**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

REPORTABLE
Case No: 11711/2014

In the matter between:

**POTPALE INVESTMENTS (PTY) LTD** **Plaintiff**

And

**NKANYISO PHUMLANI MKHIZE** **Defendant**

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**JUDGMENT**

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**Gorven J:**

[1] On 5 November 2013, the plaintiff sold a Toyota Quantum Sesfikile 16 Seater vehicle (the vehicle) to the defendant by way of a credit agreement. The plaintiff retained ownership of the vehicle and the defendant was obliged to pay instalments and to procure and keep in place insurance against the loss of or damage to the vehicle. During August 2014, the plaintiff instituted action against the defendant seeking the following relief:

1 Confirmation of termination of the agreement.

2 Return of the vehicle.

3 Expenses incurred for removal, valuation, storage and sale of the vehicle.

4 Attorney and client costs.

[2] The defendant entered an appearance to defend. This prompted an application for summary judgment. An opposing affidavit was delivered. The defendant there takes the point that a quotation, annexed to the particulars of claim, makes reference to five documents which are not annexed. The conclusion is drawn that, as a result, the 'plaintiff is simply not entitled to any relief without disclosing those documents and pleading those relevant terms and conditions and the particulars of claim are vague and embarrassing.'

[3] The summary judgment application was set down on the opposed role on 18 March 2015. On that date, a consent order was taken in which summary judgment was refused, the defendant was granted leave to defend and the costs of the application were reserved for decision by the trial court. On 8 April 2015, the plaintiff delivered a notice of its intention to amend the particulars of claim and the amendment was effected without objection. The particulars of claim, as amended, pleaded as a breach the failure of the defendant to pay premiums in respect of two insurance policies which he was obliged to take out. It also pleaded that the defendant had breached the agreement by failing to pay instalments and that the arrears totalled R22 134.09.

[4] After having been given leave to defend on 18 March 2015, the defendant had 20 court days to deliver 'a plea with or without a claim in reconvention, or an exception with or without application to strike out.'[1] This was not done. It

[1] Rule 22(1) of the Uniform Rules of Court (the rules). Although other documents could be delivered, I shall hereafter simply refer to a plea.

was also not done within 20 days after the amendment was effected. On 26 May 2015, the plaintiff delivered a notice under rule 26 (the rule 26 notice).[2] This required the defendant to deliver a plea within five days, failing which he would be *ipso facto* barred from pleading. Instead, on 29 May 2015, the defendant delivered a notice headed 'Defendant's Rule 35(12) and 35(14) Notice' (the rule 35 notice). This required the plaintiff to make available for inspection and copying the five documents mentioned in the affidavit opposing summary judgment as well as the two insurance proposal forms referred to in the amended particulars which gave rise to the insurance policies for which, the plaintiff avers, the defendant failed to pay premiums. No time limit was given for compliance. The period of 5 days in the rule 26 notice elapsed on 2 June 2015 without the defendant having delivered a plea.

[5] On 3 June 2015, the plaintiff applied for default judgment under rule 31(5). On 4 June 2015, the defendant delivered a document headed 'Defendant's Notice in Terms of Uniform Rules 30 and 30A'. This alleged that the plaintiff's notice in terms of rule 31(5) constituted an irregular step on the following grounds:

'1. On 29 May 2015 the defendant delivered a notice in terms of Uniform Rule 35 (12) and (14) requesting the production of certain documents in the plaintiff's amended particulars of claim.

2. The defendant is entitled to have sight of the documents requested under Uniform Rules 35 (12) and (14) before he delivers his plea to the plaintiff's amended particulars of claim.

3. The defendant is consequently not in default of delivery of his plea and the plaintiff's application for default judgment and notice under Uniform Rule 31 (5) are irregular and premature. The plaintiff's notice of bar did not preclude the defendant from seeking the production of the documents referred to in the plaintiff's amended particulars of claim under

[2] The provisions of this rule shall be dealt with below.

Uniform Rules 35 (12) and (14) and such notice suspended the defendant's obligation to plead.'[3]

Rule 30A reads:

'(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.'

It is common cause that the plaintiff did not respond at all to the rule 30A notice.

[6] The plaintiff set down the application for default judgment before the court on 27 July 2015. This prompted the defendant to launch what he termed an interlocutory application, to be heard on the same day, for the following relief:

1 The plaintiff's notice in terms of rule 31(5) is set aside.

2 It is declared that:

2.1 The defendant is not barred from delivering a plea.

2.2 The plaintiff is not entitled to apply for judgment by default against the defendant, from the Registrar or the Court, until the plaintiff has responded to the defendant's notice in terms of Uniform Rule 35 (12) and (14) and the defendant thereafter fails to deliver a plea in the manner provided for in the Uniform Rules and/or in any order of this Court.

