

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 5159/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED NO

Judge Dippenaar

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA Applicant

and

GONASGREN GANESAN REDDY First Respondent
LINDA REDDY Second Respondent
PIETER HENDRIK STEYN Third Respondent
TANIA STEYN Fourth Respondent
ADC ENERGY CC Fifth Respondent
ADC CABLES (PTY) LTD Sixth Respondent
AVIWE NDYAMARA N.O. Seventh Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 2nd of September 2022.

DIPPENAAR J

[1] This application was set down for hearing on 14 July 2022 as an unopposed application for default judgment on 3 August 2022. The notice was served electronically on the respondent's attorneys by consent between the parties. Judgment was sought against the first to fifth respondents as guarantors (collectively referred to as the "respondents") in respect of various claims for significant monetary amounts.

[2] At the hearing, counsel representing the respondents appeared and a debate ensued between the parties as to the fate of the main application. The applicant contended that it was entitled to default judgment in the absence of an answering affidavit, whilst the respondents sought an order striking the application from the roll, together with punitive costs.

[3] The respondents argued that as there was an opposed interlocutory application pending to compel discovery under rule 35(14) which had been launched during February 2022 and that the enrolment of this application on the unopposed roll was flawed and constituted an abuse of the process of court.

[4] Due to the congested state of the roll and the fact that the respondents' submissions were only produced during the hearing, judgment had to be reserved.

[5] It is necessary to set out the history of the application in some detail. The main application was launched on 4 February 2021. An intention to oppose was delivered by the respondents on 22 April 2021. To date no answering affidavit has been delivered. The respondents delivered notices in terms of rule 35(12) and rule 35(14), seeking various documents. The main application was enrolled on the unopposed roll on 17 August 2021. On 16 August 2021, the respondents delivered a postponement application. On 17 August 2021 an order was granted by Makume J by agreement between the parties, *inter alia* directing that the documents and recordings specified in the respondents' rule 35(12) and 35(14) notices dated 13 August 2021 be furnished to the respondents to the extent that the said documents or tape recordings were in the applicant's possession. The documents in the applicant's possession were furnished to the respondent during November 2021, save for a so-called Halkerd report, which formed the subject matter of a further rule 35(14) notice delivered by the respondents on 2 February 2022. The applicant objected to the production of the report and contended that the report was irrelevant and contained confidential information and trade secrets of the applicant.

[6] The respondents launched their interlocutory application to compel compliance with the rule 35(14) notice and provision of the Halkerd report on 21 February 2022. Heads of argument in the interlocutory application were filed by the respondents on 14 July 2022. At the time of the hearing, the applicant had not yet delivered its heads of argument.

[7] No formal application was launched by the respondents and the striking off application was orally argued from the bar. In the pending interlocutory application, the respondents did not seek any extension of the time periods for the delivery of answering papers, nor the stay of the main application. No notice under rule 30 was delivered by the respondent pursuant to the service of the notice of set down.

[8] Against this backdrop the arguments of the parties must be considered. The applicant's stance was that it was entitled as a matter of law to proceed with the main application in the absence of an answering affidavit. Reliance was placed on *Potpale*

*Investments v Mkhize (“Potpale”)*¹, wherein Gorven J held that the delivery of a rule 35 notice did not suspend the period in which the defendant was obliged to deliver a plea. This reasoning was also followed in *Distell Limited v Naidoo and Others*², wherein, in the context of a notice in terms of rule 35(12) it was held that the delivery of a rule 35 (12) notice did not suspend the relevant time periods and the respondent should have availed itself of the remedies envisaged by rule 27 to extend any time period not provided for in terms of the rules.

[9] Navsa JA in *Democratic Alliance and Others v Mkhwebane and Another*³(“*Mkhwebane*”) also commended the reasoning in *Potpale* and pointed out that the party seeking documents would be put to a choice whether to file an answering affidavit or seek an extension of time pending the finalisation of an application to compel production of documents.

[10] The reasoning in *Potpale* was confirmed by the Supreme Court of Appeal in *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited*⁴, wherein Petse AP confirmed the finding of Gorven J that delivery of a notice in terms of rule 35(12) or rule 35(14) does not suspend the period referred to in rule 26 or any other rule. Petse AP further pointed out:

“There is nothing in the language of rules 35(12) and 30A to suggest that once a demand has been made for the production of the documents to which the rule 35(12) notice relates, the party is excused from complying with the time frames prescribed in terms of Uniform Rule 6(5)(d)(ii) or 6(5)(e), as the case may be. In Potpale, Gorven J rightly observed that the delivery of a notice in terms of r35(12) or (14) does not suspend the period referred to in r26 or any other rule. Whilst there is much to be said for the view expressed by the learned Judge, sight should however not be lost of the fact that it is open to the court, in the exercise of its discretion, to extend the prescribed time periods prescribed in terms of the rules whenever a proper case therefor has been made out by the party seeking such indulgence. Indeed, this is what Uniform Rule 27 itself contemplates”.

