THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

***Democratic Alliance and Others v Mkhwebane and Another* (1370/2019) [2021] ZASCA 18 (11 March 2021)**

From: The Registrar, Supreme Court of Appeal
Date: 11 March 2021
Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) upheld the appeal and the respondents were ordered to pay the costs of appeal jointly and severally, the one paying the other to be absolved, including the costs of two counsel.

This was an appeal against an order of the Western Cape Division of the High Court, Cape Town, in terms of which an interlocutory application brought by the appellants in terms of rule 30A of the Uniform Rules, to compel the production of documents by the respondents requested under rule 35(12), was dismissed. Additionally, the appellants were ordered to file an answering affidavit in the main case within 15 days of the order. It was against those two orders that the present appeal, with the leave of the court below, was directed.

The second appellant, Ms Glynnis Breytenbach, acting in her representative capacity as a member of the first appellant, the Democratic Alliance, conducted a press conference where she published a media statement of and concerning the first respondent, Advocate Busisiwe Mkhwebane, the Public Protector. Amongst other things it was alleged that Advocate Mkhwebane was not a suitable candidate to be appointed Public Protector as she had been a government spy employed by the State Security Agency (SSA) during her deployment to the People's Republic of China by the Department of Home Affairs. There were further similar statements made by the third appellant, also a member of the DA. The second respondent is the office of the Public Protector.

The first respondent was aggrieved. Her complaint was that the statements made by the appellants of her were defamatory, impinged on her integrity and reputation, had no foundation in fact, impacted on the office of the Public Protector and demanded that the allegations be retracted. The appellants' refusal to accede to the demand for the retraction led to the main application by the respondents, in terms of which they sought a declaration that the statements were false and defamatory and that the appellants be ordered to publish a retraction. The appellants filed a notice of intention to oppose the main application. Prior to filing their answering affidavit, the appellants filed a notice in terms of Uniform rule

35(12), seeking the production by the respondents of seven documents they considered they were entitled to.

The respondents produced five of the seven items required by the appellants. The refusal of the respondents to produce the remaining two items led to the interlocutory application in the court below during June 2018 to compel the production of the two documents in terms of rule 30A of the Uniform Rules. The appellants contended that the documents sought were directly relevant to the question of whether Ms Mkhwebane was a spy at the material times claimed in the statements complained of and were thus compellable. The documents sought were Ms Mkhwebane's application for a position as analyst at the SSA which was referred to in her letter of appointment, which she had attached to her affidavit in the main application, and a contemplated letter of acceptance also referred to therein. The respondents, in resisting the application to compel the production of the documents, adopted the position that neither of those documents had been 'referred to' as that term is understood in the applicable rule of court

The court below took the view that neither document had been relied on in the main application or 'referred to' as envisaged by the rule requiring production of documents, namely rule 35(12). It also held that the documents need not have been referred to at all, echoing the stance adopted by the respondents.

The SCA considered that rule 35(12) is part of a set of rules regulating discovery, inspection and production of documents in relation to litigation. It held that the production of documents referred to in annexures that may be compelled in terms of rule 30A read with rule 35(12), must be 'subject to some limitation', without which there would be absurd results. In deciding whether to order the production of documents a court must consider whether they were relevant to the issues between the parties and there must be a direct or indirect reference to the document sought and that supposition was not enough.

The SCA held that the court below erred in concluding that there was no reference to the application for appointment to the post of Analyst and that it was irrelevant. It was noted that in refusing production of the requested documents, the court below appeared to have attached some significance to the fact that the appellants, prior to the launching of the main proceedings, claimed to have evidence to substantiate their allegations against Ms Mkhwebane. In that regard the court below erred. The question was whether the documents had evidentiary value and might assist the appellants in their defence of truth and public interest. Her application for the post of Analyst at the SSA was relevant to the time of when and how she was connected to the SSA.

In relation to the envisaged letter of acceptance, the SCA was unpersuaded that there was a reference within the meaning of rule 35(12) to the document sought to be produced. There was no indication that it had been completed and that it existed. It refused to order the production of a document that may or may not exist and to which reference had not been made in terms of the rule.

In terms of the question of the order placing the appellants on terms to file their answering affidavits, the SCA recorded that it had accepted on behalf of the appellants that if this Court was to order the production of one or both of the documents sought, the order issued by the court below in relation to the filing of an answering affidavit could remain in place. In this regard The SCA stated that it was in everyone's interest, including the Office of the Public Protector that the litigation be expedited and finalised

In regard to an approach to applications to compel the production of documents in terms of rule 35(12) the SCA held that there should not be an emphasis on an onus. Rather there should at the very least be a basis provided in terms of which the documents are sought. The court will then have regard to the pleadings or affidavits and exercise a discretion based on all the available materials before it.

In light of the above the SCA upheld the appeal, with costs, including the costs of two counsel. It set aside the order of the court below substituting it as follows: (1) the applicants in the main application to produce for inspection and copying the first applicant's application for the post of Analyst in the SSA by no later than 1st April 2021; (2) the respondents in the main application to file their answering affidavit by no later than the 16th April 2021 and lastly, the respondents in the interlocutory application were ordered to pay the applicants' costs, including the costs of two counsel where so employed, jointly and severally, the one paying the other to be absolved.