3 The plaintiff is directed to deliver a response to the defendant's notice in terms of Uniform Rules 35 (12) and (14) within five (5) days of the date of this order.

4 In the event that the plaintiff fails to comply with the terms of paragraph 3 above, the defendant is granted leave to apply to this Court on the same papers, supplemented as far as may be necessary, for an order dismissing the plaintiff's claim.

[3] His emphasis.

5 Subject to the plaintiff's compliance with the terms of paragraph 3 above, the defendant is authorised and directed to deliver a plea within 10 days of the date of receiving the plaintiff's response.

6 The plaintiff is directed to pay the costs of this application.

This is an application for relief under rule 30A. Two kinds of relief are sought. The first seeks to set aside the application for default judgment as an irregular step. The second seeks to compel compliance with the rule 35 notice.[4] It is opposed by the plaintiff.

[7] The defendant does not say that he complied with the rule 26 notice. He submits that the delivery of the rule 35 notice suspended the time period given in the rule 26 notice until such time as the documents sought were made available for inspection and copying. The affidavits for and against the relief sought in the interlocutory application were delivered by the attorneys representing the parties and, in the main, amount only to argument on the agreed facts set out above.

[8] The interlocutory application and the application for default judgment were argued together. I shall refer to the parties as the plaintiff and the defendant respectively. The parties agree that, if the relief sought in the interlocutory application is granted, the default judgment application cannot succeed since this would necessitate a finding that the defendant is not barred from delivering a plea. It is therefore convenient to deal with that application first. I shall address the contention that the application for default judgment amounted to an irregular step.

[4] *Centre for Child Law v Governing Body of Hoërskool Fochville & another* [2015] 4 All SA 571 (SCA) para 18.

[9] Rules 35(12) and (14) read as follows:

'(12) 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.

(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.'

Rule 26 provides as follows:

'Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and *ipso facto* barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.'

[10] The crisp question is whether the delivery of the rule 35 notice suspended the five day period given in the rule 26 notice in which to deliver a plea. Apart from a comment made in a textbook, which I will deal with later, I was not referred to any authority directly on point. I also did not come across any.

[11] The defendant's submission runs along the following lines. He is entitled to deliver a notice in terms of rule 35(12) at any time before the hearing of a matter. The seven documents were mentioned in the amended particulars of

claim. He is also entitled to deliver a notice in terms of rule 35(14) at any time after entering an appearance to defend. The notice may be issued for the purpose of pleading. The defendant has a right to inspect and copy the documents before having to plead. He is therefore not obliged to comply with the rules relating to the time within which to plead until the notice has been complied with. The delivery of the rule 35 notice accordingly suspends the time period given in the rule 26 notice.

[12] The defendant calls in aid certain authorities. In *Protea Assurance Co Ltd & another v Waverley Agencies CC & others*,[5] Marais J said:

'Applicant's desire that second respondent should first have to file his affidavit in response to the allegations made by Roberts as to what second respondent said to him during the telephone conversations which were recorded on the tape before being allowed to listen to the tape is understandable as a forensic strategy, but to gratify it would be to defeat the object of Rule 35(12). That Rule plainly entitles a litigant to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely. That entitlement, unlike the entitlement to general discovery for which Rule 35(1) provides, does not arise only after the close of pleadings in a trial action, or after both answering and replying affidavits have been filed in motion proceedings: it arises as soon as reference is made in the pleading or affidavit to a document or tape recording. It is inherent in that that a litigant cannot ordinarily be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleading or affidavits.'

This was referred to by approval by Thring J in *Unilever plc & another v Polagric (Pty) Ltd*,[6] where he said:

'It does not necessarily follow that the respondent should know what its defence will be without having to inspect the applicants' documents. The respondent is not required to depose to or deliver its opposing affidavits before it has been afforded an opportunity of inspecting and copying the documents referred to in Rule 35(12) . . . [here he referred to the above passage from *Protea Assurance*]. See also *Erasmus v Slomowitz (2)* 1938 TPD 243 at 244. It

[5] *Protea Assurance Co Ltd & another v Waverley Agencies CC & others* 1994 (3) SA 247 (C) at 249B - D
[6] *Unilever plc & another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 336C–I.

is clear from these decisions that, otherwise than is the case with discovery under Rule 35(1) and (2) read with Rule 35(13), a defendant or respondent does not have to wait until the pleadings have been closed or his opposing affidavits have been delivered before exercising his right under Rule 35(12): he may do so at any time before the hearing of the matter. It follows that he may do so before disclosing what his defence is, or even before he knows what his defence, if any, is going to be. He is entitled to have the documents produced "for the specific purpose of considering his position" (*Erasmus v Slomowitz (2)* (supra at 244); see also *Gehle v McLoughlin* 1986 (4) SA 543 (W) at 546D - E). I conclude that the applicants' refusal to produce the documents sought cannot be justified on this ground.'

