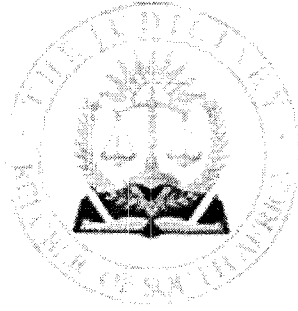


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 35547/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
19/02/2019	
DATE	SIGNATURE

In the matter between:

LSC CIVILS t/a SC CIVILS SC

First Applicant

NATHAREM CONSTRUCTION & MAINTENANCE

Second Applicant

NATHAREM & SC CIVILS JOINT VENTURES

Third Applicant

and

MARAGELA CONSULTING ENGINEERS (PTY) LTD

Respondent

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J U D G M E N T

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MASHILE, J:

INTRODUCTION:

- [1] This is an application for dismissal of the Respondent's Plea and for default judgment to be entered against the Respondent in the sum of

**R4 582 917.30.** The basis of the dismissal of the plea is the non-compliance with 2 orders of this Court.

**FACTUAL BACKGROUND:**

- [2] Following the closure of pleadings in the main action, the Applicants delivered the traditional discovery notices upon the Respondent in terms of Rule 35. The Respondent discovered but the Applicants believed that the Respondent's answer was inadequate in consequence of which the Applicants caused a notice in terms of Rule 35(3) as read with Rule 35(6) to be served and filed. On **21 August 2018**, the parties held a pre-trial conference the outcome of which was that the Respondent would file their further and better discovery affidavit on or before **5 September 2018**.
- [3] The Respondent failed to provide further and better particulars on **5 September 2018** as agreed. As a result of the Respondent's non-compliance, the Applicants launched an application to compel the Respondent to make further and better discovery. On **9 October 2018**, this Court per **Mashile J** directed the Respondent to comply with the notice in terms of Rule 35(3) as read with Rule 35(6) within 5 days of service of the court order upon the Respondent. A copy of the order was served by email upon the Respondent's attorneys on **10 October 2018**. On **17 October 2018** and in compliance with the Applicants' request, the Respondent again replied. The Applicant remained dissatisfied with the Response.

- [4] The order directed the Respondent to 'deal with and discover the Respondent's bank statement during the period **January 2016** to **December 2017**, correspondence between the Respondent and City of Johannesburg during the aforementioned period and copies of all invoices, billing and/or statements between the Respondent and City of Johannesburg'.
- [5] When the Respondent filed an answer on **17 October 2017**, it stated that it had bank statements but raised 3 objections why it could not disclose them. I will deal with the three excuses later in this judgment. That said, it is significant that the Respondent's purported compliance was found inadequate by **Ismail J** on **13 November 2018**.
- [6] As a result of the Respondent's failure to respond to the court order, the Applicants launched a further application for the dismissal of Respondent's defence and for judgment. The matter was set down for hearing for **6 November 2018**. On that day, the matter came before **Ismail J** who declined to grant the relief sought but afforded the Respondent opportunity to comply with the order of **9 October 2018**. **Ismail J** ordered the Respondent to comply with the order by **13 November 2018** failing which the Applicants would be at liberty to apply for a hearing date on **4 December 2018** to:
- 6.1 Strike out the Respondent's defence;
  - 6.2 Claim payment and costs.

The order of **Ismail J** was duly served and filed. However, it could not proceed on **4 December 2018** due to a mistake in the Registrar's office.

**THE APPLICANTS' ASSERTION:**

- [7] The Applicants argue that the claim against the Respondent is for monies arising from a joint venture agreement illicitly received by the Respondent. According to the Applicants, this is the case made out initially in the *ex parte* application where funds were attached in the Respondent's account and the case *in casu*. In its Plea, the Respondent has denied Applicants' claim and entitlement to funds.
- [8] The Applicants contend further that they have made out a case for the discovery of the documents, which are now urgently required to enable them to prepare for trial. The provision of the statements will ascertain the amount of money received from the City of Johannesburg and as such, the need to call certain witnesses from the City of Johannesburg and the bank will be obviated thereby reducing the time spent in court. The Respondent cannot refuse to provide the documents, reason the Applicants, because this Court has so ordered.

**THE RESPONDENT'S ASSERTION:**

- [9] Preliminarily, on **5 December 2018**, the Respondent delivered a notice in terms of Rule 7 challenging the authority of Messrs Bedder-Friedland Incorporated to act on behalf of the Second Applicant. In addition, the

Respondent refers this Court to Annexure “**MCE4**”, which is an undated letter to Messrs Beder-Friedland Incorporated demanding that the latter should desist from claiming that it has a mandate to act on its behalf. For this reason, the Respondent argues that the case of the Applicants should be dismissed.

