

SOUTH AFRICA / JUDGMENT

Nteleko obo Nteleko v Member of the Executive Council for the Department of Health, Eastern Cape Province (2665/2017) [2023] ZAECMHC 21; 2024 (1) SA 258 (ECM) (9 May 2023)

[2023] ZAECMHC 21

COURT

Eastern Cape High Court, Mthatha

BEFORE

Notyesi

CASE / FILE NUMBER

2665/2017

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MTHATHA)

Case No:

2665/2017
REPORTABLE

In the matter between:

GCOBISA
NTELEKO obo KHAZIMLA NTELEKO
APPLICANT
and
MEMBER
OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, EASTERN
CAPE PROVINCE
RESPONDENT

JUDGMENT

Notyesi AJ

Introduction

[1] The Applicant, relying upon the provisions of Uniform rule 35(7),[1] sought of an order directing the Respondent to comply with notices served upon her in terms of subrules 35(1), [2] 35(8)[3] and 35(10).[4] In addition for an order of compliance with the aforementioned rules, the Applicant had sought an order directing the Respondent to deliver her discovery affidavit within a period of five days and a costs order. The application to compel was uncontested. There was no notice in terms of rule 30A or any form of notice issued prior to the application to compel. The Applicant relied solely on notices served upon the Respondent in terms of the aforementioned rules. On 25 April 2023, I granted an order compelling the Respondent to comply with the notices, although declining to grant the costs order indicating that my reasons for doing so would follow. These are my reasons.

The parties

[2] The Applicant is the Plaintiff in the main action and the Respondent is the Defendant. Pleadings in the action had been closed.

Issues

[3] The questions for determination were:

- (a) whether the Applicant ought to have complied with Uniform rule 30A; and
- (b) whether the Applicant was entitled to a costs order.

Background

[4] On 19 June 2017, the Applicant instituted a delictual claim against the Respondent. The claim is defended by the Respondent and in that regard, a plea was filed on 11 September 2017. Pleadings were thereafter closed. On 19 October 2017, the Applicant served and filed notices in terms of Uniform rules 35(1), 35(8) and 35(10) and the Applicant's discovery affidavit. There was no reply by the Respondent to the Applicant's rule 35 notices.

[5] The Applicant, aggrieved by the non-response of the Respondent to the notices, served and filed an application to compel on 27 November

2017. It is not clear from the papers of what happened to the aforesaid application. On 11 April 2023 the applicant instituted the present application which she set down for hearing before court on 25 April 2023. After hearing the application, I issued the following order:

- ‘1. That the Respondent is directed to file a discovery affidavit within fifteen (15) days from the date of service of this order.
2. There shall be no order as to costs.
3. Reasons for order in paragraph 2 shall follow.’

Legal framework

[6] The failure to comply with notices under Uniform rule 35 is at the heart of the present application. This is a procedural aspect of litigation. In *Khunou & Others v Fihrrer & Sons*,^[5] Slomowitz AJ said the following about civil procedure in general and the Rules of Court in particular:

‘The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner. . . .

It follows that the principles of adjectival law, whether expressed in the Rules of Court or otherwise, are necessarily flexible. Unfortunately, this concomitant brings in its train the opportunity for unscrupulous litigants and those who would wish to delay or deny justice to so manipulate the Courts’ procedures that their true purpose is frustrated. Courts must be vigilant against this and other types of abuse. What is more important is that the Court’s officers, and especially its attorneys, have an equally sacred duty. Whatever the temptation or provocation, they must not lend themselves to the propagation of this evil, and so allow the administration of justice to fall into disrepute.’

