

SOUTH AFRICA / JUDGMENT

Botes and Another v Botes (85540/17)

[2020] ZAGPPHC 781 (31 December 2020)

[2020] ZAGPPHC 781**COURT**

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

85540/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN****THE REPUBLIC OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: 85540/17****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

To be revised

31/12/2020

BOTES

GERT

1ST APPLICANT

BOND

ENTERPRISES

CC

2ND APPLICANT

And

BOTES

NEOLIEN

RESPONDENT

JUDGMENT**N V KHUMALO J****Introduction**

[1] This is an application in terms of Rule 30A for further and better discovery. The Applicants seek an order to compel compliance with a Rule 35 (12) Notice served upon the Respondent on September 2018 requesting access and or delivery of certain documents as detailed in its Annexure “A”, for its inspection, within ten (10) days, failing which, it would proceed to seek an order to strike out the Respondents’ Answering affidavit to its Application and

Respondent’s counterapplication for liquidation.

[2] The Applicant and the Respondent are erstwhile husband and wife having divorced in 2014. They used to stay together at 30 Pierre Road Ruimsig, in Roodepoort, a property that forms the principal asset of the 2nd Applicant, a Close Corporation of which both hold equal membership interest. After the divorce they continued to stay in the property but in different residences until 2017, when the Respondent moved out, leaving the 1st Applicant in charge of the property and the 2nd Applicant. In terms of their settlement agreement they had a right of occupation until such time that the property is sold. The proceeds were to be divided equally between the parties. The 1st Plaintiff was to pay maintenance of their children.

[3] In addition to the residences, the property constitutes of a number of buildings which the 2nd Applicant rented out as workshops or business premises. The parties also together ran various businesses in the premises. Besides the various businesses they ran together, the 1st Applicant ran a gym called Evolution Fitness and Wellness and Race Cage whilst the Respondent ran exclusively a business called “A Word or Two” and worked full time for a company called Advanced Digital Devices (Pty) Ltd (ADD) owned by her father. They were both equally responsible for the 2nd Applicant’s bond over the property which was linked to a cheque account and an access facility. Likewise, they were equally responsible to all debts and entitled to its profits. The income and profits they generated was channelled to the 2nd Applicant. The 1st Applicant alleges that the Respondent exclusively controlled the administration and the financial management of the 2nd Applicant including all the income from the buildings’ rental until she moved out of the premises in 2017.

[4] Consequent to the Respondent vacating the premises, the 1st Applicant launched an Application for an interim order interdicting the Respondent from continuing to run the affairs of the 2nd Applicant, selling or encumbering her interest pending his launching of proceedings for a substantive relief in terms of s 36 of the Close Corporation Act 69 of 1984 (CCA) whereupon the Respondent was to be excluded from the affairs of the 2nd Applicant on allegations of mismanagement of the 2nd Applicant and fraud. Claiming also to be owed an amount of R797 340.25 by the Respondent.

[5] The Respondent launched an Application in convention for the winding

up of the 2nd Applicant in anticipation of the intended substantive proceedings. The Founding Affidavit of the winding up Application formed part of the Answering Affidavit to the 1st Applicant's interdict Application. It is the 1st Applicant's argument that in these proceedings the Respondent is in fact the Applicant and her Founding Affidavit to the

liquidation Application cannot be answered without access to the documentation she has referred to in her Founding Affidavit.

[6] In her Affidavit the Respondent denied ever being in full control of the businesses but admitted to have been doing the bank transfers from the 2nd Applicant's mortgage bond and various businesses for the past twenty years or more on the insistence of the 1st Applicant. She alleged that from 2014, the date of divorce to August 2017 when she left the property, she had contributed her entire salary earned at ADD to keep the family afloat. The amount contributed was calculated by her accountant, Mr Etsebeth to be R1 608 039.10. Her overall contribution from all her several sources amounting to R3 127 787.98. The 1st Applicant on the other hand alleged to have breached his maintenance obligations.

[7] The Respondent alleges to have actually contributed and carried the lion's share of the financial burden of maintaining the 2nd Applicant and the various other businesses and the entire household notwithstanding an order of court that placed the obligation on the 1st Applicant. She therefore claims that the 2nd Applicant is indebted to her in respect of her loan account in an amount of R 1 442 922.22 and to be in no position to pay her without selling its primary asset, namely the property, therefore commercially insolvent and thus making it just and equitable for winding it up in terms of s 68 (d) of the CCA. She in addition claims to have been deliberately excluded from active participation in the affairs of the 2nd Applicant, which have resulted in the breakdown of their relationship, a reason also justifying the winding up.

