

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

Signature

Date: 16th March 2023

CASE NO: 4750/2017

In the matter between:

ELECMEC TRANSMISSIONS CC**APPLICANT**

and

MALUMA FARMING ENTERPRISE 1938 (PTY) LTD**RESPONDENT**

In re:

ENIG (PTY) LTD**1st PLAINTIFF****MALUMA FARMING ENTERPRISE 1938 (PTY) LTD****2nd PLAINTIFF**

And

ELEMEC TRANSMISSIONS CC**DEFENDANT**

JUDGMENT

MDHLULI AJ

- [1] The whole point of orders of the courts are to be executed and/or complied with. Failure for one to comply with any of the court orders, has potential of causing one to be in contempt of court and causing our courts to be in disrepute. Whether one believes the order so granted is wrong, bad or otherwise, court orders are valid till set aside, varied and/or rescinded. Court orders are not just made for no apparent reason, they are granted to assist a party in litigation. Compliance therefore is key to the rule of law and effectiveness of justice.
- [2] Before me is an opposed application to dismiss or strike out the First Plaintiff's/Respondent's claim in terms of Rule 35(7)¹. Respondent having failed to file its heads of argument timeously as per the directives of this court. The heads were only handed up after argument in court. I proceeded with the matter nonetheless in the interest of finality of matters and interest of justice. Moreover, that the party's claim is primarily on the papers. Directives like Rules should be complied with always. I note this because it is concerning for me, as the matter before me finds its substance from the alleged non-compliance with the order of Muller J of 22 July 2021. The factual matrix giving rise to the present application is common cause to the parties or not seriously disputed.

¹ Uniform Rules of Court

[3] The Applicant/Defendant in its application in terms of Rule 35 (3) sought for discovery of the following documents that are relevant to the Respondent's claim for financial loss/damages suffered purportedly because of a defective nut dehusking machine bought from the Applicant in possession of the Plaintiff/Respondent:

- 3.1 Written supply agreements in terms whereof the Plaintiff was the supplier of contracting party for macadamia nuts, locally or internationally for the period of 1 January 2012 to 31 December 2017;
- 3.2 Written orders issued to the Plaintiff for the supply of macadamia nuts for the period of 1 January 2012 to 31 December 2017;
- 3.3 Purchase orders supplied to the Plaintiff for the supply of macadamia nuts for the period of 1 January 2012 to 31 December 2017;
- 3.4 All invoices issued by the Plaintiff to clients, locally or internationally, for macadamia nuts supplied or sold for the period of 1 January 2012 to 31 December 2017;
- 3.5 Proof of payments made by client to the Plaintiff, including but not limited to electronic fund transfer receipts, for the period of 1 January 2012 to 31 December 2017;
- 3.6 Deposit slips, cheques or bank deposits provided to the Plaintiff as proof of payment for macadamia nuts the period of 1 January 2012 to 31 December 2017;

- 3.7 The management statements of the Plaintiff the period of 1 January 2012 to 31 December 2017;
- 3.8 The financial statements of the Plaintiff for the period of 1 February 2012 to 31 March 2018;
- 3.9 The bank statements of the Plaintiff for the period of 1 January 2012 to 31 December 2017;
- 3.10 The Plaintiff's VAT registration certificate with The South African Receiver of Revenue, herein after referred to as "SARS";
- 3.11 The Plaintiff's registration certificate with SARS as exporter
- 3.12 The income tax assessments completed by the Plaintiff for the period of 1 February 2012 to 31 March 2018;
- 3.13 The Plaintiff's tax assessment issued by SARS for the period of 1 February to 31 March 2018;
- 3.14 The weighbridge slips for the macadamia nuts sold locally and/or internationally for the period of 1 January 2012 to 31 December 2017;
- 3.15 The scale receipts for the macadamia nuts sold locally and/or internationally for the period of 1 January 2012 to 31 December 2017;
- 3.16 Receipts and Invoices for export duties in respect of macadamia nuts exported for the period of 1 January 2012 to 31 December 2017;
- 3.17 A copy of the Plaintiff's registrations with the Department of Agricultural, Forestry and Fisheries.

It was submitted then that it was reasonable to suppose, that the above contains information which may either directly or indirectly enable the Applicant to either advance its own case or to damage the case of the Respondent. Without going into the genesis of this matter which is common cause, it is safe to say the order was granted against the Respondent for compliance with Rule 35(3) within 10 days of receipt of order thereof.

[4] With regard to non-compliance, Applicant submits that the Respondent invited an inspection of all documents mentioned in the Rule 35(3). However, Respondent failed to comply save for the following: supplier agreements, written orders, purchase orders, and registration with SARS as an exporter.

[5] On 16 August 2021 Applicant was invited for an inspection, same was attended by the 3 (three) ladies Monja, Refentse and Rosemary from DDKK Attorneys and were shown 11 (eleven) files. There were no indexes to the 11 files and the documents asked for in Rule 35(3) notice were not made available.

[6] The issues to be determined are the following:

6.1 Whether the First Plaintiff's/Respondent's claim be struck out/dismissed due to non-compliance with the Court Order dated the 22 July 2021 and in terms of Rule 35(7) of the Uniform Rules of Court.

