REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 32777/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

DATE **17/03/25**

SIGNATURE

In the matter between:

VIOLET MALETJEMA MOTSHELE **Applicant**

ID NUMBER: 6[...]

and

SIPHO SAMUEL SEFORE MOTSHELE **Respondent**

ID NUMBER: 7[...]

In re: matter between:

VIOLET MALETJEMA MOTSHELE **Plaintiff**

ID NUMBER: 6[...]

and

SIPHO SAMUEL SEFORE MOTSHELE **Defendant**

ID NUMBER: 7[...]

JUDGMENT

Joyini AJ

INTRODUCTION

[1] This is an application to strike out the respondent's claim and defence to the counter-claim for failure to comply with the court order dated 11 October 2023.

[2] The respondent opposes the application.

APPLICANT'S VERSION

[3] According to the applicant, the respondent did nothing to comply with the court order and ignored email reminder dated 12 July 2024.

[4] The applicant contends that the opposition to this application is but one of the tactics used by the respondent to further delay the finalisation of the main action which was instituted by the respondent on 11 May 2017. He also argues that this unreasonable and unnecessary delays are simply a denial of the applicant's right to a fair trial and justice.

[5] The applicant submits that he is highly prejudiced as a result of the respondent's deliberate and contemptuous actions and thus the order sought herein warrants that this court grants it.

RESPONDENT'S VERSION

[6] It is common cause that subsequent to the court order being duly served on the respondent's legal representative, a meeting was initiated by the respondent's legal representative to ascertain the required documents, as at the time, Mr Sebothoma (respondent's attorney) was under the impression that the affidavit prepared by the respondent addressed the issue in dispute.

[7] During the above-mentioned meeting, which was held at the applicant's legal representative's office, no clarity was provided on the evident

misunderstanding, instead, the discussion centred around possible settlement proposals.

[8] It was during the preparation of the answering affidavit in this application that Mr Sebothoma (respondent's attorney) became aware of the rule 35(3) notice served on 18 November 2022, which was at all times, the basis of the application to compel. Subsequent thereto, documents previously sent to Ms Julius by the respondent, which were regrettably not printed out, were discovered on her emails and same were compiled and sent to the applicant's legal representative on 26 August 2024.

PURPOSE OF STRIKE OUT APPLICATION

[9] The purpose of a strike out application is to ensure that material from a party's statement of case is deleted and cannot be relied upon in the proceedings. If the whole of a statement of case is struck out, then it normally leads to the other party being awarded judgment. Parties should however be aware that despite the court having the power to strike out a statement of case, the courts tend to use its power rarely. This is because courts are conscious of the overriding objective that parties should have access to justice, and that cases should be dealt with justly and at a proportionate cost. Striking out a party's case is a quite draconian order.

LEGISLATIVE FRAMEWORK FOR STRIKE OUT

[10] 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."

LEGAL PRINCIPLES FOR STRIKE OUT

[11] The bar to succeed in an application to strike out defendant's defence has been set up high. Applicants are required to prove that in failing to comply with court orders respondents 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*,[1] 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."

[12] In *Beinash v Wixley,*[2] the court emphasised the two requirements to be satisfied before an application to strike out a matter from a pleading or affidavit can succeed. These requirements are: the matter sought to be struck out must indeed be scandalous, vexatious, or irrelevant; and the court must be satisfied that if such a matter was not struck out the party seeking a relief will be prejudiced.

[13] It has been held that the striking out procedure is not intended to be utilised to make technical objections which merely serve to increase costs and are of no advantage to the litigating parties. It is for these reasons that sufficient degree

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[1] [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paragraph 22.
[2] **[1997] ZASCA 32**; **1997 (3) SA 721** (SCA) at 733A-B.

of prejudice should be present and such proof of prejudice is required. See the case of *Anderson and Another v Port Elizabeth Municipality.*[3]

ANALYSIS

[14] It appears that the said order was duly served on respondent and followed by email communication requiring compliance. Despite this the respondent failed to comply with the order and that prompted this application to strike out respondent's claim and defence to the counter-claim for failure to comply with the court order dated 11 October 2023.

[15] The summation of the reasons for the applicant to seek the drastic order is prejudice, delay in the finalization of the matter and the absence of an alternative relief. Applicant further contends that failure of respondent to comply with the court order is sufficient proof that respondent is in contempt and deliberate in her actions. These submissions are based on respondent's failure to comply.

[16] What the applicant is seeking is tantamount to asking the court to deny respondent access to court, close its doors and deprive respondent an opportunity to justify her defence as pleaded. The sentiments of the court in the matter of *MEC, Department of Public Works v Ikamva Architects*,[4] 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."*

[3] 1954 (2) SA 299 (E).
[4] 2022 (6) SA 275 (ECB).

[17] It is for the applicant to show that the grounds for striking out exist. If they are able to establish this, then their opponent (the respondent) will be given the opportunity to persuade the court that it would be unfair or inappropriate for a strike out order to be made. In particular, respondents may argue that the claim can only be decided at trial and that striking out their claim at an early stage would deprive them of the right to that trial.

[18] In the case of *Wilson v Die Afrikaans Pers Publikasies (EDMS) BPK,*[5] 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."*

[19] Once the applicant has shown that one of the grounds for strike out exists, the respondent has to persuade the court that it would be inappropriate, or unjust, for the order to be made. The leading cases establish that strike out is only appropriate in 'plain and obvious' cases and that judges should not rush to make findings of fact on contested evidence at this summary stage. Nor should judges hearing strike out applications conduct 'mini trials' involving protracted examination of the documents and facts (although sometimes a detailed analysis is appropriate).

CONCLUSION

[20] The court is called upon to strike out the respondent's claim and defence to the counter-claim for failure to comply with the court order dated 11 October 2023.

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[5] 1971 (3) SA 455 (T) at 462 H- 463 B.

[21] To decide this, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective affidavits, heads of arguments and oral arguments and submissions made by parties' counsel.

[22] In *Gcweka and Others v Road Accident Fund*,[6] the court held: *"[5] The court is clothed with a discretion to strike out the defence on reasons of non-compliance, which must be exercised judiciously. 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 judiciously. 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."*

[23] However, this does not mean that a court will not grant drastic remedy in cases where conduct of a respondent warrants same. In the unreported judgment in the matter of *Tertuis Leask v East Cape Forest Ltd*,[7] 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."*

[24] In my view, the case before court is distinguishable from the *Leask* case referred to above. The applicant *in casu* has failed to prove a deliberate and contemptuous conduct on the part of the respondent. The conduct of the respondent, in failing to comply with a court order cannot be condoned, but to strike out respondent's claim and defence to the counter-claim for failure to comply with the court order dated 11 October 2023 in the present case is not justifiable. As such, the applicant has failed to make out a case for the relief sought and therefore, the application fails.

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[6] (756/2021; 5174/2021; 831/2022) [2023] ZAECMHC 43 (23 August 2023).
[7] Case number1285/2001.

[25] The applicant further alleges prejudice suffered as a result of the delay attributed to the respondent. 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 circumstances to grant a reasonable costs award in favour of the applicant to compensate for the prejudice caused by the respondent.

COSTS

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

ORDER

[27] In the circumstances, I make the following order:

[27.1] The application to strike out the respondent's claim and defence to the counter-claim for failure to comply with the court order dated 11 October 2023 is hereby not granted.

[27.2] The respondent shall pay the costs of this application on an attorney and client scale.

T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Date of Hearing: 24 February 2025
Date of Judgment: 17 March 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 17 March 2025 at 10h00.