[8] Mr Etsebeth's spreadsheet covered the period March 2014, the date of divorce to August 2017 the date 1st Applicant alleges to have taken over the 2nd Applicant and its accounts. The spreadsheet is alleged to contain various entries supposedly supported by the relevant bank statements and in most instances invoices where the transaction relates to a third party merchant purchase, as opposed to living expenses.

[9] The documents sought by the 1st Applicant are identified and described in detail in Annexure A attached to its Rule 35 (12) Notice, indicating where the documents are referred to in the Respondent's Founding Affidavit. 1st Applicant alleges that the documents he is looking for had been relied upon, to compile the loan accounts which were largely made up of transactions Respondent made with various shops and suppliers. The loan account amounts are also in issue.

- [10] On 22 October 2018, following the Rule 35 (12) Notice, the 1st Applicant and his attorney attended to the office of the Respondent's attorney upon which they were given access to certain documents. The 1st Applicant denies that the till slips they were given access to, bundled in crocodile clips comprised the sum total of what was relied upon in compiling the mentioned loan accounts and alleges that invoices/receipts from Game, Builder's warehouse and the like were absent.
- [11] In letters dated 5 November 2018 and 9 January 2019 the 1st Applicant proceeded to accordingly request a proper reply to its Rule 35 (12) Notice, and warned the Respondent that should there be no reply, it will proceed in terms of Rule 30 (A). On 16 January 2019 the Respondent filed a supplementary discovery affidavit in which she provided copies of the Trust Deed and bank statements that the 1st Applicant had requested, except that of ADD which she indicated would require permission from all the directors. On the missing merchants source documents (invoice/receipts), she indicated that bank statements were used for the report in replacement thereof. The documents referred to are, inter alia, Pick and Pay, Woolworths, Paint Place, Westpack and Autozone invoices. Further that some of the documents were in the 1st Applicant's possession having been left at the property, entry to which she has been denied. She also directed that any further documents required can be requested from Etsebeth, her accountant.
- [12] On 1 February 2019, the Applicant proceeded with a Notice in terms of Rule 30A in relation to the documents as per Annexure A, requesting the Respondent to comply with its Rule 35 (12) Notice within (10) ten days. According to the 1st Applicant all the requested documents are referred to or relied upon by the Respondent in her Answering Affidavit which serves as the Founding Affidavit to her Liquidation Application. On April 2019, following the Respondent's failure to comply, 1st Applicant launched its Rule 30 A Application, to compel compliance with the Rule 35 (12) notice, failing which it would apply for the striking out of Respondent's defences and claims that are premised on the requested documents relied upon or to which reference is made.
- [13] He makes mention of Annexure APP6, a financial statement and a detailed document on the 2nd Applicant prepared by Etsebeth referred to in paragraphs 11.5 of the Respondent's Founding Affidavit. He points out that notwithstanding such reference, documents listed in paragraphs 1.1 to 1.4 of Annexure A are not attached. Reference is also made to paragraph 18.1 in which the Respondent states that Etsebeth analysed the finances of the 2nd Applicant and the various entities associated with it. He alleges that it is difficult to make out which associated entities was

Etsebeth briefed upon and requires documents referred to in that regard. Also documents that indicate that Respondent contributed her entire salary earned from ADD to the 2nd Applicant. That would be statements from her bank account and that of ADD.

