IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 14688/2021P

In the matter between:

BRENDAN MARK PILLAY	**APPLICANT**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTIONS KWAZULU-NATAL	**SECOND RESPONDENT**
THE MINISTER OF POLICE	**THIRD RESPONDENT**
THE NATIONAL COMMISSIONER OF POLICE	**FOURTH RESPONDENT**
THE NATIONAL HEAD OF THE DIRECTORATE OF PRIORITY CRIMES INVESTIGATION	**FIFTH RESPONDENT**
CAPTAIN MARK MCLEAN	**SIXTH RESPONDENT**
WENDY O'BRIEN	**SEVENTH RESPONDENT**
NASEEM CASSIN N.O	**EIGHTH RESPONDENT**
NAVIND DAYANAND	**NINTH RESPONDENT**

Coram: Nako AJ

Heard: 2 December 2024

Delivered: 24 January 2025

ORDER

The following order is granted:

1. The late filing of the first, second and seventh respondents' opposing affidavit in the rule 30A application is condoned.
2. The application in terms of rule 30A is dismissed with costs on an attorney and client scale.
3. The application in terms of rule 35(7) is dismissed with costs on an attorney and client scale.

JUDGMENT

NAKO AJ:

Introduction

[1] There were three interlocutory applications set down for hearing before me. The first application is brought in terms of Uniform rule 35(7), wherein the applicant seeks an order compelling the respondents to provide documents which had been requested in terms of a Uniform rule 35(3) notice delivered on 12 April 2023 ('the rule 35(7) application'). The second application is an application in terms of Uniform rule 30A wherein the applicant seeks an order declaring that the first, second and seventh respondents' opposing affidavit dated 26 June 2023 is out of time and that those respondents are barred from delivering their opposing affidavit in the absence of them bringing a condonation application within ten days of being directed to do so ('the rule 30A application'). The applicant seeks costs on a punitive scale against the respondents, alternatively costs de bonis propriis against their legal representatives. The third application is an application for condonation for the late filing of the opposing affidavit in the Uniform rule 30A application ('the condonation application').

[2] In the main application, the applicant seeks a review, in terms of Uniform rule 53, of a warrant of arrest issued on 30 July 2021 ('the review application'). A rule nisi was issued on 28 October 2022, with interim relief staying the execution of the warrant of arrest, pending the final determination of the review application. The record

envisaged in Uniform rule 53 was served on the applicant on 14 December 2022. The applicant is yet to file his supplementary papers, despite being directed by the court to do so, and he alleges that the record filed by the respondents is inadequate. In demonstration of his frustration with the record, the applicant caused correspondence to be sent to the respondents' representatives and thereafter issued a notice in terms of rule 35(3), followed by the rule 35(7) application.

[3] There have been delays from the respondents in delivering the record, in responding to the rule 35(3) notice and in opposing the rule 35(7) application. However, there has been a response to the rule 35(3) notice and there is an explanation on oath in the affidavits opposing the rule 35(7) application regarding the failure to produce some of the demanded documents.

Condonation and rule 30A application

[4] The applicant, in the rule 30A application, seeks to have the first, second and seventh respondents' opposing affidavit in the rule 35(7) application declared to be out of time, directing them to apply for condonation, and in the event that they fail to apply for condonation within ten days, to be barred from delivering their opposing affidavit. For the sake of convenience, the first, second and seventh respondents will collectively be referred to as the NPA respondents.

[5] The rule 30A application was brought on 12 December 2023, notwithstanding the fact that the opposing affidavit was served by the NPA respondents by email on 13 June 2023 and that Bedderson J, at the hearing of the application to compel on 14 June 2023, declared that the opposing affidavit was filed and directed the applicant to deliver his replying affidavit in terms of the rules before the return date of the review application on 27 June 2023. Bedderson J went further by finding that there was no need for a condonation application, as same was unnecessary in circumstances where the opposing affidavit had already been served.

[6] The applicant brings the rule 30A application on the premise that Bedderson J was informed of only one affidavit and not two sets of affidavits and that the NPA respondents delivered their opposing affidavit on 26 June 2023, after the applicant had filed his replying affidavit.

[7] However, the applicant fails to address the fact that two affidavits were in fact emailed, regardless of counsel referring to ‘an affidavit’ in the submissions made to Bedderson J. The applicant also fails to address the contention that the affidavits delivered on 26 June 2023 were in fact hard copies of the affidavits already served, and, as such, there was no prejudice to the applicant.

[8] It is clear from the ruling of Bedderson J on 14 June 2023 that the late filing of the opposing affidavits in respect of the rule 35(7) application was condoned and any application to demand a condonation application in respect thereof is ill-founded.

