Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M461/2017

In the matter between

OCKERD MEINTJIES	**Applicant**
and	
MOTHEO STEEL ENGINEERING CC	**1st Respondent**
JOHANES ZACHARIA HUMAN MULLER N.0.	**2nd Respondent**
OSCAR JABULANI SETHOLE N.O.	**3rd Respondent**
MASTER OF THE HIGH COURT, MAHIKENG	**4th Respondent**
NATIONAL UNION OF METAL WORKERS OF S A	**5th Respondent**
COMPANIES AND INTELLECTUAL PROPERTY COMMISION	**6th Respondent**
COMMISSIONER FOR THE SOUTH AFRICAN RENENUE SERVICES	**7th Respondent**
BAFANA MOTHENG	**1st Intervening Party**
LIZANNE CHANTAL MULLER	**2nd Intervening Party**
STEEL AND PIPES FOR AFRICA NW (PTY) LTD	**3rd Intervening Party**

KGOELE J

DATE OF HEARING	**:**	**15 June 2018**
DATE OF JUDGMENT	**:**	**17 August 2018**
FOR THE 5th RESPONDENT	**:**	**Adv. G. Wickins**
FOR THE 1st INTERVENING PARTY	**:**	**Adv. F.A.G Swart**
FOR THE 3rd INTERVENING PARTY	**:**	**Adv. L.J Lowies**

JUDGMENT

KGOELE J.

[1] These are two applications for Contempt of Court by the first **(Motheng)** and third **(Steel and Pipes)** intervening parties against the fifth respondent **(Numsa)**. Steel and Pipes also launched an application in terms of Rule 27 of the Uniform Rules of Court (**The Rules**) for the late filing of its answering affidavit, but this application is only set down for arguments only in respect of the costs thereof.

[2] The background facts to these applications are as follows: The first respondent in the main application (**"Motheo Steel"**) was in business rescue from 10 September 2013 to 1 September 2016 on which date the Corporation was placed in liquidation.

[3] An insolvency enquiry was convened into the affairs of Motheo Steel at the instance of Numsa in terms of section 417 and 418 of the Companies Act 61 of 1973 (the **"Companies Act"**) (Chapter 14 of which remains applicable). The applicant in the main application **("Meintjies")** was partially interrogated on 4 September 2017.

[4] Motheng was also partially interrogated on 5 September 2017. The second intervening party (**Muller**) in the main application, as the former business rescue practitioner, was subpoenaed to be interrogated at a further hearing of the insolvency enquiry on 23 October 2017.

[5] On 23 October 2017, Meintjies brought an application to place Motheo Steel under business rescue (**the "business rescue application"**), on a non-urgent basis. On 5 November 2017 Numsa brought an urgent counter-application for *inter alia* an Order that the non-urgent application launched by Meintjies under case number **M461/2017** (the business rescue application) be anticipated and dismissed with costs. The urgent counter-application was heard on 9 November 2017.

[6] Immediately prior to the hearing on 9 November 2017 Motheng, Muller and Steel and Pipes filed notices of their intention to intervene and participate in the business rescue application. Motheng together with Muller and Steel and Pipes were granted leave by the Court to intervene in the main business rescue application brought by Meintjies.

[7] The urgent counter-application was struck from the roll for lack of urgency and **Leeuw JP,** made an Order in terms of which the parties (including Motheng) were to file further affidavits.

[8] On 30 November 2017, Motheng filed a notice in terms of **Rule 35(12)** together with an affidavit deposed to by one **Berry** stating that Motheng supports the business rescue application but did not give reasons why he believes Motheo Steel can be rescued.

[9] On 18 December 2017, Numsa filed a reply to Motheng's Rule 35(12) notice and provided the documents requested to the extent that:

- Reference were made to a document in the Rule 35(12) notice

and;

- Such documents are in Numsa's possession.
- Such documents are relevant.

[10] Berry acknowledged receipt of this reply as is evident from Annexure **"JB5"**. Despite Numsa's reply to the Rule 35(12) notice, Motheng failed to file its affidavit in support of the business rescue application.

