

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023 - 070664

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. YES |

.....
B.C. WANLESS

20 December 2024

In the matter between:

BODY CORPORATE OF VALLEYVIEW CENTRE

APPLICANT

and

QUEEN NEW YORK COSMETIC (PTY) LTD (IN LIQUIDATION)

RESPONDENT

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Caselines. The date and time for hand-down is deemed to be 10h00 on 20 December 2024.

REASONS

WANLESS J

Introduction

[1] On the 14th of March 2024, having heard argument on the 4th of March 2024, this Court handed down an order under case number 2023 – 070664. Queen New York Cosmetic (Pty) Ltd (*“the Respondent”*) has requested reasons for this Court granting the order that it did.

The order

[2] The order reads as follows:

1. The application for the winding-up of the Respondent is postponed *sine die*.
2. The Respondent is to file its Answering Affidavit, if any, within fifteen (15) days of the date of this order.
3. The Respondent is ordered to pay the costs occasioned by the postponement on the 4th of March 2024.”

The facts

[3] In the application instituted by the Body Corporate for the Valleyview Centre (*“the Applicant”*) for the winding-up of the Applicant (*“the application”*) the facts and the history of the matter when it came before this Court (*on the unopposed motion court roll*), were largely common cause. As at the 4th of March 2024 the real or sole dispute between the parties (*as dealt with hereunder*) was a procedural/interlocutory one.

[4] The facts which were common cause or could not be seriously disputed by either of the parties, were the following:

- 4.1 the application was instituted by way of a Notice of Motion dated 29 June 2023;

- 4.2 the application papers were served upon the Respondent on 28 August 2023;
- 4.3 the application was set down on the unopposed motion court roll for hearing on the 12th of September 2023;
- 4.4 shortly before the 12th of September 2023, on the 7th of September 2023, the Respondent filed its notice to oppose the application;
- 4.5 the application was removed from the roll of the unopposed motion court on the 12th of September 2023, costs to be costs in the cause;
- 4.6 on the 28th of October 2023 the Respondent filed a notice in terms of subrule 35(12)(a). Having filed its notice to oppose the application on the 7th of September 2023 the Respondent, in terms of subrule 6(5)(d)(ii), had to file its Answering Affidavit on or before the 28th of September 2023. In the premises, the Notice in terms of subrule 35(12)(a) was filed after the date by which the Respondent was to file its Answering Affidavit (*by one month*);
- 4.7 the Applicant elected not to respond thereto and the Respondent did not take any further steps in terms of, *inter alia*, rule 35;
- 4.8 the matter was set down once again for hearing on the unopposed motion court roll on the 4th of March 2024;
- 4.9 shortly before the 4th of March 2024, on the 1st of March 2024, the Respondent filed a notice in terms of rule 30A;
- 4.10 the matter came before this Court on this Court's unopposed motion roll on the 4th of March 2024.

The respective arguments on behalf of the parties

The Respondent

- [5] In terms of its Practice Note the Respondent sought an order that the application be removed from the roll and the Applicant be ordered to pay the costs thereof on the scale of attorney and client. This relief was set out in a Draft Order uploaded onto caselines by the Respondent. With regard to the issue of costs the Respondent also uploaded two further Draft Orders, one of which made provision that the Applicant pay the costs on the party and party scale whilst the other provided for the costs to be costs in the cause of the application.
- [6] The principal basis for this relief was that in light of the Respondent having filed the notice in terms of subrule 35(12)(a) it was not necessary for the Respondent to file an answering affidavit. In the premises, it was submitted, on behalf of the Respondent, that it was not competent for the Applicant to have set the matter down on the unopposed motion roll on the basis that the Respondent had failed to file an answering affidavit in terms of the Uniform Rules of Court. Hence the filing by the Respondent of the notice in terms of rule 30A on the grounds that, by doing so, the Applicant had carried out an irregular step. In the premises, it was submitted that the only order that this Court could make was to remove the matter from the roll with an appropriate order as to costs. Other grounds have been raised by way of, *inter alia*, correspondence received from the Respondent's attorneys. Where applicable, these will be dealt with herein

The Applicant

- [7] In brief, the Applicant submitted that the filing of the Respondent's notice in terms of subrule 35(12)(a) did not suspend the requirement that the Respondent file its Answering Affidavit in the application. Further, it was submitted that the said notice failed to satisfy the requirements of that subrule. In light of the reasons for the order that this Court made, it is not necessary to deal with the latter submission.
- [8] Following thereon, the Applicant submitted that it was not an irregular step for the Applicant to set the matter down on this Court's unopposed motion roll and, in light of

the failure of the Respondent to file an answering affidavit or seek relief in terms of, *inter alia*, the provisions of rule 27, it was competent for this Court to grant an order winding-up the Respondent (either on a provisional or final basis).