- [14] The 1st Applicant points out that the requested documents have never been refused or their existence denied by the Respondent who had instead requested a few more days to comply and never did. He has also indicated that neither Etsebeth or the Respondent had qualified the reports or reliance thereupon as having been constrained by a shortage of source documents and therefore insists that the Respondent and Etsebeth make available the documents relied upon for the compilation of the reports for inspection. The 1st Applicant as a result also prays for the authorisation of a subpoena duces tecum against Etsebeth. He also alleged the bank statement of the 2nd Applicant has been altered.
- [15] The Respondent's Opposing Affidavit was delayed and filed on 30 August 2019. It incorporated an Application for Condonation of its late filing, raising indeed for the first time defences of non- availability, non-existence and or no reference made or irrelevance of some of the documentation being requested in terms of the rules. She also alleges that disputes of fact on the accounting require the matter to be sent to trial on oral evidence. The indication of an intention to subpoena Etsebeth being indicative of the necessity of a trial to quantify the outstanding amounts.
- [16] The Respondent has indicated that she has sought to make available and attached to her Founding Affidavit more than 290 pages of all documentation in her possession and control that could enable the 1st Applicant to reply to her answering affidavit. Same has also been inspected by the 1st Applicant's attorney at their premises. A demand of the bank statements of the Vorster Family Trust is neither possible to comply with nor necessary as the Trust is not a party to the proceedings, therefore its statements irrelevant to the issues in dispute. She regards the request as malicious and vexatious.
- [17] In addition, Respondent alleges that 1st Applicant is in possession of some of the documents which he removed when he broke into the Respondent's residence. She points out that she has indicated in her Founding Affidavit that her documents are in some respect incomplete. Likewise, Etsebeth did not purport to attach all source documents to his report. Whilst all documents Etsebeth had relied upon had been inspected.
- [18] She argues that it is not possible to find every invoice in relation to family expenses and proof of the transaction at Game, Builders Warehouse and the like is derived from the bank statements. Further that the bank statements of a Word or Two and her own personal bank statements that is item 9 and 12, although irrelevant, had already been made available to the legal representatives of the Applicants, and again tendered. As regards item 10 and 13 (on "FA14"),
- the bank statements of ADD are not relevant and no reference made to such statements. She accuses the 1st Applicant of profiting from the rental and owing maintenance.
- [19] On the 1st Applicant's complain that source documents relied upon by Etsebeth listed in paragraphs 1.1 to 1.4 of Annexure A are not attached, there was no longer a contention.

[19.1] In respect of item 1.1 and 1.4, the 1st Applicant confirmed that he together with his attorney had been given access to the bank statements of the Second Applicant. The 1st Applicant is, anyway, entitled to directly request the bank for the statements since he is a 50% holder of the member's interest.

[19.2] In respect to item 1.2, the document referred to is the same as the one mentioned in item 1.1. and 1.3 which is the financial statements of the 2nd Applicant. It has been agreed that 1st Applicant has also been given access to the statements.

I will therefore deal with the remaining items

[20] Furthermore, the 1st Applicant has in his affidavit prayed for the court to grant him the relief sought in this Application so that he can be able to answer to the Respondent's Liquidation Application in convention and reply to her answering Affidavit.

[21] The Respondent had argued that the 1st Applicant's request for further documentation without the filing of his Replying Affidavit is an abuse of the court processes, which is not justifiable in law. She as a result, with reference to Potpale Investments (Pty) Ltd v Mkhize 2016 (5) SA 96 (KZP) at par 18 and 23 prays that the Application to compel be dismissed with costs. I therefore have to first deal with the preliminary point raised. The paragraphs referred to in Potpale read:

[18] the rules in question nowhere say that the delivery of a notice in terms of rule 35 (12) or (14) suspends the period referred to in rule 26 or any other rule. There are sanctions attaching to non-compliance with some parts of Rule

35. That of Rule 35 (12), for example, is that the non-compliant party may not use the documents in question. Where documents have been appropriately referred to, in other words where they are an integral part of the case of the party concerned, the likely result of this sanction would be that that party would not be able to prove its case.

[23] This reasoning commends itself to me as applying equally to the present matter. The delivery of the rule 35 notice did not suspend the period in which the Defendant was obliged to deliver a Plea or other document referred to in Rule 22. When he was confronted with a Rule 26 Notice, he was put to an election. He could either have done his best to plead and so have defeated the bar or he could have applied to extend the time within which to plead and to compel production of the documents for that purpose."

[22] As it is clear from the passage the party in Potpale was already under bar to deliver its Plea when it filed its Application to compel. In casu the period within which the Applicants were to file the Affidavits had expired lapsed. However no further step was taken by the Respondent to prevent the Applicants from applying for condonation.

[23] To interpose to this narrative, mention is made of the provisions of Rule 35 (12) that reads:

“Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording, to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.”

[24] Moreover, s 35 (13) provisions are relevant and read:

“The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications.”

[25] Accordingly as soon as a document is mentioned or referred to in a pleading or Affidavit, the other party's entitlement to see it arises. According to the Superior Court Practice, the purpose of the subrule is to facilitate the ventilation of disputes, and not meant to be an end in itself. Therefore, a party is not required to depose to or deliver opposing affidavits (or a plea) before having been afforded an opportunity of inspecting and copying the documents referred to in the subrule; see *Unilever v Polagric (Pty) Ltd* 2001

(2) SA 329 (C) at 336 G-J. However, that does not mean that Rule 35

(12) suspends the delivery of the Plea or Affidavit whichever is applicable, as there are sanctions that are attached to non-compliance in Rule 35 (12) which also includes Rule 30 A. In terms of the former the non-compliant party may not use the documents in question even though appropriately referred to; see the quoted paragraphs

[13] and [23] at 103D-105 in Potpale.

