

SOUTH AFRICA / JUDGMENT

Howard v Blumenthal (44102/2019) [2021] ZAGPJHC 363 (3 June 2021)

[2021] ZAGPJHC 363**COURT**

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

CASE / FILE NUMBER

44102/2019

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE NO: 44102/2019

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: /NO
REVISED.
DATE: 2/6/2021

In the matter between: GEORGE
HOWARD
APPLICANT
And
CLIVE CHAIM
BLIUMENTHAL
RESPONDENT

JUDGMENT

MAKUME J:

- [1] The Respondent issued summons against the Applicant on the 12th December 2019 arising out of a business arrangement that had come to an end. In the particulars of claim the Respondent seeks amongst

others an order directing the Applicant to render an account of all the partnership transactions for the period 1st July 2015 to 30 November 2016.

- [2] A plea including a special plea of prescription was filed followed by a replication to the special plea.
- [3] On the 5th May 2020 the Applicant served and filed notices in terms of Rule 35(1)(6)(8) and (10) calling upon the Respondent to within 20 days make discovery. These notices were followed by a notice in terms of Rule 35(3) & (6) on the 23rd June 2020.
- [4] On the 3rd September 2020 an order was granted by Matsemela AJ in terms of which the Respondent was ordered to:
 - a) Deliver to the Applicant a full and complete response to the Applicant's notice in terms of Rule 35(3) within 10 days of the order.
- [5] On the 2nd September 2020 before Siwendu J the Applicant obtained an order compelling the Respondent to within 10 days deliver a full and complete response to the Applicant's notice in terms of Rule 35(6) dated the 5th May 2020. The response was to be delivered within 10 days from date of the order being granted.
- [6] On the 17th September 2020 some three days prior to the launching of the Rule 35 (7) application the Respondent's attorneys Messrs Larry Marks addressed an email to the Applicant's attorneys in the following words:

"As advised previously, our client had to travel overseas for a funeral and due to the covid travel restrictions has had to remain overseas for some period of time. Our client departed from South Africa on the 23rd August 2020 and is booked to return to South Africa on the 20th September 2020.

We request that you allow us until the 25th September 2020 to consult with our client and to finalise the reply to the Rule 35 notice under the above circumstances. In addition we tender inspection of our clients discovered documents. Kindly advise us of three alternative dates and times that are convenient to yourselves."

- [7] On the 18th September 2020 the Applicant's attorneys Messrs Schindler responded to the above letter as follows:

"It is quite clear that your client has no regard for his obligations under the court orders and has simply chosen to ignore them.

Our client is not in a position to indulge your client and will proceed to avail himself of rights in this regard. Our client's rights are and remain strictly reserved."

- [8] On the same day Larry Marks the Respondent's Attorneys having noted the Applicant's attorneys' response addressed another email to them and said the following:

“We refer you to our previous correspondence where we invited you to provide us with three dates and times that were convenient to you to inspect our client’s discovered documents, it seems you do not wish to avail yourselves of that courtesy. We accordingly advise you that the discovered documents may be inspected at 15h00 on the 21st September 2020 in terms of Rule 35(6). Please find formal notice of the time and place to inspect annexed hereto together with the notice of change of address.”

- [9] On the 21st September 2020 the Applicant launched the present application in terms of Rule 35(7) of the Uniform Rules seeking an order to strike out the Respondent’s particulars of claim on the basis that the Respondent failed to comply with the orders granted on the 2nd and 3rd September 2020 within the time prescribed in the two orders.
- [10] On the 25th November 2020 the Respondent filed his answering affidavit opposing the striking application in terms of Rule 35 (7). In his affidavit Mr Clive Blumenthal the Respondent said that the application in respect of the order granted by Matsemela AJ was issued prematurely as the order was only served on the 10th September 2020 and the dies expired only on the 25th September 2020. Secondly that he complied with that order on the 25th September 2020.
- [11] In respect of the order granted by Siwendu J on the 2nd September 2020 he said that, that order was served on him on the 8th September 2020 which means that he was only obliged to comply on the 22nd September 2020, accordingly that the striking off application was issued prematurely on the 21st September 2020.
- [12] In conclusion the Respondent told the court that he complied with the Siwendu J’s order on the 25th September 2020.
- [13] In his replying affidavit the Applicant says that the two orders should read that the Respondent had to comply with the two orders within 10 days from the granting of the order and not 10 days from date of service of the order.

THE ISSUE

- [14] What is in issue in this application is firstly the proper interpretation of the two orders in particular whether the orders had to be complied with 10 days from date of granting of such order or 10 days from date of service of such order.
- [15] Secondly what the purpose of Rule 35(7) is having regard to the circumstances, especially taking into consideration the correspondence exchanged between the attorneys on the 17th and 18th September 2020.
- [16] Rule 35(7) reads as follows:

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

- [17] Rule 35(7) must be interpreted purposefully and in accordance with the guidelines established in *Natal Joint Municipal Pension Fund vs Endumeni Municipality* 2012 (4) SA 593 SCA. Put simply the court has a discretion whether to order compliance or to strike. This is made clear by the words used in the section namely “The court may order compliance and failing such compliance may dismiss the claim or strike out the defence.”
- [18] In *Continental Ore Construction vs Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 594 H, the court held that neither party has an absolute right to discovery the court has a discretion whether or not to order compliance with the rule.
- [19] In *Burmah Oil Co Ltd v Governor and Co of the Bank of England* [1980] AC1090 at 1145 Lord Scarman said:
- “Although in the High Court discovery of documents is automatic in most civil litigation, this is no more than a convenient practice ordered and regulated by the Rules of Court: See RS 024, and the recent decision of this House in Science Research Council v Nasse [1980] AC1028. Discovery of documents remains ultimately a matter of the discretion of the court.”*
- [20] A court may not grant an application to strike out unless it is satisfied that the Applicant will be prejudiced in the conduct of the claim or defence if the application is not granted (See *Putco Ltd v TV & Radio Guarantee Co Pty Ltd* 1984 (1) SA 443 (W)). Although this case dealt with strike out as regulated in Rule 23(2) and Rule 6(15) it is in my view also relevant for striking in terms of Rule 35(7). The Applicant must prove prejudice. This is not the case in the present matter.
- [21] Rule 35(7) applies only where there has been a failure to comply with sub-rules (1) to (6) for it refers to “failure to give discovery as aforesaid.” The rule does not apply when there has been compliance after the period specified in the order, which is what the Applicant’s case is in this matter. This brings me to the second issue that is when did failure to comply with such order commence was it 10 days calculated from date of such order or was it 10 days after service of such order on the Respondent.
- [22] The court in *Wilson v Die Afrikaanse Pers Publikasies (EDMS) BPK* 1971
- (3) SA 455 (T) at 462 H- 463 B held as follows:
- “The striking out of a defendant’s defence is an extremely drastic step which has the consequences that the action goes forward to a trial as an undefended matter. In the case if the orders were granted it would mean that a trial court would eventually hear this action without reference to the justification which the Defendant has pleaded and which it might conceivably be in a position to establish by evidence. I am accordingly of the view that very grave step will be resorted to only if the court considers that a Defendant has deliberately and contemptuously disobeyed its order to furnish particulars.”*

[23] The facts in this matter show that the order was not only complied with but also that the Rule 35(7) striking application was launched prior to the expiry of the 10-day period to stipulated in the second order. On the 18th September 2020 before the application was launched Respondent tendered compliance which was ignored.

[24] It is clear that the application was conceived and predicated on a false premise that the court order is triggered from the date of the court order and not service. This is clear from the contents of paragraph 30 of the founding affidavit in which the applicant says:

“Notwithstanding this complaint this defence is not available to the respondent as the orders expressed to provide for ten days from the date of the order and not ten days from the date of service of the order.”

[25] In the present matter the court orders only became effective against the Respondent from the day they were served. The SCA in the matter of Fakie N.O. VCC II Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paragraph 22 laid down the basis for a conviction of contempt of court as follows:

- a) The civil contempt procedure is a valuable and important mechanism from securing compliance with the court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- b) In particular the Applicant must prove the requisites of contempt (the order, service or notice, non-compliance, and wilfulness and mala fides) beyond reasonable doubt.
- c) But once the Applicant has proved the order, service or notice and non-compliance, the Respondent bears an evidential burden in relation to wilfulness and mala fides.

[26] Ndlovu J in Mounitzen vs Greystone Enterprises (Pty) Ltd & Another 2012 (5) SA 74 (KZD) stated the following in regard to the purpose of service:

“[28] In general terms the purpose of service in the present context is clear, it is firstly intended to notify the person intended to be served of the nature, contents and exigency of the process of court or other documents served upon such person and secondly to return to the court proof of such services in the manner prescribed by the law. Indeed the Appellate Division (Now Supreme Court of Appeal) once observed in S v Watson that the term “served” has the ordinary connotation of legally delivered i.e. delivered in accordance with the law so as to notify the person on whom it is served of its content.”

[27] It is undoubtedly clear that a court order has to be served upon a Respondent in order for it to have effect.

[28] In my view the court orders did not have any effect until the day they were served on the Respondent in this matter. Accordingly, the Rule 35(7) application was served prematurely and has no legal effect in any case the Respondent has proved compliance with the court order and as Rule 35(7) dictates this court has a discretion whether to order compliance or to strike.

[29] On the facts in the present matter, it was unnecessary for the Applicant to have brought this application and persisted with it despite the Respondent having complied. The Applicant has failed to show any prejudice in the conduct of his defence. He should have withdrawn the application on receipt of the answering affidavit. His insistence in pursuing the relief of striking is in my view an abuse of the rules and should be visited with a punitive costs order as argued by the Respondent.

[30] In the result I make the following order:

ORDER:

1. The Application to Strike in terms of Rule 35(7) is dismissed.
2. The Applicant is ordered to pay the Respondents taxed costs on an attorney and client costs.

DATED at JOHANNESBURG this the 02nd day of JUNE 2021.

M A MAKUME

JUDGE OF THE HIGH COURT

DATE OF HEARING : 25 MAY 2021

DATE OF JUDGMENT : 03 JUNE 2021

FOR APPLICANT

: ADV K REDDY

INSTRUCTED BY : MESSRS SCHINDLERS ATTORNEYS

FOR RESPONDENT : ADV S COHEN

INSTRUCTED BY : MESSRS LARRY MARKS ATTORNEYS

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