[9] The applicant, however, brought the rule 30A application some five months, one week and two days after the hard copies of the affidavit he wishes to raise an objection to were delivered, and more than four months after the expiry of the period prescribed in rule 30A notice. The NPA respondents were late in delivering their notice to oppose this application and their subsequent opposing affidavit and they have brought a condonation application for their late opposition to the rule 30A application.

[10] In response to the late delivery of the opposing papers to the rule 30A application, the applicant issued yet another notice in terms of rule 30A, demanding a condonation application for the late filing of the papers opposing the rule 30A application, which prompted the NPA respondents’ condonation application.

[11] The NPA respondents’ representative tenders an explanation for the delay. She relates her ordeal of becoming a victim of a car hijacking, which included being kidnapped by the hijackers for three hours and the robbery of her cell phone, her diary containing the relevant dates in this matter, her laptop containing documents related to this matter, and other personal items. The representative further relates the trauma she experienced and having to undergo therapy.

[12] The applicant rejects the explanation on the basis that the representative has not attached proof that she laid criminal charges in the form of a CAS number related thereto and generally claims that he has been prejudiced by the NPA respondents’ failure to comply with the rules of court.

[13] It is trite that an applicant in a condonation application must tender a reasonable explanation for the delay, which excludes a wilful disregard for the rules of court, demonstrate that they enjoy reasonable prospects of success in the application and that it is in the interests of justice to condone the late filing.

[14] There is no dispute that the affidavits delivered by the respondents on 26 June 2023 were in fact the same affidavits served by email on 13 June 2023. There is also no dispute that the applicant replied to one of the affidavits on 23 June 2023. However, the applicant did not reply to the opposing affidavit of the NPA respondents because the email had apparently been categorised as junk mail and was missed by the applicant's representatives.

[15] Rule 30A provides that:

'(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.'

[16] The relief sought by the applicant in the rule 30A application is not in alignment with the rule in two respects. The first is that the applicant seeks to prescribe a remedy for the alleged failure to comply with the rules by seeking an order whereby the NPA respondents are directed to apply for condonation and barring the NPA respondents from bringing the application for condonation should it not be brought within the ordered period.

[17] The second is that the application concerns the failure to comply with the timelines prescribed in Uniform rule 6, and as such, the applicant ought to have used the procedure prescribed in rule 30 in bringing this application. This is so, as the remedy sought by the applicant, to the extent that he requires the affidavits to be

ignored until and/or unless they are regularised by an order condoning their late filing, is not what rule 30A envisages and is more in line with the remedies set out in rule 30.

[18] The applicant ought to have brought his application within 15 days of the NPA respondents failing to remedy his complaint. This is so because complaints against the failure to comply with the Uniform rules ought to be brought timeously, as they are intended to facilitate a speedy and proper resolution of disputes. In this regard, the rule 30A notice is afflicted by both the delay and not being aligned with the rule.

[19] A proper consideration of the papers shows that the real difficulty was not the late filing of the affidavit but rather the applicant's belief that the NPA respondents only served their affidavit on 26 June 2023, while they, in fact, delivered on the same day as the third, fourth, fifth and sixth respondents. Thus, the complaint is not the failure to comply with the order granted on 14 June 2023, but rather the applicant's failure to pick up the second affidavit in respect of the NPA respondents in his emails, which he then failed to reply to, and as such, rule 30A, or even rule 30 for that matter, does not find application.

[20] The purpose of the rule is to ensure that the rules of court are compiled with, on notice, in circumstances where there has been non-compliance, but not to bar a respondent from any attempt to fall in line with the rules nor to demand an application for condonation.

[21] Dealing with a similar objection where the court was invited to disregard affidavits on the basis that they were out of time, Wepener J in *Pangbourne Properties Ltd v Pulse Moving CC and another*[1] held that:

'There are a large number of matters that come before us in this division in which parties, for a variety of reasons, agree to file affidavits at times suitable to them. Each case must be decided on its own facts and it cannot be said that when affidavits are filed out of time that these are not, without more, before the court. Without attempting to tabulate all instances where affidavits which are filed out of time may indeed be validly before a court, I refer to two examples only. Affidavits can validly be before the court pursuant to an agreement between the parties — see rule 27(1) which provides for such an agreement. They can also be validly

[1] *Pangbourne Properties Ltd v Pulse Moving CC and another* 2013 (3) SA 140 (GSJ) para 16.

before the court if the interests of justice require it. See the unreported judgment of *In re Application for the Issuing of a Letter of Request* (GNP case No 3771/07, 14 September 2007) where Van der Merwe J (as he then was) said: "Though the replying affidavit was well out of time it had to be taken into account in the interests of justice." Shongwe J (as he then was) said in the unreported judgment of *Venter v Van Wyk* (GNP case No 30323/04, 27 June 2005):

"The first point in limine is, in my view, highly technical. It is correct that the replying affidavit was filed out of time and that no formal application for condonation was filed by the respondent. However there is a lot of mud-slinging to and fro between the parties which situation I do not prefer to entertain. It is a waste of valuable time. I therefore rule that I will admit all affidavits before me and deal with the important issues presented by the application."'