[7] In *Szedlacsek v Szedlacsek*; *Van der Walt v Van der Walt*; *Warner v Warner*,^[6] Leach J, dealing with Uniform rule 21(4), which is akin to the provisions of Uniform rule 35(7), said:

‘It is clear from the final words of this subrule, emphasized in italics above, that this Court retains a discretion to grant or refuse an order for the delivery of further particulars. An applicant is accordingly not entitled to an order compelling a reply as of right should the opposing party fail to deliver further particulars timeously or sufficiently, but must set out sufficient information to enable the Court to consider whether or not to exercise its discretion in his favour. It is impossible to lay down any test which can be slavishly applied to determine whether an order compelling delivery should be granted as each case must turn upon its own particular facts and circumstances, but it seems to me that in most cases it would probably be wholly insufficient for a party seeking relief under Rule 21(4) to rely solely upon the other party’s failure to timeously comply with the ten-day time period laid down by Rule 21(2). Furthermore, in my opinion,

although there is no specific requirement for an applicant proceeding under Rule 21(4) to give notice of his intention to bring an application under that subrule (that having been the case even prior to the repeal of Rule 30(5), which required that notice to a defaulting party be given of an application for an order compelling compliance with a notice of request - see for example Khunou's case supra at 360, Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd 1968

(1) SA 503 (T) and Erasmus Superior Court Practice B1-139), it is of course sound practice for a party to call upon his opponent to remedy a default or failure to timeously comply with a request for particulars for trial and to put him to terms before leaping into Court and incurring substantial costs in an application of this nature. Accordingly, a Court will be slow to come to a party's aid by granting an order directing the opposing party to comply with a notice or request where no such earlier demand has been made. In my view, an application to compel compliance with a procedural step should really be regarded as a last option, to be exercised when other reasonable and far less costly alternatives have been unsuccessful and the defaulting party has shown himself to be unreasonably dilatory.'

[8] In Khunou & Others v Fihrer & Sons,[7] Slomowitz AJ in relation to the repealed Uniform rule 30(5) said:

'I agree that the Rule is one which ought in general to be complied with, and I do not question that a failure to comply with it in the ordinary course affect the matter of costs and probably result in the application itself being dismissed. One of the purposes of the Rule is to prevent unnecessary applications being brought and to put a defaulting party on notice as to the consequences of his default. Whether, however, the failure to comply with the Rule absolutely precludes relief being granted in the absence of condonation is an issue which I do not have to decide since in my view counsel's argument overlooks the facts.'

[9] The remarks above, must be borne in mind when considering relief sought under rule 35(7) of the Uniform rules. The rule provides as follows –

'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, 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.'

[10] In terms of this rule, the court has a discretion whether or not to enforce discovery or inspection. In an appropriate case, the court may, in the exercise of its discretion, order deferment of discovery of documents relative to a contingent issue. The court, in the exercise of its discretion, must remain alert to the potential abuse of the discovery process. This may arise if the procedure is utilised in *terrorem* to debilitate a respondent by requiring it to incur exorbitant expenses and to tie up large numbers of qualified staff and lawyers.[8]

[11] Uniform rule 35(7) is an inbuilt procedure of rule 35 for the enforcement of subrules 35(1), 35(3), 35(6) and 35(8). In terms of rule 35(7), there seems to be no requirement for a further notice before approaching Court to apply for compliance with the provisions of rule 35, except in relation to rule 35(12). In this regard, the question would be whether a litigant seeking to enforce compliance with subrules 35(1), 35(3), 35(6) and 35(8) would be compelled to provide a notice prior to the launch of the application to compel. There have been differences of opinion in this regard. The authors are also not in concurrence in their views, although, there appears to be an acceptance that non-compliance with a notice would not lead to the Applicant being deprived of relief solely for the reasons that there was no notice prior to the application to compel.

[12] In *ABSA Bank Ltd v The Farm Klippan* 490 CC[9] the Court held:

‘I, therefore find that an application may be made in terms of those rules which provide a specific remedy for failure to comply therewith without the applicant first having to give notice in terms of Rule 30A or to follow the provisions thereof.’

[13] Uniform rule 30A provides:

‘(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order–

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.’