¹ 2016 (5) SA 96 (KZN) paras [18]-[23]

² (2557/2016) [2019] ZAKZPHC 80 (4 December 2019) paras [68]-[69]

³ (1370/2019) [2021] ZASCA 18 (11 March 2021); 2021 (3) SA 403 (SCA) paras [47]-[48]

⁴ (219/2021) [2022] ZASCA 24 (9 March 2022); [2022] 2 All SA 299 (SCA) para [85];

[11] From the aforesaid authorities is it clear that a party in the position of the respondents is not left without a remedy, which a court in the exercise of its discretion may grant.

[12] In its “notes on argument” (as they were referred to), the respondents provided an extensive version regarding the history of the dispute between the parties. Reference was made to the respondent’s intention to raise various defences to the applicant’s claims, being predatory lending on the part of the applicant, a public policy defence based on *Sasfin v Beukes*⁵ and the contention that the enforcement of the guarantees on which the applicant’s claims are based, would be *contra bonos mores*. It was stated that these proposed defences were raised in the pending interlocutory application.

[13] The respondents sought to distinguish *Potpale* on its specific facts on two grounds. First, as it pertained to action proceedings and a notice of bar under rule 26, whereas the present proceedings are application proceedings where there is no similar provision to rule 26 which applies. Second that in *Potpale*, the defendant had not launched proceedings to compel compliance with its rule 35 (12) and 35(14) notices and it was in this context that it concluded that the defendant does not have a right to the documentation sought and cannot engineer a stay of the plaintiff’s proceedings.

[14] Reliance was further placed by the respondents on *Sanniesgraan CC v Minister of Police*⁶, and the authorities referred to therein. However, in *Potpale*, Gorven J referred to and considered the very authorities relied on by the respondents as referred to in *Sanniesgraan*. Insofar as the reasoning in *Sanniesgraan* diverges from *Potpale*, I respectfully decline to follow *Sanniesgraan*. The weight of the authorities supports the interpretation in *Potpale*.

⁵ 1989 (1) SA 1 (A)

⁶ 2021 JDR- 2057 (NWM)

[15] Whilst it is correct that each case must be determined on its own facts, the distinctions sought to be drawn by the respondents are artificial. If the principles in *Potpale* are considered in the context of *Caxton* and the other authorities, they apply irrespective of whether the proceedings are instituted by way of action or motion. As made clear in *Caxton*, the delivery of a notice in terms of rule 35(12) or rule 35(14) does not suspend the period referred to in rule 26 or any other rule.

[16] The launching of a compelling application would not make any difference to the above principle, save of course if an extension of time periods had been sought in that application. No authority was advanced by the respondents in support of the proposition that the launching of an application to compel does that which the notice under rule 35(14) could not achieve.

[17] The respondents further do not at present have a procedural right to the documents. The fact that a compelling application was launched does not equate it to a right to the documents. A further complexity is that the present matter concerns a rule 35(14) notice rather than a rule 35(12) notice. Those complexities are more appropriately to be considered by the court seized with the interlocutory application and I express no view thereon.

[18] Ultimately a party in the position of the respondents is left with a choice, either to deliver its affidavit without the documents or to seek to extend the time periods for filing, pending the finalisation of the application to compel. The respondents did not exercise their remedies.

[19] In these circumstances it cannot be concluded that the enrolment of the application was flawed or constituted an abuse. It follows that the respondent is not entitled to the punitive costs order sought against the applicant.

[20] I am not however persuaded that in the circumstances of this matter default judgment should be granted, as the applicant urged me to do. The application is clearly opposed and it would not be in the interests of justice to deprive the respondents of an appropriate opportunity to protect their interests and exercise the remedies at their disposal.

[21] In my view, analogous to a situation where a respondent appears on the day of the hearing of a default judgment application and seeks an opportunity to oppose, in the present instance the respondents are seeking an indulgence. As such it would be appropriate to direct the respondents to pay the wasted costs.

[22] I grant the following order:

[1] The application is postponed sine die;

[2] The respondents are directed to pay the wasted costs.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 3 August 2022
DATE OF JUDGMENT	: 2 September 2022
APPLICANT'S COUNSEL	: Adv. D. Mokale
APPLICANT'S ATTORNEYS	: Cliffe Dekker Hofmeyr Inc.

RESPONDENT'S COUNSEL

: Adv. P.F. Louw SC

: Adv. L Van Rhyn Van Tonder

RESPONDENT'S ATTORNEYS

: Krause Attorneys Inc.