 000007-12.

the party and party scale. The costs of the counterclaim are reserved for later determination in that proceeding.³⁴

Order

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

1. The respondent's late delivery of its answering affidavit is condoned. The respondent shall pay the costs of the application for condonation.
2. It is declared that the respondent has failed to comply with paragraph 2 of the order of this Court granted on 10 June 2024.
3. The respondent's claim in convention in the action under case number 44776/2021 is dismissed in terms of rule 35(7) of the Uniform Rules of Court.
4. The respondent shall pay the applicant's costs of the action in convention on party and party scale, and the costs of this application on the scale as between attorney and client.
5. The relief sought in respect of the striking out of the respondent's defence to the applicant's counterclaim (the plea in reconvention) is not granted at this stage and is regulated by paragraphs 6 and 7 hereof.
6. The respondent is afforded a final opportunity, within 15 days of the date of this order, to comply properly with paragraph 2 of the order of 10 June 2024, by delivering the documents called for in paragraphs 1, 3, 4, 6, 7, 10, 11, 12 and 13 of the applicant's rule 35(3) Notice in terms of the Uniform Rules of Court. Alternatively, by delivering an affidavit which, in respect of each such paragraph, discloses the searches undertaken, the record systems and archives examined, the identity of the persons who undertook them and the outcome thereof, and the whereabouts, insofar as known, of any document formerly but no longer in the respondent's possession.

³⁴ Prior costs orders, CaseLines 000-2, at para 4, and 000-3, para 2; draft order, CaseLines 000027-1 to 2.

7. Failing compliance with paragraph 6, the applicant may apply on these papers, duly supplemented, for an order striking out the respondent's defence to the counterclaim.



MJ TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Applicant:	Adv C M Dredge
Instructed by:	Hendrik Malan Attorneys, Pretoria
Respondent:	Adv N Kekana
Instructed by:	Leepile Attorneys Inc, Johannesburg
Date of hearing:	27 January 2026
Date judgement delivered:	28 August 2026