

REPUBLIC OF SOUTH AFRICA



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

**CASE NO: A206/2025
26468/2020**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO

03 SEPTEMBER 2026 _____

DATE

SIGNATURE

**UNEMPLOYMENT INSURANCE FUND
MINISTER OF EMPLOYMENT AND LABOUR
DIRECTOR GENERAL FOR THE DEPARTMENT OF
EMPLOYMENT AND LABOUR**

1st Appellant

2nd Appellant

3rd Appellant

and

**VANTAGE MEZZANINE FUND II PARTNERSHIP
VANTAGE MEZZANINE FUND II (PTY) LTD**

1st Respondent

2nd Respondent

RE: ACTION:

**VANTAGE MEZZANINE FUND II PARTNERSHIP
VANTAGE MEZZANINE FUND II (PTY) LTD**

1st Plaintiff

2nd Plaintiff

and

UNEMPLOYMENT INSURANCE FUND	1st Defendant
MINISTER OF EMPLOYMENT AND LABOUR	2nd Defendant
DIRECTOR GENERAL FOR THE DEPARTMENT OF EMPLOYMENT AND LABOUR	3rd Defendant
SOMNIPOINT (PTY) LTD (IN LIQUIDATION)	1st Third Party
MURRAY N.O CLOETE	2nd Third Party
MAHLANGU N.O; KHATAZILE SIMON	3rd Third Party

JUDGMENT

FRANCIS-SUBBIAH, J

(JANSE VAN NIEWENHUIZEN et MOKOSE JJ concurring)

[1] The appellant, Unemployment Insurance Fund (“UIF”) appeals against the judgment of the court of first instance, with leave from the Supreme Court of Appeal. The appeal concerns the First Respondent, Vantage Mezzanine Fund II Partnership and the Second Respondent, Vantage Mezzanine Fund Proprietary Limited (collectively, “Vantage”), which successfully obtained an order striking out the UIF’s defence on the basis of its failure to comply with an order compelling discovery.

[2] There are three questions for determination on appeal. This is whether the UIF had complied with the order compelling discovery, bearing in mind its contention that it could not discover documents that were not in its possession or under its control. Secondly, if non-compliance with discovery is found, was an order striking out the appellant's defence an appropriate order made in the circumstances of exercising a judicial discretion. Finally, should the appeal succeed, it will be necessary to consider whether the respondents' conditional cross-appeal, seeking a separation of issues, be upheld.

Background Summary

[3] In April 2015, the UIF entered into a lease agreement with a company called Somnipoint (Pty) Ltd ("Somnipoint"), the landlord for office space in the ABSA Tower building in Pretoria CBD. Somnipoint had previously purchased the ABSA Tower with a loan facility taken from Vantage. The ABSA Tower was used as security for any obligation under the loan agreement. Somnipoint had ceded the ABSA Tower rental income to Vantage during March 2014. The parties concluded a written Cession and Pledge agreement.

[4] Subsequently, in September 2017, Somnipoint defaulted in its repayment obligations under the loan agreement. In November 2018 Vantage, in exercising its rights in terms of the cession, gave UIF notice of Somnipoint's cession of its rentals. The effect of this meant that UIF had to pay to Vantage the monthly rental amounts due. In other words, the UIF as tenant and creditor, legally had to pay Vantage as cessionary, the monthly rental amounts owed to Somnipoint – the landlord. On 13

December 2019, Vantage addressed a written letter of demand to UIF demanding payment.

[5] The UIF accepts that it received Vantage's cession and demand notice but initially failed to abide by it and continued paying the ceded monthly rentals to Somnipoint. Vantage, as a result contends that UIF had voluntarily assumed the obvious risks of disregarding the cession notice. Nonetheless, at a later stage the UIF acknowledged the cession rentals and notices and began to directly pay rent to Vantage. It is submitted that only between October 2019 and May 2020 that the UIF honoured and partly complied with the cession notices by making payments directly to Vantage. The outstanding amount due to Vantage includes rent, utilities, and other charges.

[6] In September 2020, Vantage instituted high court action against UIF due to UIF's failure to comply with the cession and demand notices seeking a money judgment in the amount of R36.6 million. Vantage likewise sought an order for the compulsory winding-up of Somnipoint, which owed Vantage approximately R300 million in terms of the loan facility and an order declaring ABSA Towers especially executable.

[7] The action proceedings between Vantage and UIF were under commercial case management by the court of first instance per Bam, J who had heard the fully ventilated arguments on the striking out of the defence. The key reasoning in the

judgment to strike out the UIF's defense was the non-compliance with the previous court order and further request requiring them to provide discovery as per Rule 35(3) of the Uniform Rules of Court. Vantage contended that the UIF's responses were 'deficient, inadequate and non-compliant with the rules' and did not address specific requested documents, such as lease agreements, correspondence, and proof of payments. UIF provided general statements of non-possession and lack of knowledge, without addressing specific requests or statutory duties.