[14] The remedy under Uniform rule 30A used to be provided by rule 30(5). The subrule was repealed. Rule 30A provides a general remedy for non compliance with the rules. To the extent that the provisions of rule 30A may be in conflict with a provision in another rule which provides a specific remedy for non compliance with that rule, a party need only follow the provisions of the other rule, without first having to give notice in terms of this rule or follow the provisions of this rule. The court has an inherent power to dismiss an action on account of a delay in its prosecution by the plaintiff. The circumstances under which the court may do so will depend on the period of the delay, the reasons therefor and the prejudice suffered by the other party.[10]

[15] According to Harms[11] a notice under rule 30A must precede an application under rule 35(7).

[16] With these remarks in mind, I turn to discuss the issues identified for determination in this application.

Whether the Applicant ought to have complied with Uniform rule 30A

[17] On 25 April 2023, there were 106 matters enrolled for hearing in the unopposed motion court. Half of those matters were applications to compel discovery. It has been brought to the Court's attention that every unopposed motion court is inundated with the applications to compel under Uniform rule 35(7). When these matters are called, the legal representatives would submit draft orders in which consent orders would be sought for the applicant to be granted leave to withdraw the application and the respondent to pay costs occasioned by the application to compel. On this reason, the inference is irresistible that had prior notice or warning been given, to the defaulting party, the matter would have been resolved without resort to a formal application. On this basis alone, there is a need to properly interpret the provisions of rule 35(7) and 30A, moreso in view of sound practice that litigation should not be by way of ambush. In *Szedlacsek v Szedlacsek*, [12] Leach J remarked:

'It is trite that Rules are there for the Court, not the Court for the Rules and this Court must zealously guard against its Rule being abused, particularly by the making of unnecessary procedurally related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation but which appear to be designed merely to inflate costs to the advantage of a practitioner's pocket.'

[18] Rules of Court, like any set of rules, cannot, in their very nature, provide for every procedural situation that arises. They are not exhaustive and moreover, are sometimes not appropriate to specific cases. The courts retain their inherent power exercisable within certain limits to regulate their own procedure and to adapt it and, if needs be, the Rules of Court, according to the circumstances.[13]

[19] I have no qualms and I agree that Uniform rule 35(7) is a remedy available to a litigant who had sought discovery under subrules 35(1), 35(3), 35(8) and 35(10) and that it is an inbuilt remedy under rule 35. I am however, constrained to disagree that rule 35(7) is in conflict or that it may be in conflict with rule 30A. The rules are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible, with the real issues between them, but also to ensure that the courts dispense justice uniformly and fairly, and that the true issues are clarified and tried in a just manner. The costs of litigation are exorbitant and highly expensive. It is on this basis that the rules of court should be interpreted with an understanding that discovery procedures are intended to assist the parties and to discover the truth and in doing so to expeditiously resolve disputes avoiding dilatory technicalities. In my view, every attempt by all parties involved must be to ensure that litigation is made less expensive and formalistic in nature. The rules must be interpreted to facilitate the quick mechanism of ensuring that matters serve before court for determination and fast resolution of real disputed issues.

[20] The purpose of Uniform rule 30A is to provide a remedy where a party failed to comply timeously with a request made or notice given pursuant to the rules. The rule provides a general remedy for non-compliance with the rules and in my view, it is applicable to any failure to comply with the rules or request made or notice given pursuant to the rules, provided that the remedy is not in conflict with another rule. When a notice is given for the delivery of documents within a prescribed period, there is no default

at that stage. The default would only arise once the period given expires without a response or delivery of the required documents.

Once that occurs, self-evidently, the defaulting party must be warned about the consequences and be afforded an opportunity to comply with the notice or request that has been made.

[21] In my view, such an approach, would help to avoid unnecessary litigation and escalation of costs of litigation for the reason that the defaulting party would be given a notice of his default with a demand for compliance. I have no doubt in my mind that if the defaulting party persists with his default, despite the warning or notice, then, *cadit quasio*, wilfulness or negligence would be inferred. The aggrieved party would be entitled, without much difficulty, to the relief and a costs order for the application to compel that would have become necessary to enforce compliance with the rules.

