

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA  
REPUBLIC OF SOUTH AFRICA

Case No: 14176 / 2017

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
04.09.2023	
DATE	SIGNATURE

In the matter between:

**PHANYANE MOLEBONE DAPHNEY**

Applicant

And

**PREMIER OF GAUTENG PROVINCE**

First Respondent

**MEC OF THE DEPARTMENT OF HEALTH**

**GAUTENG PROVINCE**  
Respondent

Second

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## JUDGMENT

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### **BOTSI-THULARE AJ**

#### ***Introduction***

[1] This matter came before me on the 25 July 2023, in terms of Rule 35 (3) an application to strike out the defence, being Premier of Gauteng Provide cited as first defendant and the MEC of the Department of Health in Gauteng Province as second defendant.

[2] In essence the application to strike out came after an order dated 16 July 2018, where this court granted an order to compel the defence and which was never complied with.

#### ***Facts***

[3] On 1 February 2018, the notice in terms of Rule 35(3) of the Uniform Rules of Court was served to the respondents. Prior to serving the latter rule, the applicant has served the respondent with Rule 35(1),35(6),35(8) and 35(10) notice. On 16 February 2018 the respondents were served with a letter requesting them to comply with the rules and they allegedly failed. Despite the notice in terms of these rules, the respondents failed to comply.

[4] The applicant contends that its claim and preparations to this matter will be prejudiced unless the respondent is compelled to comply with the notice in terms of Rule 35(3). The applicant has no alternative but to launch the instant application.

[5] On 16 July 2018 an order was granted to the respondent to comply Rule 35(3) which the respondent failed to do so. The applicant stresses that there is a need for

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this information to be made available by the respondents for the applicant's case. The non-compliance from the respondents depict lack of interest on their part.

[6] In the supplementary affidavit, the applicant further contends that the notice in terms of Rule 35(3) was not satisfied by the respondents, and after several requests and follow- ups the respondents still failed to comply.

### ***Issues***

[3] Currently this matter was removed from the roll on 11 April 2023 to be exact, to enable the plaintiff to serve notice of motion anew. Thus, this matter was enrolled for the 25 July 2023, and was stood down until 27 July 2023 following the show up by the defense during the court proceedings.

[4] On 27 July 2023, I made a following order:

1. the parties must have a pre-trial conference on or before 1<sup>st</sup> August 2023,
2. the pre-trial minutes be loaded ten days post the hosting of the pre-trial minutes,
3. the applicant may approach the court for a default judgment should the prayer 1 and 2 not be complied with,
4. the parties may approach the court for a preferential trial date post the hosting of the pre-trial conference, and
5. the respondent to pay the costs on the attorney and own client scale.

### ***Law Applicable to the facts***

[6] Rule 35(3) of the Uniform Rules of Court provides that:

*If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10*

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*days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.*

[6] When a court is asked to strike out a defence for failure to comply with the rules of court, the court does so once all arguments from both parties are promptly put before the court. In these circumstances this court cannot ignore the affidavits and dismiss the striking out of defence merely because one party failed to comply with the procedural steps by not making information available to enable a matter to proceed.

[7] The court in *Wilson v Die Afrikaanse Pers Publikasies*<sup>1</sup> 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 information."*<sup>2</sup> (own emphasis)

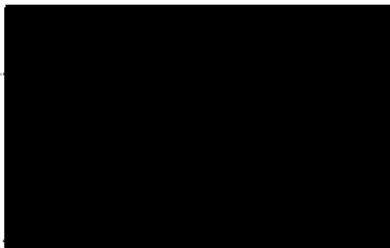
[8] Having considered that this matter is an old matter, I gave the above order, to enable all parties to have a pre-trial and for the interest of justice. I should point out the fact that defence raised a very important point "that records might not be available anymore considering the time".

[9] I give my reasons for the court order dated 27 July 2023.

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<sup>1</sup> EDMS) BPK 1971 (3) SA 455 (T).

<sup>2</sup> *Id* at para at 462 H- 463 B.



**MD BOTSI-THULARE**  
**ACTING JUDGE OF THE HIGH COURT**  
**PRETORIA**

For the Plaintiff:  
Monyai Moshoeu

For the Defendant:  
Adv Tc Kwindu