The law

- [9] The correct legal principles to be applied in this matter are so well-established that they may even be described as “*trite*”. In the premises, it is not the intention of this Court to burden these reasons for the order made unnecessarily, by, *inter alia*, repeating copious and oft repeated excerpts/citations from numerous authorities dealing therewith. Rather, this Court will attempt (*as far as possible*) to provide a succinct summary thereof.
- [10] It was common cause between the parties that in the matter of *Potpale Investments (Pty) Ltd* 2016 (5) SA 96 (KZP), Gorven J (*as he then was*) held, *inter alia*, that the filing of a notice in terms of subrule 35(12) does not suspend the time limit in which a party is to file a further pleading (*at paragraph [18] of the judgment*). Moreover, this Court did not understand there to be any dispute between the parties that, whilst *Potpale* is the decision of a single Judge, the aforesaid principle has not been set aside by any superior court.
- [11] This is correct. In fact, it is clear that the finding of the court in *Potpale* has received judicial approval from the Supreme Court of Appeal (“*the SCA*”) where, in the matter of *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA), it was noted, with approval (*at paragraph [47] of the judgment*]) that, in *Potpale*, Gorven J was of the view that “.....a party confronted with time limits within which to plead or file affidavits could plead, or file opposing affidavits, and then compel the documents and, if thereafter so advised, amend or supplement what he has already filed. Or such party could apply to court to extend the time limits pending the production of the documents sought”. Further, the SCA stated (*at paragraph [48] of the judgment*), that “*There is much to commend the reasoning and the approach in Potpale.*” The fact that the SCA distinguished *Mkhwebane* from *Potpale* on the facts, in no way whatsoever detracts from the principle enunciated in the latter decision. Furthermore, the submission by the Respondent’s attorneys, in a letter dated 30 October 2024, that, *inter alia*, *Potpale* and *Distell* should be “*ignored*” in light of *Mkhwebane*, is simply incorrect and based upon an incorrect

interpretation of *Mkhwebane*. Also, the averments made in the same letter that the capital sum and/or the interest thereon, upon which the application for the winding-up of the Respondent was founded, are not correct, were irrelevant when this Court made the order that it did on the 14th of March 2024.

- [12] Shortly thereafter, in the matter of *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* [2022] 2 All SA 299 (SCA) (9 March 2022) the SCA once again confirmed the decision of the court in *Potpale* when it was held (at paragraph [85] thereof) that:

“ 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 seeking such documents is excused from complying with the timeframes prescribed in terms of Uniform Rule 6(5)(d)(ii) or 6(5)(e), as the case may be. In Potpale Investments (Pty) Ltd v Mkhize, Gorven J rightly observed that the delivery of a notice in terms of rule 35(12) or (14) does not suspend the period referred to in rule 26 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 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. “(Emphasis added)

- [13] In addition to the foregoing (as accepted by both parties when the matter came before this Court on 4 March 2024) the court in *Distell v Naidoo* (unreported) KZP case number 2557/2016 dated 4 December 2019, held (at paragraphs [68] and [[69] of the judgment) that:

“Does the delivery of the rule 35(12) notice suspend the 15-day period in which the respondents are to file an answering affidavit?

[68] There appears to be no authority on this issue apart from a reference in the judgment of Gorven J in *Potpale Investments (Pty) Ltd v Mkhize*. A reading of rule 35(12) and (14) does not indicate that delivery of such notice suspends the period

referred to for the filing of an answering affidavit. In addition, although rule 35(12) imposes sanctions for non-compliance, it does not indicate that delivery of any pleadings and/or any affidavits is suspended pending compliance with the rule. A litigant can utilise the provisions of rule 27 to ask for an extension of any time period not provided for in terms of the rules.

[69] Having regard to the judgment of Gorven J in Potpale, it would appear that he was of the view that the delivery of the rule 35 notice did not suspend the period in which the defendant was obliged to deliver a plea. Consequently, the enrolling of the default judgment was not an irregular step in terms of rule 35(12). A document referred to in an affidavit may also fall within the ambit of the rule. However, the obligation of a party to produce such a document is subject to limitations such as relevance. I agree that the filing of the rule 35(12) notice did not suspend the dies and that the respondents ought to have utilised the provisions of rule 27 to request an extension of the dies.”

