

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 987/11

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
Date: 1 March 2022	
E van der Schyff	

In the matter between:

ION POP

APPLICANT

and

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

RESPONDENT

JUDGMENT

Van der Schyff J

- [1] The applicant, who appeared in person, approached the court with an application in terms of Rule 35(7) of the Uniform Rules of Court. He alleges that the respondent failed to comply with an order handed down by Tolmay J on 17 November 2020 to make discovery within 14 days of the date of the order. He seeks that the respondent's defence in the main action be struck.

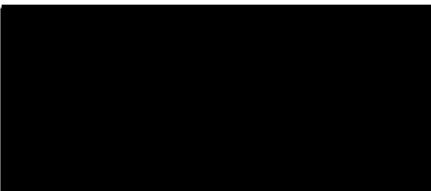
- [2] The respondent opposed the application. The respondent alleges that it has already filed a discovery affidavit prior to the court order being granted on 17 November 2020. The discovery affidavit was served on the plaintiff personally at court on 10 October 2013. Subsequent to the discovery affidavit being served, the applicant filed a notice in terms of Rule 35(3) requesting that specific documents be made available to him. The respondent filed an affidavit stating that the 'defendant has diligently searched through all available records for such documents but has not been able to find them to date hereof.'
- [3] The applicant submitted that he was entitled to approach the court for a second time to compel discovery since the discovery occurred six years ago and the respondent might in the meantime have found the documentation he seeks. From the papers filed it is apparent that the applicant seeks the content of the court file from the Magistrate's Court Germiston in terms of which default judgment was granted against him during September 1997, pursuant to which his home was sold in execution. He apparently alleges in the particulars of claim, which are not uploaded to the CaseLine's file but referred to the respondent's heads of argument, that the Clerk of the Magistrate's Court Germiston, falsely and without due reason caused a default judgment to be entered in favour of Nedcor Bank Ltd.
- [4] The respondent's defence, as set out in its heads of argument is that –
- a. Summons was issued by Nedcor Bank Ltd against the applicant for his failure to pay instalments in terms of the mortgage bond in respect of immovable property;
 - b. Pursuant to service of the summons on 24 July 1997, the applicant failed to enter an appearance to defend the matter as a consequence of which judgment was granted by default against him on 2 October 1997;
 - c. A warrant of execution was issued on 2 October 1997 in terms of which the immovable property was sold on 11 May 1998;
 - d. The applicant brought an application for the rescission of the default judgment which was opposed and dismissed on 28 February 2001.

- [5] The applicant took issue with the power of the appointed state attorney to act. An affidavit was filed on behalf of the respondent wherein it was confirmed that Gabisile Nkosi is a senior assistant attorney attending to this matter employed by the Office of the State Attorney. A letter received from the Legal Practice Council (LPC) and uploaded to CaseLine confirms that Miss Barbara Gabisile Nkosi is recorded as a practising attorney within the jurisdiction of the Gauteng Provincial Office of the LPC.
- [6] The applicant did not make out a case for the respondent's defence to be struck. If the respondent at trial wants to rely on documentation not discovered, leave will have to be obtained from the trial court.
- [7] As for costs, the applicant is a lay person. The respondent failed to explain the correct position to Tolmay J when the order to compel the respondent to discover was heard, and the order granted. The applicant approached the court for the relief sought based on the order granted by Tolmay J. In these circumstances I am of the view that it is fair that the costs of this application are costs in the trial.

ORDER

In the result the following order is granted:

1. The application is dismissed.
2. Costs of the application are costs in the trial.


E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 1 March 2022.

Counsel for the applicant:
For the first and third defendants:
Instructed by:

In Person
Adv. G. Bester SC
State Attorney

Date of the hearing:

28 February 2022

Date of judgment:

1 March 2022