[11] On 26 February 2018, more than three months after the first Court Order (the Order of Leeuw JP) was granted and more than two months after Numsa's reply to Motheng's Rule 35(12) notice, Berry addressed a letter to Numsa's legal representatives in which it was alleged *inter alia* that Numsa has not responded adequately to the Rule 35(12) notice and further sought a postponement of the matter on 01 March 2018. This was the first time since Numsa filed its reply to Motheng's Rule 35(12) that Motheng complained about the alleged inadequate reply.

[12] The Court Order of 9 November 2017 had also amongst others enrolled the main business rescue application for hearing on the 1st March 2018. On 1 March 2018, immediately prior to the hearing, Motheng together with Steel and Pipes brought applications to postpone the hearing of the business rescue application. In his application for postponement, Motheng states that Numsa has not replied to his Rule 35(12) notice and as a result he was not in a position to file an affidavit.

[13] Notwithstanding Numsa's opposition to the postponements, the main business rescue application was once again postponed and the Court as per **Hendricks J** instructed all the parties to agree on time periods for filing of further papers. It appears from the papers of all these parties that they could not reach an agreement. Judge Hendricks eventually granted an Order wherein the paragraphs which serve as a bone of contention in the present applications were made. The said paragraphs read thus:-

> *"2 THAT: The 5th Respondent will serve its "explanatory affidavit" on all parties on the 8th day of MARCH 2018 and shall apply on date of hearing of the main application for leave to have same allowed and all other parties may answer to it on or before the 8th day of APRIL 2018;*
>
> *"3 THAT: The 5th Respondent must reply <u>in full</u> to the Applicants, 1st and 3rd intervening parties Rule 35(12) notice on the 8" day of March 2018;*
>
> *"4 THAT: All parties who wish to file a replying affidavit can do so on or before the 22nd day of MARCH 2018."* **[Emphasis Added]**

[14] After some time, Motheng instituted an application for Contempt of Court proceedings alleging that Numsa has not complied with the Court

Order of 1 March 2018 in that it has not replied "*in full*" to the Rule 35 (12) Notice.

[15] The case of Motheng is basically that all the parties before Court could not find each other with reference to the (then) Draft Order by the fifth respondent (Numsa) and the counter Draft Order submitted by his legal representatives amongst others. According to Motheng, it was then agreed that Judge Hendricks would be approached in the afternoon of the 1st of March 2018 in Chambers in order to administer the final adjudication of the main application and the interlocutory applications through the assistance of a case management conference.

[16] Counsel representing Motheng submitted that the conduct of Numsa and its legal representatives by not only disregarding the Court Order of the 8th of November 2017 and again, Judge Hendrick's Order of the 1st of March 2018, falls no short of wilfulness or *mala fides*. According to Motheng's legal representative, the conduct of Numsa and its legal representatives are clear as they amount to a total disregard of the Rule of Law, the independence and integrity of a Court of law and the Constitution.

[17] Motheng's submissions is further that the legal representatives of Numsa cognisant of what case management entails, the reasons why Counsel on behalf of Motheng raised the consideration of case management already on the 8th of November 2018 in this Court, and again the *mero motu* observation of the Court on the 1st

of March 2018 that eventually led to a ruling of the management of the case, and the endeavours to have a proper Court Order being granted on the 1st of March 2018, decided not to obey the Court Order. According to him, they did not only put in jeopardy the aforementioned instruments of the law, but also did that to the detriment of all other litigants, respondents, affected parties and other interested parties which may have, or is having, an interest in the proper administration of justice in this regard.

[18] Steel and Pipes also in its application supports Motheng that Numsa should be held in Contempt because the word "*in full*" according to it means that Judge Hendrick's Order is instructive.