- [10] On the merits, the Respondent's defence is that it has complied with the orders of this Court per **Mashile** and **Ismail JJ** and refers to its affidavit in reply to the Rule 35(3) notice, which it signed on **17 October 2018**. I could not decipher the date on which this reply was signed but it is safe to assume that it was delivered after **17 October 2018**, the date on which it was ostensibly signed. The essence of the contents of the reply to the Rule 35(3) is that the Respondent declined production of the requested documents on the ground that they are irrelevant and/or contain confidential information and/or request was too wide and/or immuned from disclosure.

#### **THE LEGAL POSITION:**

- [11] Rule 35 generally deals with discovery of documents and/or tape recordings. Rule 35(3) specifically 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 him to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such*

*documents are not in his possession, in which event he shall state their whereabouts, if known to him."*

[12] Rule 7 is headed: 'Power of Attorney' and subrule (1) provides that:

*"Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he is satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."*

[13] To the extent that this matter also involves contempt of court orders, it could be instructive to refer to the decision in *Burchell v Burchell*, [2006] JOL 16722 (E) where it was held that 'civil contempt' remains a criminal offence under the Constitution, and that a respondent in such proceedings is inevitably an 'accused person' under s 35 of the Bill of Rights. **Froneman J** pointed out that committal for contempt of court orders raises no conflict with freedom of speech or other fundamental rights, but that, on the contrary, compliance with court orders is of fundamental concern to a society that bases itself on the rule of law.

### **ANALYSIS:**

[14] It will be appropriate to begin with the point *in limine* raised by the Respondent, which is that Messrs Beder-Friedland Incorporated lack authority to act on behalf of the Second Applicant and that as such, the

case should be dismissed. Ordinarily, I would have agreed with the Respondent because the wording of Rule 7(1) is clear -- once a legal representative's authority to act on behalf of a party is challenged, he or she cannot continue to act as such until he has satisfied the court that he is authorised so to act.

[15] However, it is manifest that the Respondent knew or ought to have known that by **5 December 2018** when he delivered his challenge of authority in terms of Rule 7 that the horses had bolted. This must be so because this Court had on **9 October 2018** already ordered him to comply with the further and better discovery of the Applicants. Accordingly, for as long as there had not been an appeal against those orders, they are still extant. The Rule 7 challenge is therefore ineffective and the preliminary point must be dismissed as devoid of any merit.

[16] Turning to the defence of the Respondent on merits that he has complied with the request for further and better discovery of the Applicants. In this regard, it is not without significance that the application to dismiss the Respondent's plea came before **Isrnail J** on **13 November 2018**. On that date he was satisfied that the Respondent's reply of **17 October 2018** was lacking and ordered that the application for dismissal of the Respondent's plea be set down for hearing for **4 December 2018**.

[17] The Respondent has argued that it has complied with the order of **Mashile J** dated **9 October 2018** in that it has dealt with the documents. That is not what **Ismail J** concluded though on **13 November 2018** when he held that the Applicants could set the matter down for hearing for **4 December 2018**. The order of **Mashile J** directed the Respondent to 'deal with and discover' the requested documents. Thus, the Respondent may have dealt with the documents in its reply to the Rule 35(3) notice but it has still failed to discover them. To the extent that the reply stopped short of the discovery, the Respondent's compliance is rendered unsatisfactory.


[18] From whichever perspective one looks at this matter one thing is inexorable and that is that the Respondent is in contempt of two orders of this Court, one dated **9 October 2018** and the other, **13 November 2018**. For as long as there is no compliance with those orders, the Respondent's defences cannot be entertained.

#### **ORDER:**

[19] **In the circumstances, I am constrained to uphold the application and I make the following order:**

- 1 The Respondents plea and defence is dismissed;**
- 2 Judgment is granted against the Respondent/1<sup>st</sup> Defendant (in the main action) in the sum of R4 582 917.30;**

- 3 The respondent is to pay interest on the aforesaid sum at the rate of 9% per annum calculated from 27 July 2017 to date of payment; and
- 4 The Respondent to pay the costs;



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**B MASHILE**  
JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION, JOHANNESBURG

**APPEARANCES:**

For the Applicant: **Mr. SB Friedland**  
Instructed by: Beder-Friedland Inc

For the Respondent: **Mr. NS Nxumalo**  
Instructed by: Motlanthe Attorneys

Date of Hearing: 11 February 2019  
Date of Judgment: 19 February 2019