

SOUTH AFRICA / JUDGMENT

MEC for Education North West and Another v Engelbrecht and Others (2516/2022) [2024] ZANWHC 208 (13 November 2024) [2024] ZANWHC 208

COURT

North West High Court, Mafikeng

BEFORE

M Z Makoti

CASE / FILE NUMBER

2516/2022

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FLYNOTES:

CIVIL PROCEDURE – Notice of bar – Whether irregular step – Department sought discovery – Rule 30A notice intending to compel – Respondents serving notice of bar on department while it was awaiting dies to expire – Department ought to have applied for extension of period within which to plead – Would have enabled filing of application to compel discovery – Not non-suited by notice of bar to proceed with application – Application to declare notice of bar irregular dismissed – Department granted 10 days to plead to claim of respondents.

IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE
NO: 2516/2022

Reportable:	YES/NO Circulate to Judges: YES/NO Circulate to Magistrates: YES/NO Circulate to Regional Magistrates: YES/NO In
the matter between:	THE MEC FOR EDUCATION: NORTH WEST Applicant
HEAD:	DEPARTMENT OF EDUCATION NORTH WEST N.O Second Applicant And STEPHANUS GERHARDUS ENGELBRECHT First Respondent RIANET ENGELBRECHT Second Respondent RONNIE HOUGH Third Respondent SONJA HOUGH Fourth Respondent GOVERNING BODY: STELLA COMBINED SECONDARY SCHOOL Fifth Respondent
Delivered:	This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 13 August 2024.

JUDGEMENT

MAKOTI AJ

Introduction

[1] I share the views of those who call the South African legal landscape a dynamic tapestry of legislation and case law.[1] This case makes the statement tangible. Until I heard arguments from the parties' representative, my mind was wondering in a particular direction, constantly asking the question 'how dare the respondents ignore issued legal processes?'. To say that my mind was tossed from side to side is to understate the issue. The cause of my trepidation: an opposed irregular step issue raised by the applicants.

For determination

- [2] The applicants raised an irregular step against the filing by the respondents of a Notice of Bar against it. It is common cause that the said Notice was delivered as the Department, as defendant, had not timeously pleaded to the claim issued on behalf of the respondents. Also, the parties are ad idem that when the Notice was delivered the Department had filed a Notice in terms of Rule 35(14) of the Uniform Rules in which it had asked to be provided with a transcription of evidence of one Christelle Jooste at the criminal trial of one Xanda Bylsma.
- [3] The transcription was not provided, whereupon the Department filed a Notice of its intention to file an application to compel its discovery. While awaiting the transcription or the dies induciae to expire, the respondents filed the impugned Notice of Bar. The applicants regard the filing of the Notice of Bar as an irregular step. It therefore seeks an order declaring the filing of the Notice irregular and that it be set aside.
- [4] I am accordingly called to determine whether the respondents have taken an irregular step by filing the Notice of Bar while they were served with a Rule 35(14) Notice and the Notice of intention to compel discovery of the transcript. I sojourn towards the answer in paragraphs below.

Brief chronology

- [5] I consider it helpful that I sketch the sequence of the events which led us to this stage of the proceedings. It is as follows:

[a] On 6 December 2022 the Department delivered its Notice in terms of Rule 35(14) calling upon the respondents to discover and provide the transcript of a criminal trial at the Magistrate Court. I need not deal with what actually happened before that Court, save to state that the reason why the Department requires the transcript is that the respondents' particulars of claim attributed the Department's culpability to statements that were apparently made by a witness during the trial.

[b] Then, on 20 January 2023, a Notice in terms of Rule 30A was filed on behalf of the Department indicating its intention to apply for an order to compel the respondents to file the transcript. Due to practical difficulties caused by the service of the Notice of Bar the application to compel was not eventually issued.

[c] The respondents upon receiving service of the Notice mentioned in the preceding paragraph served the impugned Notice of Bar on the Department on 31 January

2023. In terms thereof, the date for filing the Department's plea fell on the same date on which the dies expired in respect of the Department's Notice in terms of Rule 30A.

[6] As indicated, the Department was upset by being served with the Notice of Bar when it was still waiting for the dies to expire on 06 February 2023, upon which occurrence it could decide whether to file an application to compel the filing of the transcript.