[19] Counsel representing Steel and Pipes argued that it is clear that Numsa is trying to blow hot and cold. He indicated that, in his replying affidavits attorney Kriel, representing Numsa, points out that paragraph 2 of Numsa's proposed draft Order during the case management in Chambers of **Hendricks J** was couched as follows:

> *"The 5th Respondent must reply <u>in full</u> to the Applicant's and 3rd Intervening parties' Rule 35(12) notices with five (5) days from date hereof."* **[My underlining]**

[20] According to him, it is thus clear that Numsa's proposal was that it willingly assumed the obligation to answer to Steel and Pipes notice in terms of Rule 35(12) "*in full*" within five days from the date of the Court Order of 1 March 2018. He maintained that the argument is actually simple that, if Hendricks J just wanted a mere

compliance with the Rule 35(12) notice, then it was not necessary to insert the words "*in full*". There must thus, according to him, be cogent reasons why these words were inserted in addition to the Court Order by Hendricks J. According to him, Kriel provides the answer why this is so.

[21] He submitted on behalf of Steel and Pipes that when Numsa made its proposal in respect of and/or assumed its obligation under Steel and Pipes' notice in terms of Rule 35(12), it was well appraised of the contents of the said notice. This, according to him, is clear from the affidavit filed by Numsa opposing the application for postponement of the matter on 1 March 2018. He submitted that Numsa cannot thereafter object to the obligations it willingly assumed.

[22] He reiterated the fact that Steel and Pipes as well as some of the other parties thereafter and especially on 1 March 2018 complained that there was no compliance "*in full*" with Rule 35(12) request by them and which complaint was addressed through an Order of Court by Hendricks J on 1 March 2018. He maintained that the fact that it was made an Order of Court is not without consequence. He argued that *inter-alia* it entails that since it is an Order of Court, Steel and Pipes could not apply for another Order enforcing an Order that has already been granted. That, according to him goes without saying.

[23] Counsel representing Steel and Pipes argued that it appears as if Numsa is of the view that a Rule 30 procedure should have been followed, but it forgets that there was a Court Order already in

place. He referred this Court to the matter of **Oliphant v Jonck (09/21910) [2016] ZAGPJHC 76 (30 March 2016)** wherein the Gauteng Local Division of the High Court in Johannesburg under **Case No: 09/21910** made it clear that the correct procedure to be followed is a Contempt of Court procedure.

[24] In as far as the costs for the Rule 27 application is concerned, Steel and Pipes' case is that Numsa was actually delaying the matter intentionally by waiting until the last minute before it filed its answering affidavit and therefore not giving Steel and Pipes sufficient time to file its own replying affidavit. In other words, times were structured and delayed to such an extent that it was impossible to comply with the timeframes. This is so, according to the legal representative of Steel and Pipes, because Numsa was well aware of the fact that Steel and Pipes requires inspection of the requested documents in order to file its affidavit in the main application.

[25] It is further the submission of Steel and Pipes that Numsa's disingenuous conduct explained above materially inhibited Steel and Pipes' ability to prepare its affidavit. This conduct is *mala fide* and contrary to the interests of justice and the spirit of the Court Order. Considering Numsa's conduct, in particular, its contrived arguments to avoid answering the notice as explained above, Steel and Pipes argued that Numsa should be ordered to pay the costs of this application on an attorney and client scale, alternatively on an ordinary scale and as a further alternative that each party is to pay its own costs.

[26] To both applications of Contempt of Court Numsa pins its grounds of opposition to the authorities that advocate for the proposition that Contempt is not a recognised remedy in relation to a party's failure to comply with an Order for discovery. To this end, Numsa heavily relied on the decision of the matter of **Breitenbach v Breitenbach 2008 JDR 0344 (T)**, wherein the Court rejected the argument that a party dissatisfied with the other side's failure to make discovery in terms of a prior Court Order could apply for an Order of Contempt instead of following the remedies provided for in the Rules (in that case, sub-Rules 35(3) and (7) was the subject matter). Numsa reiterated the stance which was made therein that to permit such a course would mean that the Rules "are toothless and committal would be the only effective remedy to assist the applicant."