[13] In commenting on these cases, and those referred to in them, DE Van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice*,[7] conclude concerning rule 35(12):

'The time period for the delivery of opposing affidavits (or a plea) is therefore suspended pending the production of the documents or recordings referred to in the subrule.'

The defendant says that the three relevant rules must be interpreted in line with this statement. It is this which is relied on as direct authority for the defendant's submission.

[14] In *Protea Assurance*, an interdict had been sought against the respondents. Reference was made in the papers to a tape recording and photographs. The respondent, having delivered a rule 35(12) notice, applied for the production of these documents and also for a stay of the application pending their production and the delivery of further answering affidavits. One of four bases of opposition to the application was the contention of the applicant that the respondent should be made to file an answering affidavit before seeing the documents in question. The court held that 'ordinarily' a party should not be required to do so without sight of a document referred to in the opponent's pleading. It is noteworthy that the application to compel was accompanied by

[7] DE Van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice* (2 Ed) Vol 2 at D1-478.

one suspending the time limits. No case was sought to be made out that the delivery of the rule 35(12) notice automatically had that effect.

[15] Similarly, in *Unilever*, the applicant had launched interdict proceedings based on an alleged breach of its trademark by the respondent. The respondent delivered a rule 35(12) notice and, when the documents were not forthcoming, applied to compel their production. The suspension of time limits was not mentioned. The defence of the applicant was stated in these terms:

'I dispute that it was necessary for the respondent to inspect the applicants' archives and records in order to conduct its defence. In this regard I submit that the respondent should know what its defence will be without having to inspect the applicants' archives or records.'

It is this contention which prompted Thring J to hold:

'The respondent is not required to depose to or deliver its opposing affidavits before it has been afforded an opportunity of inspecting and copying the documents referred to in Rule 35(12)'.

[16] The gravamen of the judgments relied on by the defendant is that the rule may be invoked prior to the disclosure of a defence. Neither of them deals with the issue before me concerning the suspension of time periods by way of delivery of a rule 35(12) or (14) notice.

[17] It is necessary to construe the rules to evaluate the proposition in *Erasmus* referred to above. The approach to be taken has been restated on a number of occasions recently by the Supreme Court of Appeal.[8] The Constitutional Court, in *Cool Ideas 1186 CC v Hubbard & another*,[9] put it this way:

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[8] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) ([2009] 2 All SA 523) para 39; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] ZASCA 13) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) ([2013] ZASCA 176) para 12.

[9] *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 474 (CC) para 28.

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
(a) that statutory provisions should always be interpreted purposively;
(b) the relevant statutory provision must be properly contextualised; and
(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[10]

[18] The rules in question nowhere say that 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. A further sanction is that a non-compliant party becomes subject to the provisions of rule 30A. In that way, if a case is made out, production of the documents can be compelled. Rule 26 provides that the period between 16 December and 15 January must not be counted in calculating the time allowed for compliance. There is no reference in that, or any other, rule that delivery of a notice in terms of rule 35(12) or (14) has any such effect. In the light of the specific mention of the period between 16 December and 15 January, one would expect such a reference if the contention of the defendant is correct.

[19] The purpose of the rules is to govern procedural matters relating to litigation. They set standardised time limits within which parties must take

[10] References omitted.

certain steps. This relieves the court from having to do so in each case. Where a litigant in unable to comply with the rules, both rule 27 and the common law jurisdiction of a high court to govern its own procedures empower a court to condone non-compliance. The standardised time limits are, therefore, not immutable. Where time limits cannot be complied with, the court may extend them. An adoption of the plain, grammatical, meaning of the rules in question, in the light of the purpose of the rules, does not lead to any absurdity. This does not support the statement in *Erasmus*.

[20] The defendant says that it has a right to the production of the documents and that this would be negated if the time to deliver a plea was not suspended. This is not so. In the first place, neither *Protea Assurance* nor *Unilever* held that the entitlement to the documents was absolute and that, by necessary implication, the time to put up a plea or affidavit was suspended until the notice had been complied with. Secondly, the defendant is not without remedy. As was done in *Protea Assurance*, and as is pertinently provided for in rule 27(1) and (2), the defendant could have applied to extend the time limits within which to deliver the plea and have brought an application to compel. He chose not to do so.