[14] More recently, on the 2nd of September 2022, Dippenaar J delivered a judgment, in this Division, namely *Industrial Development Corporation of South Africa (“IDC”) v Reddy and Others (unreported)*, case number 5159/2021 (2 September 2021). Not only do the facts of that matter bear a remarkable similarity to those of the present matter but the well-written judgment of the learned Judge provides (a) an invaluable history of the relevant jurisprudence pertaining to the issue at hand following *Potpale* until the delivery of that judgment and (b) explains much of the reasons why this Court granted the order on the 4th of March 2024 that it did.

[15] In application proceedings 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 (*at paragraph [2] of the judgment*). The respondents argued that as there was an opposed interlocutory application pending to compel discovery under subrule 35(14) which had been launched during February 2022 and that the enrolment of this application on the unopposed roll was flawed, constituting an abuse of the process of court (*at paragraph [3] of the judgment*).

[16] 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* and Dippenaar J noted that Gorven J had held that the delivery of a rule 35 notice did not suspend the period in which the defendant was obliged to deliver a plea. The learned Judge further noted that this reasoning was also followed in *Distell*, where, 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 (*at paragraph [8] of the judgment*).

[17] In traversing earlier decisions the court in IDC also noted that in *Mkhwebane (supra)*, Navsa JA 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 (*at paragraph [9] of the judgment*). Dippenaar J further noted (*at paragraph [10] of the judgment*) that the reasoning in *Potpale* was confirmed by the SCA in *Caxton (supra)*, wherein Petse AP confirmed the finding of Gorven J that delivery of a notice in terms of subrule 35(12) or subrule 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.” (Emphasis added).*

[18] In the premises, the court in IDC came to the (*correct*) decision that the Respondents in that matter (*as is the case for the Respondent in the present matter*) is not left without

a remedy, which a court in the exercise of its discretion may grant (*at paragraph [11] of the judgment*).

[19] The Respondents in IDC sought to distinguish *Potpale* on the ground that it pertained to action proceedings and a notice of bar under rule 26, whereas the proceedings in IDC were application proceedings where there is no similar provision to rule 26 which applies. In the present matter this distinction can also be made and the Respondent relied thereon.

[20] In turn, the Applicant in IDC argued that in *Potpale* the Respondent had not launched proceedings to compel compliance with its subrule 35(12) and 35(14) notices and it was in this context that it (the Applicant) concluded that the Respondent did not have a right to the documentation sought and could not engineer a stay of the Plaintiff's proceedings. This argument is also relied upon by the Applicant in the present proceedings before this Court.

[21] It was also noted by the court in IDC (*at paragraph [14] of the judgment*) that reliance was further placed by the Respondents on *Sanniesgraan CC v Minister of Police 2021 JDR 2057 (NWM)* and the authorities referred to therein. However, Dippenaar J correctly pointed out that in *Potpale*, Gorven J referred to and considered the very authorities relied on by the Respondents as referred to in *Sanniesgraan*. In the premises, Dippenaar J, insofar as the reasoning in *Sanniesgraan* diverged from that in *Potpale*, declined to follow *Sanniesgraan* on the basis that the weight of the authorities supported the interpretation in *Potpale*.

[22] Dealing with these arguments as raised by the respective parties in IDC, Dippenaar J (*at paragraphs [15] to [19] of the judgment*) held:

“[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.....
.....*

[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.” (Emphasis added).

[23] At the end of the day, Dippenaar J was not persuaded that, in the circumstances of that matter, default judgment should be granted, as the Applicant urged the Court to do. The court in IDC held that in light of the fact that the application was clearly opposed, 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 (at paragraph [20] of the judgment).

[24] In Dippenaar J's view the facts in IDC were 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 and, in that instance, the Respondents were seeking an

indulgence. As such, it was held in *IDC* that it would be appropriate to direct the Respondents to pay the wasted costs (*at paragraph [21] of the judgment*).

[25] In the premises, the court in *IDC* postponed the application *sine die* and ordered the Respondents to pay the wasted costs (*at paragraph [22] of the judgment*). For all intents and purposes the same order, having the same practical effect and based on virtually identical facts to those in *IDC*, was made by this Court in the present matter. The only difference was that, having postponed the application *sine die*, this Court ordered the Respondent to file any answering affidavit within a specified time period. This order was made with the intention of moving the matter forward in an orderly and/or correct, manner.