[7] I have already identified the issue for determination and do not repeat it. However, I perceive that to properly answer the question at issue, one will be guided by consideration of what effect the delivery of a Notice in terms of Rule 35(14) has in litigation proceedings.

[8] Both legal representatives referred me to legal authorities- for which I am grateful- the substance of which I will take a moment to summarise below.

Applicable legal principles

[9] Ours is a jurisprudence replete with legal authorities which provide guidance to the Court in dealing with matters of this nature. In the true nature of the ever-changing legal landscape, a dichotomy in the Court's decisions was made palpable in this matter.

[10] Counsel for the Department referred me to *Sanniegraan CC v Minister of Police*[2] (*Sanniegraan*) in which Laubscher AJ drew a distinction based on varying stages of the filing of the Notices in terms of Rule 35(12) and (14). The Court said:

“(f) It must be noted that in Potpale Investments (Pty) Ltd v Mkhize matter the facts were that the notice in terms of Rule 35(12) and 35(14) was delivered by the defendant subsequent to the plaintiff delivering its notice of bar in terms of Rule 26. It is stated in the said matter that: “The crisp question is whether the delivery of the rule 35 notice suspended the five day period given in the rule 26 to deliver a plea. ... The point being made in Potpale Investments (Pty) Ltd v Mkhize matter the five-day bar period was already running when the defendant delivered a notice in terms of Rule 35(12) and (14). This is not the case in casu.” (Emphasis added)

[11] The total sum of the Department's case was that, where the notices were delivered before a notice of bar was delivered, the subsequent delivery of the notice of bar becomes irregularity. A distinction between this case and *Sanniegraan* is that in the latter an application to compel delivery of the records that were sought in terms of rule 35(14) notice had already been instituted and pending determination. I make nothing about this distinction.

- [12] On the principle of Sanniegraan, a plaintiff should not be allowed to escape the ‘consequences of an application to compel ...’ by delivering rule 26 notice of bar. That would, if allowed, render the application or, rule 30A notice filed in this case, nugatory.

That is the basis upon which the court in that matter refused to follow the authority in Potpale Investments (Pty) Ltd v Mkhize (Potpale), which is authority for the principle that notices in terms of rule 35(12) and (14) do not suspend the running of dies.

- [13] To bolster the submission, the Department also relied on Steyl NO and Others v Agricultural Band of South Africa[3] in which it was held, inter alia, that:

“[21] In circumstances where a notice in terms of rule 35(14) is delivered after a notice of bar has been issued, the time period for filing a plea is not suspended. Should however, a 35(14) notice be delivered and followed up with an application to compel prior to a notice of bar being delivered, the period for delivery of a plea is suspended. These situations were comprehensively discussed in the matter of Sanniegraan CC v Minister of Police.”

- [14] On behalf of the respondents, counsel argued that the delivery of the notice of bar was not irregular and that the Department could have applied for an extension of time to file an application to compel discovery. In Industrial Development Corporation of South Africa v Reddy[4] the court declined to follow Sanniegraan saying that:

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

- [15] The court was further referred to the authority in Democratic Alliance v Mkhwebane[5] in which the principle laid out in Potpale was endorsed by the SCA. Counsel further submitted that Sanniegraan cannot be followed as it creates an impression that time factors play an important role while, the relevant subrules (12) and (14) do not have the effect of suspending the dies, nor were they intended to by the drafters to have that effect.

- [16] In Caxton and CPT Publishers and Printers Limited v Novus Holdings Limited[6] the SCA the court dealt directly with the issue and held 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) notices relates, the party is excused from complying with the time frames prescribed in terms of the 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.”

- [17] The legal position is clear that nothing about rule 35(14) suspends the filing of pleadings, save where the court grants an extension of time.