[8] Vantage argued that UIF's failure to provide documents prejudiced them against their ability to prepare for trial and caused unnecessary delays, as they had to bring multiple interlocutory applications to compel compliance. They also disputed UIF's claim that delays were caused by Vantage and provided a detailed chronology to show that UIF was responsible for the delays. It was emphasised that UIF's obligations under the Public Finance Management Act¹ (PFMA) were to maintain proper records and ensure transparency. They argued that the lack of documentation was inconsistent with these statutory duties.

[9] The UIF claimed they had fully complied with the court order and discovery obligations, asserting that after July 2022, there were no further requests from Vantage. They argued that their supplementary affidavits and discovery schedules addressed the plaintiffs' requests. They maintained that they had a valid defence and

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intended to proceed with it, arguing that striking out their defense would cause them prejudice, while Vantage would not be prejudiced by any alleged non-compliance.

[10] UIF invoked section 34 of the Constitution of the Republic of South Africa, 1996², emphasizing the drastic nature of striking out a defense and the need to protect their right to a fair hearing to defend a substantial claim involving public funds. Although not pleaded they argued that the cession agreement was invalid under section 217 of the Constitution and procurement legislation, suggesting any payments to Vantage would have been unlawful.³

[11] The court of first instance found that UIF's responses on discovery to be vague, non-compliant, and inconsistent with their statutory obligations as a public entity. Their delays and failure to comply undermined the administration of justice and public confidence. Failure to produce relevant documents prejudiced Vantage in proceeding with its claim. The court further emphasized that the power to strike out a

²Section 34 provides as follows:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum"

³ Constitution of the Republic of South Africa, 1996. Section 217 provides as follows:

"1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for

a. categories of preference in the allocation of contracts; and
b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

defence is discretionary and not limited to cases of willful disobedience (contumacy)

⁴ but can be exercised where the integrity of the court process is at stake.

The Legal Basis

[12] It is trite that the Court of Appeal first determines whether the court of first instance had a narrow or wide discretion.⁵ The rationale for an appellate court's restraint was set out in ***Florence v Government of the Republic of South Africa***,⁶ where Moseneke DCJ commented that the

“principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making”.⁷

[13] The Constitutional Court in ***Trencon Construction v Industrial Development Corporation***,⁸ noted that two types of discretion have emerged in our case law in determining the standard of interference that an appellate court is justified in applying when considering the exercise of a discretion by a court of first instance. First, discretion in the narrow (true/strict) sense and second, discretion in the wide (broad/loose sense).

⁴ *Wanson Company of South Africa (Pty) Ltd v Etablissements Wanson Construction De Material Thermique Societe Anonyme* 1976 (1) SA275 (T) at 280C-D – a finding of contumacy is not obligatory before striking out a defence.

⁵ *Giddey N.O v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para 19.

⁶ 2014 (6) SA 456 (CC).

⁷ *Id* at para 113.

⁸ 2015 (5) SA 245 (CC) at para 83. Also see: *Government Printing Works v Public Service Association and Another* [2024] ZALAC 63 at para 15.

[14] Where appellate court exercises a narrow, strict and circumscribed approach the Constitutional Court in ***Giddey NO v JC Barnard and Partners***⁹ held that the discretion exercised is a discretion in a strict sense and could succeed only on limited grounds on appeal. O'Regan, JA held that:

“...the appellate court will not consider whether the decision reached by the court of first instance was correct but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law.”¹⁰

[15] Moreover, the appeal court is not entitled to substitute its own discretion merely because it would have reached a different conclusion. The decision involves a value judgment, although the Judge does not exercise an unfettered discretion. In ***Media Workers Association of South Africa and Others v Press Corporation of SA Ltd***,¹¹ the Supreme Court of Appeal explained that a narrow discretion would entail that the court may choose from a range of options. This type of discretion is said to be “true” as the court has an election of which option to apply and each option is entirely permissible.¹² This position was also adopted in the recent Constitutional Court judgment of ***Sustaining the Wild Coast NPC and Others v***

⁹ 2007 (5) SA 525 (CC).

¹⁰ *Giddey N.O* at para 19.

¹¹ (1992) (4) SA 791 (A) at 800D-E.

¹² Also see *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) at para 52.

Minister of Mineral Resources and Energy and Others; Natural Justice and Another v Minister of Mineral Resources and Energy and Others,¹³ where the court stated that “[a] true discretion exists when a lower court has a choice of equally permissible options.”