[22] Rule 35(7) does not provide for a further notice, although it is designed to ensure compliance with the provisions of rule 35. Bearing in mind that the object of the rules is to achieve justice using less expensive means, it cannot be countenanced that the aggrieved party would simply leap to court without demanding compliance with the notice given or request made to the defaulting party that an application to compel would be resorted to as a form of last resort. In these circumstances, rule 30A(1) provides a remedy and a reasonable period upon which the defaulting party should purge the default complained about. There is no basis for a suggestion that a notice is not required prior to the institution of an application to compel. There are more benefits when a notice is served prior to the institution of the application to compel and no prejudice would arise out of simply serving a notice to the defaulting party.

[23] I agree with the remarks made by Leach J in *Szedlacsek v Szedlacsek* that ‘although there is no specific requirement for an applicant proceeding under Rule 21(4) to give notice of his intention

to bring an application under that subrule (that having been the case even prior to the repeal of Rule 30(5), which required that notice to a defaulting party be given of an application for an order compelling compliance with a notice or request) . . . It is of course sound practice for a party to call upon his opponent to remedy a default or failure to timeously comply with a request for particulars for trial and to put him to terms before leaping into court and incurring substantial costs in an application of this nature . . . In my view, an application to compel compliance with a procedural step, should really be regarded as a last option, to be exercised when other reasonable and far less costly alternatives have been unsuccessful and the defaulting party has shown

himself to be unreasonably dilatory.’[14]

[24] The above proposition also finds support in *Khunou and Others v Fihrrer & Sons* where Slomowitz AJ expressed himself as follows:

‘I agree that the rule is one which ought in general to be complied with, and I do not question that a failure to comply with it will in the ordinary course affect the matter of costs and probably result in the application itself being dismissed.’[15]

[25] I do accept that non-compliance with Uniform rule 30A in an application of this nature, does not absolutely preclude relief being granted in the absence of condonation. However, in my view, rule 30A should be invoked in circumstances where there is a failure to comply with a request or notice given under these rules and that includes Uniform rule 35. Rule 35(7) confers a discretion to the court and the court would be entitled to insist that the defaulting party should be given a prior notice of the intended application to compel. Even if the interpretation of rule 35(7) were to lead to a conclusion that no notice is required prior to the application to compel, the rule of practice demands that a notice of the intention to launch an application to compel if the default is not purged, does exist. The aforesaid notice would need to be reasonable and for this purpose, the time period prescribed for a notice under rule 30A, would provide uniformity and is fair.

[26] In the present application, there was no notice and the application to compel was filed without affording opportunity to the defaulting party to correct the default. Whilst the application appeared to have been conceived way back on 27 November 2017, it was not pursued. The application only served before court on 25 April 2023. The delay was not explained from the papers. By now, it must be axiomatic that the Applicant was obliged to serve a notice before seeking relief under rule 35(7).

[27] For the above reasons, the Applicant ought to have followed the provisions of rule 30A notwithstanding the provisions of rule 35(7) which is an inbuilt procedure under rule 35. On the basis that rule 30A is not peremptory, I granted the main relief for compliance with the notices issued under rule 35, although there was no notice issued under rule 30A. I do sound a warning that non-compliance with rule 30A, in circumstances such as these, may lead to the dismissal of the application with a penalty of costs against the Applicant.

Whether the Applicant was entitled to costs order

[28] The Applicant had applied for costs in her application to compel discovery. I refused to grant an order of costs, notwithstanding my order granting relief compelling the Respondent to discover the required documents. There are various reasons for my refusal of the order of costs. Firstly, the application to compel was launched and served without notice. Secondly, on a proper scrutiny of papers there was delay in the launch of the application to compel and there is no explanation for the delay. More significantly, the Applicant failed to serve a notice to the Respondent prior to launching the application to compel. There was non-compliance with rule 30A. In my view, the application should have been preceded with a

reasonable notice. The time period provided in rule 30A(1) would have been a reasonable time for the notice. The remarks in the cases of *Szedlacsek v Szedlacsek* and *Khunou and Others v Fihrrer & Sons* are apposite. For the reason that the application was not opposed, I considered an order that there should be no order as to costs,

otherwise, if the application was opposed, I would have granted costs against the Applicant.