6.2 Whether a case has been made out to strike the claim of the Respondent.'

- [7] Rule 35 (7) provides that *“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”*.
- [8] The Applicant in his affidavit supporting this application submits that the Respondent was ordered by the Honorable Court as per Muller J on 22 July 2021 to comply with the Applicant’s notice in terms of Rule 35(3) within 10 days from date of service of the order and attached the said order therein. In the application before me which includes correspondences between the parties, there is nowhere, where I am pointed to the date of delivery of the said order by the Applicant on the Respondent. This evidence is necessary for this court to determine the Respondent’s non-compliance, at least to the extent that dies are concerned. It cannot automatically be assumed that the order was served without any evidence to this effect. I cannot issue orders based on assumptions, clear and concise allegations such as when service was made of the order as well as the expiration of the dies concerned is necessary for me to consider the orders sought. Failure to deal with this primary element means that the Applicant issued the striking off application prematurely. This should be the end of this matter. However, in the interest of consideration of all matters before me I elect to proceed herein under.

This non-service is concerning for me, like it was for the Respondent who on its letter of 04 August 2021 attached as **annexure “I”** of Applicant’s affidavit wrote ***“The order has as yet not been served on my offices”***. Surprisingly against this complaint/allegation, Applicant in its response letter dated the 11 August 2021 and **marked “J”** to its affidavit writes *“We refer to the above matter and the judgment delivered by the Honorable Justice Muller on or about 22 July 2021 and record that you and your client have failed to comply with the terms of the Court Order within 10 days thereof, being Thursday, 5 August 2021. We also record that it is apparent from your previous correspondence and more specifically your letters dated 3 and 4 August 2021 that you have knowledge of the said Court Order and have read same”*. Applicant again presented with an opportunity to remedy its non-failure, instead takes the high horse route in its response to the complaint, and misses another opportunity to make right its wrong. Respondent once more in its letter dated the 12 August 2021 attached to Applicant’s founding affidavit and **marked “K”** writes amongst others *“I am astounded with the aggressiveness as displayed in your letter. I reiterate, that the judgment that was passed by Judge Muller made provision for the Respondent to comply with the provisions of Rule 35 within 10 days from date of service of the order. The order has not been served on my office. Kindly note that any intended application that you are threatening to proceed with, will be opposed, due to the frivolous nature thereof”*. Against this

background the Applicant issued this application on the 28 September 2021 approaches for the dismissal of Respondent's claim and/or striking of defense with costs.

- [9] The Respondent contends it has complied with the order to the extent that the documents exist and are in its opposition summarily. On annexure "K" demonstrated which documents are available as per Rule 35(3) herein above referred on paragraph 3 as follows:

9.1 1, 2, 3, 7, 11 and 16 do not exist.

9.2 4, 5, 6, 8, 9, 10, 12, 13, 14, 15 documents have been delivered and available for inspection

9.3

- [10] Rule 35(7) must be interpreted purposefully and in accordance with the guidelines established in *Natal Joint Municipal Pension Fund vs Endumeni Municipality*² 2012 (4). 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.*" It is my view that whenever I am called to exercise my discretion I must do so within the ambits of the law and in the interest of justice, same shall be applied herein. Respondent argued that "The court, in exercise of its discretion, must remain alert to the potential abuse of discovery process. This may arise if the procedure is utilised in terrorem to

² 2012 (4) SA 593 SCA

debilitate a respondent by requiring it to incur exorbitant expenses and to tie up large numbers of qualified staff and lawyers”³.

- [11] 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*⁴. 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.
- [12] 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 as there was no service of the said order herein to assist me in determining this crucial matter which is the crux of this application, non-compliance.
- [13] The court in *Wilson v Die Afrikaanse Pers Publikasies (EDMS) BPK*⁵ 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

³ Makate v Vodacom (Pty) Ltd 2014 (1) SA 191 (GS) at 200E-F

⁴ 1984 (1) SA 443 (W).

⁵ 1971 (3) SA 455 (T) at 462 H-463 B.

step will be resorted to only if the court considers that a Defendant has deliberately and contemptuously disobeyed its order to furnish particulars.”

- [14] The facts in this matter show that the order was not only complied with to the extent possible to the Respondent but also that the Rule 35(7) striking application was launched prior to the delivery of the court order and/or the expiry of the 10 days’ period so stipulated in the Court Order of Muller J. On both the 12th and 16th August 2021 before the application was launched Respondent tendered compliance which was ignored.
- [15] 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 the letters written to the Respondent above dealt with. In the present matter the court order has not yet become effective for lack of service in relation to the Respondent though valid
- [16] Ndlovu J in *Mounitzen vs Greystone Enterprises (Pty) Ltd & Another*⁶ stated the following in regard to the purpose of service: “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

⁶ 2012 (5) SA 74 (KZD)

is served of its content.” It is undoubtedly clear that a court order has to be served upon a Respondent in order for it to have effect.

[17] In my view the court order does not have any effect until the day it is 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.

[18] 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 its defence. It is my view that the Applicant has failed to prove non-compliance as well as to make out a case for the orders sought in the notice of motion.

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

1. The application is to strike is dismissed.
2. The Applicant is ordered to pay the Respondent’s costs.



**R.P MDHLULI
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

Heard on : 16th January 2023

Judgment circulated on : 15th March 2023

For the Applicant : Adv R.F de Villiers

Instructed by : Deneys Zeederberg Attorneys

For the Respondents : Adv A.C Diamond

Instructed by : Charl Naude Attorneys