



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

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

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Signature Date

In re: the matters between:

WISEMAN MOMELEZI GCWEKA

and

THANDO DLANGA

and

NOMXOLISI MKHAMBAPHI

and

ROAD ACCIDENT FUND

CASE NO: 756/2021

Plaintiff/Applicant

CASE NO: 5174/2021

Plaintiff/Applicant

CASE NO: 831/2022

Plaintiff/Applicant

Defendant/Respondent

JUDGEMENT

TILANA-MABECE AJ

1. The applicants are plaintiffs in the main action and respondent is the defendant. The issue for determination in all these matters is the striking out of defendant's defence for reason of failure to comply with a court order compelling discovery of documents. The matters were set down on an unopposed roll, and the applicants were invited to make submissions. For convenience a consolidated judgment is produced.
2. It appears that the said orders were duly served on defendant and followed by the notices and/or communication requiring compliance. Despite this defendant failed to comply with the orders and that prompted these applications to strike out defendant's defence.
3. The summation of the reasons for the applicants to seek the drastic order is prejudice, delay in the finalization of their matters and the absence of an alternative relief. Applicants further contend that failure of defendant to comply with the court orders is sufficient proof that defendant is in contempt and deliberate in its actions. These submissions are based on defendant's failure to comply and no further details are provided to substantiate.
4. Application to strike out a defence is regulated by Rule 30A which provides as follows:

"(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 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 claimant's defence be strike 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. "

5. The court is clothed with a discretion to strike out the defence on reasons of non-compliance, which must be exercised judicially. In my view, striking out a defence should be a last resort as it is a drastic step. Accordingly, a court must be appraised of sufficient facts on the basis of which it could exercise its discretion judicially. It is not enough to state obvious factors as mentioned by applicants, gross recalcitrance or wilful recklessness on the part of defendant must be shown.

6. In the case of **Wilson v Die Afrikaans Pers Publikasies (EDMS) BPK 1971 (3) SA 455 (T) at 462 H- 463 B** where the court 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.”

7. What the applicants are seeking is tantamount to asking the court to deny defendant access to court, close its doors and deprive defendant an opportunity to justify its defence as pleaded. The sentiments of the court in the matter of **MEC, Department of Public Works v Ikamva Architects 2022 (6) SA 275 (ECB)** are apposite, where a full court on appeal held:

“The interpretation and application of a court rule often requires a consideration of the provisions of the Constitution. Section 34 is relevant in this respect, providing that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. The striking-out of a plaintiff’s claim or a defendant’s defence has a far-reaching impact on this right. It has the potential to deprive a litigant of a fair trial, bringing an end to a claim or defence. In the case of a defendant, the usual effect of a striking-out is to prevent the presentation of a defence so that judgment will be entered for the plaintiff, subject to any further order of court.”

8. This does not mean that a court will not grant drastic remedy in cases where conduct of a defendant warrants same. In the unreported judgment in the matter of **Tertuis Leask v East Cape Forest Ltd, case number 1285/2001** in justifying the granting of the drastic remedy, Plasket J, described the conduct of the defendant’s legal representative as being without contrition, arrogantly disdainful and that defendant was prepared to do anything to delay the trial. He found that contumacy existed, and that, "the conduct of the Defendant was of such an egregious nature that the striking out of the Defendant's defence is warranted."

9. The bar to succeed in an application to strike out defendants defence has been set up high. Applicants are required to prove that in failing to comply with court orders respondent acted with intent and contempt. Requirements for a contemptuous finding were laid down by the SCA in the case of **Fakie N.O. VCC II Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paragraph 22** 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.”

10. In my view the cases before court are distinguishable from the Leask case stated above. Applicants in the current matters have failed to prove a deliberate and contemptuous conduct on the side of the defendant. The conduct of the defendant, failing to comply with a court order cannot be condoned, but to strike out defendant's defense in the present cases is not justifiable. Applicants have failed to make out a case for the relief they seek and consequently the application cannot succeed.

11. Applicants further allege prejudice suffered as a result of the delay attributed to defendant. Prejudice and delay, on their own, fall below the bar set by the courts for a successful prosecution to strike out a defence. It is an acceptable practice that where a party suffers prejudice as a result of

the conduct of another, an appropriate cost order will serve to compensate for the prejudice. I am therefore inclined under the circumstance to grant a reasonable costs award in favour of applicants to compensate for the prejudice caused by defendant.

12. I am mindful of the general principle that costs follow the order and under the present circumstances deviation from the general principle is warranted. Further the issue of costs falls within the purview of a court's discretion, which discretion needs to be exercised judicially.

In the end, the following order is made in respect of all the cases listed above:

1. Application to strike out defendants' defense is refused.
2. Defendant to pay wasted costs of the application.

MABECE-TILANA
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Appearances:

In re:

Case Number: 756/14

For Applicant: Mr Gwama

Instructed by: Zolani Gwama Attorneys

Case Number: 5174/2021

For Applicant: Adv. Genukile
Instructed by: V Funani Attorneys

Case Number: 831/2022

For Applicant: Mr Mnge
M Mnge & Associates

For Respondent: No appearance

Date of hearing: 22 August 2023

Date of delivery: 23 August 2023