Conclusion

[29] I agree with the statement that, although there is no specific requirement for an applicant proceeding under rule 35(7) to give notice of her or his intention to bring an application under that subrule, it is sound practice for a party to call upon his or her opponent to remedy a default or failure timeously to comply with a notice to discover documents and to put him or her to terms before leaping into court and incurring substantial costs in an application to compel. An application to compel compliance with a procedural step should really be regarded as a last option, to be exercised when other reasonable and far less costly alternatives have been unsuccessful and the defaulting party had shown herself or himself to be unreasonably dilatory.

[30] In all the circumstances, I conclude that in applications to compel discovery, the aggrieved party must first give a notice in terms of rule 30A, although, the court would not be precluded from exercising its discretion under rule 35(7) with great consideration of appropriate costs orders, where there is non-compliance with the requirement of a reasonable notice.

Order

It was upon these reasons that the Court granted an order in the following terms:

- (a) That the Respondent is directed to file a discovery affidavit within fifteen days from the date of service of this order.
- (b) That there shall be no order as to costs.

M NOTYESI

JUDGE OF THE HIGH COURT (ACTING)

Appearances

Counsel for the Applicant: Mr Melane Attorneys for the Applicant: M M Holi Attorneys Counsel
for the Respondent: No Appearance Attorneys for the Respondent: The State Attorney Date
Heard: 04/26/23 Date Delivered: 05/09/23

- [1] Uniform rule 35(7) reads: '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, 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'.
- [2] Uniform rule 35(1) reads: 'Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have any at time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings'.
- [3] Uniform rule 35(8) reads: 'Any party to an action may after the close of pleadings give notice to any other party to specify in writing particulars of dates and parties of or to any document or tape recording intended to be used at the trial of the action on behalf of the party to whom notice is given. The party receiving such notice shall not less than fifteen days before the date of trial deliver a notice– (a) specifying the dates of and parties to and the general nature of any such document or tape recording which is in such party's possession; or (b) specifying such particulars as the party may have to identify any such document or tape recording not in such party's possession, at the time furnishing the name and address of the person in whose possession such document or tape recording is'.
- [3] Uniform rule 35(8) reads: 'Any party to an action may after the close of pleadings give notice to any other party to specify in writing particulars of dates and parties of or to any document or tape recording intended to be used at the trial of the action on behalf of the party to whom notice is given. The party receiving such notice shall not less than fifteen days before the date of trial deliver a notice–
- (a) specifying the dates of and parties to and the general nature of any such document or tape recording which is in such party's possession; or
- (b) specifying such particulars as the party may have to identify any such document or tape recording not in such party's possession, at the time furnishing the name and address of the person in whose possession such document or tape recording is'.
- [4] Uniform rule 35(10) reads: 'Any party may give to any other party who has made discovery of a document or tape recording notice to produce at the hearing the original of such document or tape recording, not being a privileged document or tape recording, in such party's possession. Such notice shall be given not less than five days before the hearing but may, if the court so allows, be given during the course of the hearing. If any such notice is so given the party giving the same may require the party to whom notice is given to produce the same document or tape recording in court and shall be entitled, without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given'.

- [5] Khunou & Others v Fihrer & Sons 1982 (3) SA 353 (W) at 355-6.
- [6] Szedlacsek v Szedlacsek; Van der Walt v Van der Walt; Warner v Warner 2000 (4) SA 147 at 150A F.
- [7] Above n 5 at 360-361.
- [8] D E Van Loggerenberg Erasmus: Superior Court Practice 2 ed vol 2 at D1-476.
- [9] ABSA Bank Ltd v The Farm Klippan 2000 (2) SA 211 (W) at 215A-B.
- [10] Above n 8 at D1-357.
- [11] Civil Procedure in the Superior Courts, service issue 54 Volume I at B-248
- [12] Above n 6 at 149 G-H.
- [13] Above n 5 at 355.
- [14] Above n 6 at 150C-F.
- [15] Above n 5 at 360H-361A.
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