[22] There is no automatic bar to the late filing of affidavits and the aggrieved party should demonstrate the prejudice suffered for the court to intervene. However, such intervention should not create a circumstance where the ventilation of the real dispute between the parties is unfulfilled. Making this point, Schreiner JA in *Trans-African Insurance Co Ltd v Maluleka* remarked that

'…technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

[23] The only prejudice referred to by the applicant is the delay in the hearing of the review application, as the impending arrest and prosecution have been stayed by the interim interdict. The rule 30A application is not only incompetent in the circumstances for the failure to align with the rule and having been launched outside the prescribed period, but it also serves to interrupt the 35(7) application, intended to resolve the issue of the outstanding record and designed to move the review application forward.

[24] The court held in *Federated Trust Ltd v Botha*[2] that:

'The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.'

[2] *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654D-E.

[25] The court went on to hold that:[3]

'Where one or other of the parties has failed to comply with requirements of the Rules or an order made in terms thereof and prejudice has thereby been caused to his opponent, it should be the court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the object for which the Rules were designed.'

[26] In *Khunou and others v M Fihrer & Son (Pty) Ltd and others*[4] the court held that '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 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 which I have mentioned are clarified and tried in a just manner.'

[27] The rule 30A application in this matter offends against all the principles enunciated in the cases set out above while also being procedurally irregular, and, as such, should fail. The rule 30A application is not truly necessary in the circumstances of this case, and to the extent that the applicant had not replied to the second affidavit, he ought to have simply sought leave to supplement the replying affidavit to incorporate his reply to the opposing affidavit of the NPA respondents.

[28] Returning to the condonation application, it is clear that the 30A application is without merit as it is not intended to alleviate any prejudice. The application is also ill-founded on the bases that it was brought outside the prescribed period and that it was not, in the true sense, brought due to the conduct of the NPA respondents (it was due to the applicant missing the emailed version of the affidavit as it was in the junk mail folder).

[29] The NPA respondents' representative has tendered a reasonable explanation for the default and has prospects of success in defending the rule 30A application, and, as such, the condonation for the late filing of the opposing papers must be viewed as being in the interests of justice.

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[3] Ibid at 654E-F.
[4] *Khunou and others v M Fihrer & Son (Pty) Ltd and others* 1982 (3) SA 353 (W) at 355G-H.

[30] The opposition to the condonation application, after demanding same, is yet another demonstration of the applicant having lost sight of the purpose of the Uniform rules of court. Having demanded that an application should be brought for the late opposition to the rule 30A application, and after the explanation has been tendered, the opposition to the condonation application is not truly required for justice to be done or for the speedy resolution of litigation between the parties. It is unavoidable to conclude that it is designed to frustrate justice and to delay the determination of the real issues between the parties. In the circumstances, the condonation application should succeed to ensure that injustice does not arise.

The rule 35(3) notice and rule 35(7) application

[31] The parties have not provided a chronology of events leading to the issuing of the rule 35(3) notice and the bringing of the rule 35(7) application. The applicant has appended some of the correspondence between the parties, albeit selectively, as the letters from the respondents' representative are not attached, while the applicant's representative's responses are attached.

[32] The following chronology of events appears from the papers:

(a) On 28 October 2022, the applicant brought the review application together with a rule nisi;

(b) On 14 December 2022, after some failed requests for the extension of time, the respondents served a copy of the rule 53 record on the applicant;

(c) On 11 January 2023, the applicant sent a letter to the respondents' representative complaining about the inadequacy of the record and listing what documents he required;

(d) On 8 February 2023, the applicant's representatives were invited to inspect the original dockets on 21 February 2023 and responded to this invitation on 9 February 2023 by indicating their unavailability until 20 March 2023 and other dates thereafter;

(e) On 24 March 2023, the applicant's representatives declined the invitation to inspect the original dockets;