[16] In ***Mystic River Investments 45 (Pty) Ltd and Another v Zayeed Paruk Incorporated and Others***,¹⁴ the court held that the court of first instance erred by applying a wrong principle and further misread a judgment relied on. It held that “[t]his misdirection justifies interference by this Court. That being so, this Court is at large to consider the application afresh.”¹⁵

Wide sense

[17] Essentially, where discretion is applied in the wide sense, (broad/loose) the appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion if it considers that the order of the first instance court was wrong.

[18] In ***Knox D’Arcy Ltd and Others v Jamieson and Others***,¹⁶ the appellate court described the exercise of a discretion in the wide sense to mean “no more than

¹³ [2026] ZACC 33 (14 August 2026) at para 86.

¹⁴ 2023 (4) SA 500 (SCA).

¹⁵ Id at para 15.

¹⁶ 1996 (4) SA 348(A).

that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision”.¹⁷

[19] The distinction is not merely one of semantics as it determines the standard of interference that an appellate court must apply. It is thus critical for an appellate court to ascertain whether the discretion exercised by the court of first instance was a wide or narrow discretion.¹⁸

[20] Accordingly the power to strike out a defence is found in Rule 35(7) which provides:

“If any party fails to give discovery as aforesaid or having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule (6), the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.”¹⁹

[21] The striking out of a defence constitutes a drastic remedy. The exercise of this power is discretionary and must be approached with due judicial circumspection.²⁰

¹⁷ Id at 361 G-I.

¹⁸ *Trencon* above para 83.

¹⁹ Rule 35 (7) of the Uniform Rules of Court.

²⁰ *MEC for The Department of Public Works and Others v Ikamva Architects and Others* (235/2021) [2022] ZAECHC 13; [2022] 3 All SA 760 (ECB); 2022 (6) SA 275 (ECB) (17 March 2022) at para 18.

The court of first instance referring to **Leask**²¹ similarly acknowledged that the ultimate remedy, the dismissal of an action or the striking out of a defence, is a drastic remedy which is discretionary and is to be exercised judiciously.

Striking out a defence- narrow or wide discretion?

[22] A court possesses inherent jurisdiction to safeguard the integrity of its process.²² Therefore the court has the power to strike out a claim or a defence in the exercise of this jurisdiction. This discretion exercised judicially is fact specific. The court's power to strike out is embodied in several rules of court, under this subrule the court has a discretion whether or not to enforce discovery. The Rules provide remedies for non-compliance with the rules.²³ When considering a strike-out application courts consider factors such as the gravity of the non-compliance, reasons for the non-compliance, prejudice to the parties, interests of justice and contumacy.²⁴

[23] In our view, a court of first instance, when exercising its discretion in determining whether to strike out a defence, exercises a discretion falling within the narrow sense. The striking of a defence is "a matter incidental to the civil

²¹ *Leask v East Cape Forest Products CC t/a Highbury Treated Timbers* (1285/07) [2008] ZAECHC 171 (2 October 2008).

²² *Millu v City of Johannesburg Metropolitan Municipality and another* 2024 JDR 1329 (GJ) at para 17.

²³ *Kansai Plascon (Pty) Ltd v Rednec Services (Pty) Ltd and Others* [2025] ZAGPJHC 152 at para 5.

²⁴ *Kansai* above at paras 8-9.

proceedings”,²⁵ and it is clear that the court considering such an application has a wide variety of options in terms of the Rules of Court. The interference by an appellate court is thus circumscribed.

[24] UIF submitted in its appeal that the court of first instance failed to consider any of the numerous, more appropriate, lesser remedies available to it. Such as ordering a further and better affidavit, a cost order, or barring the UIF from relying on any un-discovered document. Vantage counter argued that the UIF has no defence to its action and it therefore does not seriously or genuinely want the action to proceed to trial. It has intentionally and recklessly delayed the finalisation of Vantage’s claim and its third-party proceedings since 2021.

[25] During the pre-trial conference held on 10 November 2022, Vantage alerted the UIF that they will bring the striking off application in the event that the UIF fail to provide satisfactory discovery. The court of first instance had judicially case managed the matter and provided the UIF with every opportunity to provide the requested discovery.

[26] The UIF’s response to Vantage’s Rule 35(3) notice is criticised as vague and inadequate, as they merely stated that they did not know where the requested

²⁵ *Giddey* above at para 22.

documents were and had no knowledge of their existence. UIF maintains that this is a factual enquiry determinative of the UIF's defence against Vantage and any claim against a third party. However, even at the current Appeal hearing the documents remain unavailable.

[27] The court of first instance found this problematic because the response leaves Vantage uncertain about whether the documents were previously in UIF's possession but can no longer be located or whether the documents once existed but were destroyed or lost, for example through a cyberattack; or whether the documents never existed in the first place. Accordingly, the court held that the defendants' statement effectively amounted to no proper response to their obligations under Rule 35(3).