[26] Finally, in the matter of *Madzibadela v Standard Bank of South Africa Limited and Another (1878/2022;1879/2022) [2023] ZAFSHC*, a judgment delivered very recently (22 February 2023) the court had occasion, when dealing with two rescission applications in respect of default judgments where the Applicants had failed to file a Plea, to hold (*at paragraph [8] of the judgment*), relying on *Potpale*, the following:

“The applicants further purport to show that they have a bona fide defence to the bank’s claims, and they contend that, were the court a quo privy to their defences raised in their plea of 6 July 2022, the court would not have granted the default judgements. In this respect the applicants are overlooking the consequences of a notice of bar. In terms of Rule 26 a party who fails to file a plea, for instance, within the period allowed, will be ipso facto barred. The subsequent filing of notices in terms of Rule 35(12) and (14) to compel the delivery of documents, does not have the effect of suspending the operation of the notice of bar. If a party under bar needs more time to access documents in order to file a plea, as the applicants aver was the case here, that party may apply to court for an extension of time to compel the delivery of documents and to file a plea. Needless to say, in this case it was not done. The applicants were therefore not entitled to serve their pleas on 6 July 2022, and it could not have any effect on the granting of the default judgments.” (Emphasis added)

Conclusion

- [27] In light of the aforesaid principles of law and the application of those principles to the common cause facts in the present matter, it is clear why this Court granted the order that it did, namely, that the application be postponed *sine die*; the Respondent file its answering affidavit, if any, within fifteen (15) days of the granting of the order on the 14th of March 2024 and that the Respondent pay the costs occasioned by the postponement on the 4th of March 2024.
- [28] The arguments raised on behalf of the Respondent in support of the interlocutory application that the matter should have been removed from the unopposed roll on the 4th of March 2024, namely, that the principles as enunciated in *Potpale (and followed thereafter in numerous decisions, as recently as September 2023)* do not apply to application proceedings and that the Respondent was not obliged to file an answering affidavit in terms of the rules following the filing of its subrule 35(12) notice, clearly fall to be dismissed. It follows therefrom that the Applicant was entitled to set the application down for hearing on this Court's unopposed motion roll (*which did not constitute an irregular step as contemplated by rule 30A*) and that the Respondent is not entitled to a costs order in its favour (*let alone a costs order on the punitive scale*).
- [29] As to allowing the Respondent to file an answering affidavit within a specified time, this indulgence was granted by this Court (*as in IDC*) on the basis that the matter was clearly opposed. It was therefore in the interests of justice that the Respondent be given an opportunity to file its Answering Affidavit (*which it nevertheless declined/failed to do, resulting in the Respondent being finally wound-up*).
- [30] This Court, in the exercise of its general discretion in respect of costs, ordered that the Respondent pay the costs of the postponement of the matter on the 4th of March 2024 (*on a party and party scale*). Such an order, made in the discretion of this Court (*exercised judicially*) was on the basis that the Respondent was ultimately granted an indulgence to file its Answering Affidavit. Furthermore, despite the Respondent having had ample time to do so, it had failed to file an answering affidavit by the 4th of March 2024. In addition, the arguments raised by the Respondent as to why it was not obliged

to file an answering affidavit had no basis whatsoever, either on the facts or in law, and the Respondent had persisted therewith despite being faced with trite principles of law. Also, the Respondent took no steps whatsoever to seek condonation for its failure to file its Answering Affidavit timeously or seek an extension of the time limits to enable it to do so. In the premises, it was clear that the Applicant should be awarded the costs occasioned by the postponement on the 4th of March 2024, in order to, *inter alia*, partly cure the prejudice it had suffered thereby.

[31] In light of this Court accepting that the filing of the Respondent's rule 35(12) notice did not suspend the time limits in relation to the filing by the Respondent of an answering affidavit, it was obviously not necessary for this Court to consider the argument, put forward by the Applicant, that the said notice did not comply with the provisions of the relevant subrule and/or that the documents sought by the Respondent had either been provided to the Applicant by the Respondent, *alternatively*, did not have to be provided, on the basis that they were irrelevant (*the principle of relevance having been dealt with in several of the authorities as set out herein*).

[32] These then are the reasons for this Court making the order that it did, under case number 2023-070664, on the 14th of March 2024.



BC WANLESS

Judge of the High Court
Gauteng Division, Johannesburg

Heard: 4 March 2024
Judgment: 14 March 2024
Written Reasons: 20 December 2024

Appearances

For Applicant: JG Dobie
Instructed by Reaan Swanepoel Incorporated

For Respondent: MD Kohn
Instructed by Debbie De Vries