(f) On 31 March 2023, the respondents' representatives responded to the demand for documents made in the letter dated 11 January 2023 by providing 'A clip' of the dockets, tendering an explanation for the failure to include certain dockets and the investigating officer's diary in the rule 53 record and requesting the applicant to deliver his supplementary papers in the review application;

(g) On 3 April 2023, the applicant demanded the very documents the respondents said were not included in the review record as they were not relevant for the decision which was the subject of the review application and indicated his intention to bring an application to compel discovery should these documents not be provided and further demanded confirmation that the state attorney represents all the respondents;
(h) On 12 April 2023, a notice in terms of rule 35(3) was delivered by the applicant, demanding the very documents referred to in the correspondence dated 11 January 2023 and 31 March 2023; and
(i) On 28 April 2023, the applicant brought the rule 35(7) application.

[33] The record delivered by the respondents is in terms of Uniform rule 53 and relates to the decision which is the subject-matter of the review application and it is not per se discovery as envisaged in Uniform rule 35.

[34] Rule 35(3) 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 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.'

[35] This subrule permits a party to call for documents in *addition* to documents or tape recordings disclosed in terms of rule 35(1) and these documents must be relevant to the matter in question. Strictly speaking, this subrule can only be utilised after discovery in terms of rule 35(1) and this is denoted by the use of the word 'disclosed as aforesaid' in the subrule. The respondents oppose the application partly on this premise.

[36] Rule 35(7) permits a party to bring an application to compel discovery after a failure to discover in terms of rule 35(1), and to comply with the subsequent rule 35(3) and/or rule 35(6) notice/s. In *Kgamanyane and another v ABSA Bank Limited*,[5] the

[5] *Kgamanyane and another v ABSA Bank Limited* [2024] ZAGPJHC 68 para 14.

court found that the use of the words ‘as aforesaid’ in the subrule means in terms of the earlier provisions of rule 35.

[37] The respondents have taken the point that the provisions of rule 35(7) are not available to the applicant in the review application and also if not preceded by the discovery procedure envisaged in subrule 35(1). The respondents seek the dismissal of the application on the basis that it is procedurally wrong and even if it was not, the applicant has not demonstrated the relevance of the documents requested to the review application. The respondents accept the general application of the discovery procedure to applications as envisaged by rule 35(13) but dispute that the applicants are entitled to bring this application and ought to have rather relied on rule 35(12).

[38] While I agree that the procedure followed by the applicant is incorrect, I am not inclined to non-suit the applicant on this basis but to rather consider the entire factual matrix and to resolve the real dispute between the parties, as the court is required to do.

[39] The notices are not preceded by discovery affidavits in this matter, as the main application relates to the review application. In terms of rule 53(1)*(b)*, the respondents are required to file the record of the ‘…proceedings sought to be corrected or set aside, together with such reasons as [they are] by law required or desire[d] to give or make…’ with the registrar of the high court.

[40] It is apparent that the relevance of the documents required has to be viewed in light of the review application and not in the general terms of rule 35(7), where the issues are defined in the pleadings and followed by discovery affidavits.

[41] The record, in terms of Uniform rule 53, consists of all the information relevant to the impugned decision or proceedings, except privileged information, and for information to be relevant, it must throw light on the decision-making process and the factors that were considered in reaching the decision.[6]

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[6] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) (*Helen Suzman Foundation*) para 17.

[42] The relevance of the information listed in the applicant's notice in terms of rule 35(3) must be assessed in light of the review application and the respondents' response to the letter dated 11 January 2023. The additional dockets required by the applicant did not form part of the decision-making process relating to the issuing of the warrant of arrest or the rejection of the presentations to stay the execution of the arrest. This much was communicated to the applicant on 31 March 2023 after the applicant rejected an invitation to examine the original dockets.

[43] The applicant fails to mention this response and makes a case for the respondents' failure to respond to the 35(3) notice that was delivered after a clear indication was given that the dockets required did not form part of the decision-making process of the impugned decision, as the applicant was a witness in those matters and not a suspect. The applicant does not deal at all with this fact. The applicant issued the rule 35(3) notice while knowing the reasons why the requested documents would not be forthcoming and, as such, cannot rely on this notice for the application.

[44] The applicant then ignores the response on oath relating to the documents required and does not attack the non-compliance of the response but instead argues that the documents and information required are necessary to assess the legality and/or rationality of the decision to apply for a warrant of arrest and/or the rejection of his representations to stay same.

[45] Rule 35(7) does not entitle the applicant to ignore the response and to demand information that was not before the decision maker when the decision was made. Besides this, the respondents have tendered an explanation on oath about the required documents and this is sufficient.