[28] UIF's arguments regarding compliance, prejudice, and section 217 of the Constitutional procurement defence that any payments to Vantage would have been unlawful were rejected. The Court *a quo* considered the appellants defence in their plea denying the cession that Somnipoint was not entitled to cede and assign its rights and obligations in terms of the lease agreement without notifying and/or obtaining the UIF's consent. Particularly that Somnipoint, had expressly informed the UIF that the cession had not taken place and that this induced the UIF to continue making the rental payments to Somnipoint. Further, Somnipoint continued to present invoices to the UIF for rental, and accepting payment made under such invoices, it breached clause 13.2.2 of the cession.

[29] The prejudice complained of by Vantage is the failure to pay the ceded rental amounts due to them. They pleaded that it is near impossible that no correspondence was exchanged between Somnipoint and the UIF as tenant for the period 1 November 2018 to 1 May 2022, and no proof of payment exists, given the common cause payments made by the UIF to Somnipoint, during the period identified in the notice.

[30] The court of first instance concluded that the interests of justice required striking out the UIF's defense due to their disregard for court orders,²⁶ the rules of litigation and the authority of the court by undermining the integrity of the court process and the prejudice suffered by Vantage. Considering *Millu*²⁷ the Court emphasized that courts enjoy an inherent jurisdiction to protect the integrity of the court process. The court further indicated that the defendants' obligations were heightened because the UIF is an organ of state and is subject to duties imposed by legislation such as the Public Finance Management Act (PFMA).

[31] In summary, Vantage cleared the procedural and substantive hurdles raised by the UIF, expressly showing their entitlement to enforce the lease and recover the arrear rental. The cession agreement gives the plaintiffs superior rights to claim arrear rental, regardless of any alleged breach or misrepresentation by Somnipoint.

²⁶ The public interest in the functioning of the courts for the land is undermined when parties simply ignore the rules - see *Leask* above.

²⁷ 2024 JDR 1329.

The liquidation of Somnipoint, coupled with its lack of a legal interest in the proceedings, meant that it was not required to be joined as a party. Also, the statutory notice requirement did not apply to the contractual claim for specific performance. The discretion to strike out a defence found no genuine, triable defence with reasonable prospects of success. We find no misdirection exercised by the court of first instance.

[32] Two of the questions for determination on appeal have been answered. The UIF failed to comply with the order compelling discovery, it failed to discover documents that were critical to support its defence including the document from Somnipoint informing UIF not to make payments to Vantage. In addition, in the November 2022 pre-trial conference the UIF was invited again to cure the non-compliance with Rule 35 (3) discovery order – after 21 July 2022, but still failed to do so.

[33] On the second question, the finding of non-compliance with the discovery obligations is found, and the court of first instance's exercise of a narrow judicial discretion to strike out the appellant's defence, were appropriate in the circumstances. In line with the principles in **Giddey**, the Court properly considered the UIF's right to have its dispute adjudicated on the merits. However, that right is not absolute and must be weighed against the interests of justice, the protection of the integrity of the court process and the prejudice suffered by the opposing party.

[34] Even if Somnipoint misled the UIF regarding the cession, such conduct would not in itself constitute a defence to Vantage's claim against the UIF. The UIF accordingly failed to demonstrate a genuine, triable defence with reasonable prospects of success.

[35] As stated in *Capitec Bank Limited v Mangena and Another*,²⁸

“In the context of action proceedings, which are generally longer lasting, more costly, and procedurally more complex than motion proceedings, the rules permitting a claim to be dismissed or a defence to be struck out are important procedural tools. They enable a court to ensure that a party with a frivolous claim or defence is not permitted to delay the trial process through sheer noncompliance with the rules designed to move the trial forward. They also enable the court to protect its process against a wide variety of other potential abuses.”

[36] In the circumstances, the court was entitled to balance the UIF's constitutional right to have its case heard against Vantage's entitlement to the expeditious and fair determination of its claim, as well as the prejudice caused by the UIF's non-compliance with its discovery obligations. Accordingly, the exercise of the court of first instance's discretion to strike out the UIF's defence was appropriate and cannot be faulted.

²⁸ 2023 JDR 0779 (GJ) at paras 3-4.

[37] Finally, the appeal is dismissed, and it is therefore not necessary to consider the third question pertaining to the conditional cross-appeal, seeking a separation of issues.

[38] **Court Order:**

The appeal is dismissed with costs, including the costs of the application for leave to appeal in the court of first instance and the Supreme Court of Appeal, such costs to include the costs of two counsel where applicable on scales B and C.

FRANCIS-SUBBIAH, J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date of Hearing: 03 June 2026

Date of Judgment: 03 September 2026

The judgment has been delivered by uploading onto the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 03 September 2026.