[26] In *Hawker v Prudential Assurance Co of South Africa* 1987 (4) SA 442 (C) the court held that:

“It follows from the foregoing that in my view a Defendant is not obliged to take any further step when particulars have been refused or inadequate particulars have been furnished and the particulars are strictly necessary for the purposes envisaged by Rule 21 (1). Should the Plaintiff in such circumstances, and upon expiration of the 14-day period mentioned in Rule 21 (3), deliver a demand for plea in accordance with the provisions of Rule 26, the Defendant has an election. He can either attempt to plead, or he can make an Application in terms of Rule 21 (6) for an order compelling the Plaintiff to furnish the particulars requested. The latter

Application would naturally be coupled with an Application for an order extending the barring period.

[27] In casu, the Applicants have not filed their Answering Affidavit and or Replying Affidavit to the main Application and the period within which same was to be filed has expired. The Respondent has not as a result of such failure proceeded to set the matter down for hearing in default, that would result in the dismissal of Applicants Application or jeopardise his chances from seeking condonation of the late filing of their Affidavits. As a result, the 1st Applicant is not prevented from proceeding with an Application to compel, notwithstanding

his failure to apply for an extension of the period within which it can be filed. It is different to a situation where a Notice of Bar would have been delivered or matter set down for hearing. As a result, the Respondent's prayer for the dismissal of the 1st Applicant's application for having proceeded with the Application prior to filing its Replying Affidavit which had to be dealt with first, should be dismissed.

[28] Furthermore the Respondent's opposition to the 1st Applicant's Notice in essence is that Rule 35 (12) [31] only permissible where document referred to in the Founding Affidavit or Pleading. He referred to Penta Communication Services (Pty) Ltd v King 2007 (3) SA 471 (C); Holdsworth v Reunert Ltd 2013

(6) SA 244 GNP at 246 I-J.

[29] In such situation, as soon as a document is mentioned or referred to in a pleading or Affidavit, the other party's entitlement to see it arises, even if it is mentioned or referred to in general terms. The court may therefore authorise the production of the mentioned or referred document. The fact that there is no descriptive or detailed reference to the document being no bar to authorisation of its production; see Penta Communication Services Pty Ltd v King 2007 (3) SA 471 (C) at 476 A-B.

[30] However, reference as contemplated by the subrule does not constitute reference by mere deduction or inference. In Penta Communication Services at 436 B-C; the question that was considered is whether indirect allusions to documents which may exist trigger the provisions of the subrule. It was held at par [15] that:

"Clearly therefore, even a reference to a document (or tape recording) which is not detailed or descriptive will suffice to trigger the provisions of subrule 35 (12). The question which arises in the present instance is whether Rule 35 (12) can be invoked when not only has no detailed or descriptive reference been made to the documents, but neither has there been any indirect reference to such document/s and it is only through a process of reasoning and inference drawing that it can be deducted that the document does or may exist."

[31] Furthermore the court decided that:

"reverting to the particular documents sought, no doubt where a bank account is utilised there must exist somewhere documents evidencing its existence and its use, it does not follow, however, that a reference to that bank account, without more, constitutes a reference, for the purposes of Rule 35 (12), to documentation relating to such bank account."

[32] The Respondent's Counsel has pointed out that in casu no reference is made to the bank statement of the Vorster Family Trust or ADD in the Respondent's Founding/Answering Affidavit. It is true that the Respondent only made mention of payments being made by the two entities without mentioning any specific account. It is an inference made by the 1st Applicant that the payment must have been from a bank account. Also the two entities are not a party to the parties litigation therefore the documents requested irrelevant. Etsebeth is also said to have made extensive use of bank statements with no reference to source

documents. Those bank statements have been made available to the Applicants, which is the Respondent's personal bank statements and that of A Word or Two and the 2nd Applicant. The mere mentioning of a bank account as alleged in item 10 does not trigger the application of Rule 35 (12). Therefore, the Respondent's contention that the discovery procedure in relation to item 6, 9, 10, 11, 12 and 13 of Annexure "A" inappropriate is with merit.

- [33] In respect of the request on item 8 the Respondent complains that no specific reference is made to a document but making a general request. The request is of a source document relied upon to compile the various loan accounts, the court's approach on such a request is clarified in para [21] of Penta where it is stated that:

"the provisions of Rule 35 (12) exists for a specific purpose and it is not a mechanism whereby a litigant can go behind the words of an affidavit or pleading and argue that, although there is no direct or even indirect reference to a document/s, such documents would in the ordinary course of events exist and must, if in the possession of the opposing party be produced for inspection."