[27] The following quotations which are found in paragraphs **[16] - [17]** of the same **Breintenbach** matter were emphasized:

> 16. "Civil contempt proceedings should not, in my view, be brought solely to bring about compliance with a court order and purely for the sake of punishment especially if there is a statutory remedy for non-compliance with such a court order**.** The High Court has discretion to make an order for committal. In my view, such a discretion especially in an application of this nature, should be exercised sparingly and in very exceptional circumstances, see ***Cape Times v Union Trades Directories and Others*** *1956 (1) SA 105 N at 121*. Due to serious consequences of incarceration, civil contempt proceedings should be used as a last resort, see ***Banmontyne v Banmontyne*** *2003 (2) SA 359 SCA at 362F-263A.*

17. There are other effective remedies that cannot be simply ignored. In this case it is clear that the provisions of Rule 35(7) in respect of applying to court for the dismissal of the respondent's claim and or striking of his defence, was not utilised."

[Emphasis added]

[28] Counsel representing Numsa based his line of arguments to the fact that the Rules contain two remedies that are responsive to a party's non-compliance with a request in terms of Rule 35(12):

- Firstly, Rule 35(12) itself has its own self-contained remedy namely, that the defaulting party shall not, save with the leave of the Court, use the requested document, but any other party may do so. Thus, he argued, that where the documents are an integral part of the case of the defaulting party, the likely result of this sanction is that that defaulting party would be unable to prove its case.
- Secondly, the defaulting party is subject to the provisions of Rule 30A. If a proper case is made out, production of the documents can be compelled within 10 days, failing which application can be made for an Order that the defaulting party's claim or defence be struck out.

[29] It is trite law that due to serious consequences of incarceration, civil Contempt Proceedings should be used as a last resort. This was the decision in the case of **Banmontyne** already quoted above.

[30] With these two remedies mentioned by Numsa's legal representative at its disposal, a party in motion proceedings who is dissatisfied with the response to its request in terms of Rule 35(12) is placed in the same position as a party dissatisfied with the response to its notice in terms of Rule 35(1) and (3) for the other side to make discovery in action proceedings. In other words, both parties are able to approach the Court and obtain an Order compelling compliance within 10 days, failing which the defaulting party's claim or defence can be struck out.

[31] It is quite clear from the averments made by all the parties that the Order of 1 March 2018 which is the bone of contention was a procedural Order to manage the main application. In ordering the postponement on that day, the Court made eight other procedural Orders to regulate the further conduct of the main application in light of the numerous interlocutory issues that had arose. These dealt with amongst others: Numsa's application to anticipate the hearing; an explanatory affidavit that Numsa had filed dealing with the chronology of events leading up to 1 March 2018; the rule 35(12) notices; the filing of replying affidavits by 22 March 2018 and heads of argument by 24 and 30 May 2018; the indexing and pagination of papers by 10 May 2018; the notification to affected parties; and costs.

[32] I fully agree with Counsel representing Numsa that the purpose of the Order of 1 March 2018 was to regulate the further conduct of the main application and further that, there are a host of remedies

available to a litigant when procedural Orders are not complied with. Contempt of Court is obviously not one of them.

[33] I furthermore agree with the decision of **Ledwaba J**, as he then was in the case of **Breitenbach** that was heavily relied upon by Numsa that the Court should exercise its discretion to make an Order of Contempt sparingly and not when other remedies are available. Exceptional circumstances must be present and the Contempt Order should be the last resort.

[34] The argument that the Court Order of Hendricks J and the case management thereof short-circuited all what the applicants in these Contempt of Court applications were supposed to do in terms of **Breitenbach's** case does not have merit. Firstly because, the Order of Hendricks J is clear to the effect that Numsa had to reply "*in full*". The Order of Hendricks J was not even worded like the original order of Phatudi AJ which Ledwaba J was faced with because, in that Order, Phatudi AJ ordered the respondent to *"discover the documents set out in paragraphs 1 to 29 of the applicant's notice"*.

[35] Our case is even worse because the Order was not worded in that fashion. No discovery was requested but only "*a reply in full*" was requested and accordingly ordered. But of particular significance is as Ledwaba J found in the **Breitenbach** matter, that even if this Court find that Numsa is in Contempt and makes an Order of committal eventually, which Order this Court is not prepared to make, the requested documents may still not be discovered taking into consideration the reply Numsa provided so far.