[46] The applicant contends that the dockets, which did not form part of the decision to seek a warrant of arrest, will 'extinguish and settle the baseless allegations of the ninth respondent's complaint against him'. This contention loses sight of the rationale behind the rule 53 record.

[47] The applicant also uses these proceedings to demand discovery of privileged documents not related to the review proceedings. This is impermissible in terms of

rule 35. In *Helen Suzman Foundation,* the Constitutional Court held that 'under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings'.[7] The Constitutional Court went on to compare this process to the rule 53 process, and ultimately held that this process is different as relevance is assessed as it relates to the decision sought to be reviewed.[8]

[48] The reading of the replying affidavit and the arguments presented against the resistance to file irrelevant (to the decision) and/or privileged information, as part of the review record, relate to the applicant's desire to discredit the ninth respondent as a complainant in the matter for which his arrest is sought. I am not persuaded that such a challenge can be met by requiring the review court to consider statements in dockets that relate to a criminal case against the ninth respondent in which the applicant was a witness.

[49] The applicant also requires the mandate of the sixth respondent to investigate him. Despite the respondents stating on oath that such a document does not exist and that the allocation of investigations is by virtue of the sixth respondent being employed by the third respondent, the applicant persists with his demand with no justification, except to allege that the investigation is unlawful because of some conspiracy and/or placement of the sixth respondent in the Western Cape.

[50] It is not clear on what basis the applicant insists that the documents exist when the respondents clearly state that they do not. However, what is clear is that the demand for these documents, even after the respondents have given an explanation for their absence, delays the review application. It is trite that the review application can only be decided on the strength of the information that was before the decision maker.

[51] Even on the merits of this case, the rule 35(7) application cannot succeed as the record has been delivered and the absence of the documents required by the applicant in the record has been adequately explained. Bedderson J implored the applicant as far back as June 2023 to 'get his show on the road'. I share this

[7] Ibid para 26.
[8] Ibid para 27.

sentiment, as these applications have done nothing but frustrate the review application without justification. The applicant was directed on 17 April 2023 to deliver his supplementary papers by 27 June 2023 and is yet to comply with that order.

[52] I conclude that the review application can be pursued with the record filed and any attack on the inadequacy of the record can be dealt with in the review application and the principles governing the legality and rationality of the decision in light of the information purportedly relied on to make the decision.

[53] It follows that the application has no merit and falls to be dismissed. I now turn to the issue of costs.

Costs

[54] The general principle is that costs follow the result. While the court retains a discretion in relation to costs, such discretion is to be exercised judiciously. The parties sought punitive costs against each other, with the applicant claiming that the respondents are dilatory in their tendency to deliver their oppositions late. The respondents, on the other hand, argued that the applicant should be directed to pay the costs on an attorney and client scale, as his applications constituted an abuse of process and are designed to delay the administration of justice, as the criminal case against the applicant cannot proceed until the review application is determined.

[55] The conclusion that the rule 35(7) application should not have been brought, especially after the respondents' letter dated 31 March 2023, is unavoidable. The situation is worsened by the applicant's persistence despite the explanation on oath in the opposing affidavits. At the very least, the applicant ought to have withdrawn the application once these affidavits were delivered after ignoring the correspondence and failing to inspect the original dockets upon invitation to do so.

[56] The delivered record is sufficient for the applicant to mount his attack on the decision-making process. The insistence on the procedurally flawed rule 35(7) application does not vindicate his rights but delays the very justice he claims to seek.

[57] The rule 35(7) application was unnecessary and not in pursuit of justice. The process followed served only to taunt the respondents and their legal representatives.

Court processes should not be used in this manner and as such, the costs should follow the result on an attorney and client scale.

Order

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

1. The late filing of the first, second and seventh respondents' opposing affidavit in the rule 30A application is condoned.

2. The application in terms of rule 30A is dismissed with costs on an attorney and client scale.

3. The application in terms of rule 35(7) is dismissed with costs on an attorney and client scale.

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NAKO AJ

Appearances

Counsel for the plaintiff:	Mr S Singh
Instructed by:	Govender, Mchunu & Associates First Floor, 46,48Mckenzie Road Windermere, Durban c/o Shaheel Singh Attorneys Incorporated Suite 6A, Victoria Country Club Estate 18Montrose Brown Drive 170 Peter Brown Drive Pietermaritzburg
Counsel for the defendant:	Ms Z Rasool
Instructed by:	State Attorney KwaZulu-Natal 6th Floor Metlife Building 391 Anton Lembede Street Durban c/o State Attorney KwaZulu-Natal Satellite Office 2nd Floor, Magistrate's Court Building 302 Church Street Pietermaritzburg