- [34] The provision also applies to item 2, the 1st Applicant's request for documents on the various entities that are said to be associated with the 2nd Applicant, based on an allegation that it is difficult to make out which various entities was Etsebeth briefed upon, as referred to in paragraph 18.1 of Respondent Founding Affidavit to have been analysed by Etsebeth when analysing the finances of the 2nd Applicant. The request is unreasonable as there is no direct or specific mention of a document/s. Access had been given to the documents of individual entities and companies mentioned or referred to by the Respondent that are relevant.

- [35] In relation to item 3, the request for source documents evincing the devotion of Respondent's income to the final well- being of 2nd Applicant. The Respondent has indicated that all the invoices available have been attached to the Founding Affidavit and access

thereto given to the 1st Applicant and his attorney. The financial statements of both the 2nd Applicant as well as that of the Respondent were used as reference to the expenses incurred where there are no invoices and a copy thereof also already been furnished to the 1st Applicant. However, it is noted that in the Respondent's Founding Affidavit there is no reference to source documents evincing

the mentioned devotion. Consequently, this is a typical scenario of going behind the words of the Affidavit and inferring the existence

of certain documents, to which there is no direct or indirect reference. The 1st Applicant is not entitled to invoke the Rule 35 (12) provision to enforce production of the documents.

- [36] The same applies to item 4.1 to 4.3

[36.1] In item 4.1 the referred paragraph 4.2 of the Founding Affidavit refers to a settlement agreement being part of the order of divorce and attached to the Founding Affidavit. the 1st Applicant must be in possession thereof. There is no reference to “contribution of my entire salary earned at ADD.”

[36.2] in item 4.2 there is no reference to a specific document that was relied upon but a general indication that the contribution made derived from several resources, which the Applicant has inferred to mean that documents of these sources exists that confirms the contributions. The Respondent has indicated that invoices of merchants and her bank accounts and all her entities produced for 1st Applicant to make copies.

[36.3] item 4.3 mentions source documents relied upon for calculation of the total expenses incurred on behalf of 2nd Applicant. The personal bank statements of Respondent’s accounts as well as those of the 2nd Applicant has been made available to the Applicants. No specific source documents are referred to. It is an inference that 1st Applicant makes that they exist.

[37] In relation to item 5 the Respondent has made reference to a bank loan she obtained to pay for Karen Botes’ 2019 studies, and argues that there is no mention of a bank statement. In other words the existence of a bank statement is an inference the 1st Applicant seeks to draw on the mentioning of a bank loan. The Respondent’s contention is correct, only a document on the bank loan , not the bank statements of which no reference is made, would be relevant. Reference to a bank loan does not justify the invocation of the Rule 35 (12) for production of a bank statements on the use thereof.

[38] In item 7, same as in the abovementioned instances no reference is made of bank statements evidencing the alleged payments for and in respect of Danielle Botes as per 1st Applicant’s request.

[39] The 1st Applicant has failed to make a case for the invocation of the provisions of Rule 35 (12) for the production of the documents as per Annexure “A”.

[40]

In relation to costs I have taken into consideration the 1st Applicant argument that when the Respondent was notified to better comply with the Rule 35 (12) she never raised the defences in her Opposing Affidavit, whereupon the production of the requested documents was refused or their existence denied. The Respondent had instead requested a few more days to comply and never did. He has also indicated that neither Etsebeth or the Respondent had qualified the reports or reliance thereupon as having been constrained by a shortage of source documents. As a result full costs are not justifiable. The Respondent has also failed in her prayer for dismissal of the Applicants Application on the basis of it being not justifiable but an abuse of the court processes, whereupon she has sought punitive costs on an attorney and client scale.

It is therefore ordered that:

1. The Rule 30 A Application to compel compliance with Rule 35 (12) Notice is dismissed.

2. The 1st Applicant is to pay 50 % of the Respondent's costs.

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

For the Respondent: S W DAVIES

Instructed by: J W Wessels & Partners

Ref: J W Wessels

Tel: 012 343 1410

Email: wessie@jww.co.za

For the Applicants: Adv E BISSCHOF

J Broodryk Attorney

Ref: B0059

Email: cobus@broodryklaw.co.za

Heard:

February 2020

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2020/781.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/botes-and-another-v-botes-unknown-topic-agpphc-2020>

Prepared on 10 October 2026 · Esheria