[36] I fully agree with Counsel representing Numsa that the remedies for failing to comply with the Notices of this kind are of negative sanctions. The following authorities he referred to are apposite to support his proposition before this Court:-

- **Commentary on Rule 35(12)** found in the Book of **Erasmus "Superior Court Practice**" page **D1-481**.
- **Centre for Child Law v Hoërskool Fochville and Another 2016 (2) SA 121 (SCA)** from paragraph **16** onwards.
- **Potpale Investments (Pty) Ltd vs Mkhize 2016 (5) SA 96 (KZP)**.

[37] On this issue of whether Numsa was compelled by the Order of 1 March 2018 to reply in full because the alternative remedy were sought before Hendricks J, there is a dispute. Numsa says that the Order compelling it was not sought before Hendricks J whereas the the intervening parties say it was. I fully agree with the submissions by Numsa's Counsel that this issue should be decided on its (respondent's version) in terms of **Plascon Evans Rule**. The reasons are that according to the factual averments by Numsa which were not disputed, Steel and Pipes' notice was not yet served on them on the day of the Order by Hendricks J, it was only annexed to the postponement notice. Furthermore, Motheng's letter dated 8th March 2018 which was sent after the Order was granted, was the one which introduced a positive remedy. This in my view, is a clear indication that the issue to compel was not yet in the picture, but what was discussed was that Numsa did not "*fully*" comply or did not "*reply fully*", hence the Order granted was couched in that way.

[38] In seeking an Order for Contempt in motion proceedings, the two intervening parties seek a final relief. Therefore, the following well-known Rule in terms of **Plascon-Evans** case applies:

> "Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. Where the allegations or denials of the respondent are so far-fetched or clearly untenable the Court is justified in rejecting them merely on the papers." **[Emphasis added]**

[39] But of importance is the fact that the non-compliance of the procedural Order by Hendricks J can still be sought. In addition, where the said documents are the integral part of the case of the party concerned, the likely result of this sanction would be that the non-compliant party may not use the documents in question, and furthermore, that the non-compliant party would not be able to prove its case and or lastly, he becomes liable to the provisions of Rule 30A.

[40] In *casu*, there are no exceptional circumstances (none are even alleged) and other remedies are available to Motheng and Steel and Pipes, if they are dissatisfied with Numsa's reply to their notices in terms of Rule 35(12). They have the self-contained remedy in Rule 35(12) at their disposal, as well as the remedy contained in Rule 30A as shown above. They have chosen not to

use either. Motheng threatened to bring an application to compel, but then inexplicably failed to do so and launched the present application instead. Steel and Pipes simply followed suit.

[41] Motheng and Steel and Pipes are not entitled, in my view, to approach this Court for this drastic remedy when they have other remedies available to utilise. Accordingly, their applications fall to be dismissed on this ground alone.

[42] As Numsa is substantially successful in its opposition for the Contempt of Court applications, there is no reason why costs should not follow the result. Similarly, Steel and Pipes' Rule 27 application was ill-fated and failed to justify its failure to file an answering affidavit despite the Court Order of 9 November 2017 and 1 March 2018. These are the reasons why this Court should not order Numsa to pay the costs of the Rule 27 application as prayed for by Steel and Pipes. But despite all these findings regarding costs, I am of the view that there is no sufficient basis laid for this Court to order that Motheng and Steel and Pipes pay costs on the punitive scale in their Contempt of Court applications they brought. The same applies to the costs Order of the Rule 27 application.

[43] Consequently the following Order is made:

43.1 Both applications are dismissed.

43.2 The first and third intervening parties (Motheng and Steel and Pipes) are ordered to pay the costs of these applications jointly and or severally the one paying the other to be absolved.

43.3 The third intervening party (Steel and Pipes) is ordered to pay the costs of the Rule 27 application.

A.M. KGOELE

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

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