[21] The plaintiff relies on *Hawker v Prudential Assurance Co of South Africa Ltd*,[11] in support of its stance that the rule 35 notice did not suspend the period for delivering the plea. In that matter, further particulars were sought for the purposes of delivering a plea, as was allowed at the time. Further particulars were supplied but were inadequate. The defendant then applied, outside of the time within which to deliver his plea but before any notice of bar was delivered, to compel their delivery. It was submitted that the application was out of time. The court reasoned as follows:

[11] *Hawker v Prudential Assurance Co of South Africa Ltd* 1987 (4) SA 442 (C).

'It is implicit in Rule 21(1) that the pleading in respect of which further particulars may be requested is incomplete, in the sense that it is envisaged that further particulars are necessary to enable the party requesting the particulars to plead and/or to tender an amount in settlement. Where the words "the particulars" are used in Rule 21(3), this must be construed as meaning "the particulars envisaged in Rule 21(1)" for, until such particulars are furnished, the party who requested the further particulars must be regarded as being unable to plead and/or to tender an amount in settlement.'[12]

Applying this reasoning to the application at hand, the court went on to hold:

'It follows from the aforegoing 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 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.'[13]

[22] The reasoning, accordingly, is that, without the requested necessary particulars it was not possible to plead. In other words, the defendant was entitled to the particulars before being required to plead. This mirrors the submission in the present matter that the defendant was entitled to inspect and copy the documents before being obliged to plead. *Hawker*, however, held that if the defendant was placed on bar, he was obliged either to plead or to apply to compel the particulars. Where he did plead, the bar would not fall. Where he did not do so but brought an application, the court considered that it was axiomatic that an application to extend the time to plead would accompany the application to compel. If this were not done, the clear implication is that the defendant would find himself barred from delivering a plea and subject to a default judgment. It is clear that the court did not regard the bringing of the application

[12] At 448E-H.
[13] At 449B-C.

(let alone the request for further particulars) as suspending the time period under rule 26.

[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. If he had pleaded, it would have been open to him to apply to compel delivery of the documents and, if so advised, to thereafter seek to amend his plea. Since he did not plead or apply to extend the period in which to do so, he was *ipso facto* barred on 2 June 2015. There is therefore no basis for contending that setting down the application for default judgment amounted to an irregular step. The interlocutory application must be dismissed as regards that relief.

[24] I turn to consider that part of the interlocutory application where the defendant seeks to compel a response to the rule 35 notice. On a procedural level, the rule 30A notice of the defendant does not specify, as an irregular step, the failure of the plaintiff to provide the documents. I have set out the grounds of irregularity relied on by the defendant above. None of them relates to the failure to comply with the rule 35 notice. Notice of the irregularity relied on must form part of a rule 30A notice prior to an application to compel. This was not given. As such, the relief sought to compel a response to the rule 35 notice is not competent. The interlocutory application must therefore be dismissed.

[25] The plaintiff applies for default judgment. It is applied for under rule 31(5). This rule provides as follows:

‘(5) *(a)* Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.

*(b)* The registrar may—

(i) grant judgment as requested;

(ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse judgment wholly or in part;

(iv) postpone the application for judgment on such terms as he or she may consider just;

(v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court.

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.’

The application was made to the registrar. No reason has been given why the registrar cannot deal with it. The registrar has not referred the application to court; the plaintiff simply set it down before the court without the registrar having dealt with it. This was not competent. The application for default judgment is thus not properly before me and must be struck from the roll. There is also no reason why the defendant should not recover attorney and client costs arising from the set down before court.

[26] During argument, the defendant applied from the bar for an adjournment to the application for default judgment in the event of my dismissing the interlocutory application. The reason given was that, if the defendant is wrong in his contention that the delivery of the rule 35 notice suspended the time period given in the rule 26 notice, he should be given the opportunity to launch an application in terms of rule 27(1) and (2) to extend the time limit for delivery of the plea and to condone his failure to do so. Since the application for default

judgment is to be struck from the roll, it is not necessary to consider this application.

[27] In the result I make the following orders:

1. The interlocutory application brought by the defendant is dismissed with costs, such costs to be taxed on the scale as between attorney and client.
2. The application for default judgment brought by the plaintiff is struck off the roll and the plaintiff is directed to pay the costs arising from its having been set down before the court, such costs to be taxed on the scale as between attorney and client.

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GORVEN J

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| DATE OF HEARING: | 26 November 2015 |
| DATE OF JUDGMENT: | 15 December 2015 |
| FOR THE PLAINTIFF: | S Franke, instructed by Marie-Lou Bester, locally represented by Nicholson & Hainsworth Attorneys. |
| FOR THE DEFENDANT: | H Gani, instructed by Pather & Pather Attorneys, locally represented by Ayoob Attorneys. |