Discussion

- [18] Rule 35(14) is undoubtedly useful for a party seeking the production of documents. A demand or request in terms of the rule is not to be ignored. A party that may ignore a notice in its terms may find it faces procedures in terms of rule 30A[7] of the Rules and is compelled to deliver the document so required. The application to compel is preceded by a notice in terms of Rule 30A(1) calling upon the other to comply. This was done on behalf of the Department.
- [19] A party seeking to compel another to comply with its rule 35(14) notice can escape bar in one of two ways. First, the party may plead as best as it possibly can or, secondly, by compelling discovery and seeking an extension of the period within which to plead. In my view the Department ought to have applied for an extension of the period within which to plead, so as to enable it to file its application to compel discovery of the transcript. It was misled by its reliance on Sanniegraan.
- [20] The Department, relying on Afrocentric[8] correctly submitted that the first step for the court was to determine whether the filing of a notice of bar by the respondents constituted an irregular step. The second leg to that proposition is that, should the court find the step taken to be irregular, it is vested with discretion to determine how the irregularity should be resolved or dealt with. A court may even overlook an irregularity where it does not, in its view, cause substantial prejudice on the party that is affected by the irregularity.
- [21] On behalf of the respondents it was argued that the Department ought to have taken the opportunity to apply for an extension of the time periods once it was served with a notice of bar. To regard the notice as being delivered irregularly, it was further argued, was not properly conceived.
- [22] When it took the decision to seek the setting aside of the Notice of Bar the Department was clearly convinced by and it followed Sanniegraan and Steyl NO. This view is in contrast with the decision in Industrial Development Corporation of South Africa where the Court had occasion to deal with a similar situation as the present. In that matter the Court held that the filing of the Notice in terms of Rule 35(14) does not per se suspend the time frames for the filing of pleadings.
- [23] Apart from Steyl NO, I have not found comfort from other authorities to suggest that the distinction espoused in Sanniegraan painted the correct interpretation of rule 35(12) and (14) and that it stands to be followed. The judgment is from this Division and, ordinarily, I should find contentment in following it. Regrettably, I am not so encouraged. Rather, I agree with counsel for the respondents that there is nothing in the rules that supports the differentiation conceptualized in Sanniegraan. I am fortified in this regard by the decision in Democratic Alliance v Mkhwebane in terms of which the Department had an election to either plead or to file an application for an extension of time. It did none of those things.

[24] The contention that the Department could not practically have applied for an extension is not persuasive, even though I understand that it was raised in view of the fact that the dies for filing of its plea as required by the Notice of Bar coincided with the date on which the dies for the Notice in terms of Rule 30A fell. I do not agree that it was non-suited purely by virtue of the Notice of Bar to proceed with the application, or that it ought not to have done so.

[25] An extension of time, if granted, would have enabled the Department to lodge the application to compel the discovery of the transcript that it says it needed. That is what I understand is required by law- that when a party is faced with this kind of dilemma, it has to apply for an extension of the time period for the filing of its plea.

[26] The application cannot succeed. I am minded, however, to not non-suit the Department due to this misstep. Following normal convention, the Department shall bear the costs of this failed application.

ORDER

[27] I make the following order:

[1] The application to declare irregular the respondents' Notice of Bar is dismissed with costs.

[2] The Department is hereby granted a period of ten (10) days from the date of this order to plead to the claim of the respondents.

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

REPRESENTATIVES: FOR THE NDPP: ADV K MONGALE MOKHETLE ATTORNEYS INC 18
HAVENGA STREET GOLFVIEW MAHIKENG DEFENDANTS: ADV N JAGGA DU PLESSIS-VIVIERS
INC C/O SMIT STANTON INC 29 WARREN STREET MAHIKENG

[1] Louw and Heyl Attorneys, January 2024.

[2] Sanniegraan CC v Minister of Police Case No: 680/2018 (Unreported) at p 30 par (f).

[3] Steyl N.O and Others v Land and Agricultural Development Bank of South Africa (4197/2020) [2021] ZAFSHC 161 (5 August 2021).

[4] Industrial Development Corporation of South Africa v Reddy and Others (5159/2021) [2022] ZAGPJHC 632 (2 September 2022).

[5] Democratic Alliance and Others v Mkhwebane and Another (1370/2019)

[2021] ZASCA 18; [2021] 2 All SA 337 (SCA); 2021 (3) SA 403 (SCA) (11 March 2021) at para 47.

[6]

[2022] 2 All SA 299 (SCA) para 85.

[7] Centre for Child Law v Hoërskool Fochville and Another 2016 (2) SA 121 (SCA) paras 15-17.

[8] Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd

and Others (CCT 54/22) [2023] ZACC 2; 2023 (4) BCLR 361 (CC) (24 January 2023).

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