



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MTHATHA)**

Case No.: 4947/2017

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL:**

**RESPONSIBLE FOR HEALTH IN THE EASTERN CAPE**

Applicant

and

**LUNTUKAZI CAKA**

Respondent

**IN RE:**

**LUNTUKAZI CAKA**

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL:**

**RESPONSIBLE FOR HEALTH IN THE EASTERN CAPE**

Defendant

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## JUDGMENT

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**CHITHI AJ:**

Introduction

[1] This is an application in which the applicant who is the defendant in the main action seeks condonation for the late delivery of its notice in terms of rule 30 (2) (b) and the late delivery of its application in terms of rule 30(1) of the Uniform Rules of Court ('The Rules'). This application was set down simultaneously with the application in terms of rule 30(1).

[2] The respondent who is the plaintiff in the action is resisting the application on a number of grounds including *inter alia* that (a) the application was made out of time; (b) the purported notice in terms of the provisions of rule 30 (2)(b) does not comply with the provisions of the rule as it does not stipulate what steps the plaintiff ought to have taken and what the consequences would be in the event of her not taking any such steps and that the irregularities complained of are those related to substance rather than form.

[3] At the commencement of the proceedings both parties agreed that if this court was not inclined to grant condonation it would be unnecessary to pronounce on the application in terms of rule 30(1).

[4] It would now be apposite to divert and refer specifically to the provisions of rule 30 which provide as thus:

**“30 Irregular Proceedings**

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-
  - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
  - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
  - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.  
...”

The factual background

[5] On 24 October 2017 the respondent issued summons out of this Court commencing an action for the delictual damages arising from medical negligence at All Saints Hospital at eNgcobo where the plaintiff was admitted in order to give birth.

[6] The applicant delivered its notice of intention to defend the action on 04 December 2017. On 05 December 2017 the applicant delivered a notice in terms of rule 30 (2)((b) setting out fourteen causes of complaint which it alleged constituted an irregular step. However, what the applicant’s notice in terms of rule 30 (2)(b) glaringly omitted was to call upon the respondent to

remove the causes of complaint within ten days as contemplated in terms of the rule. The notice further omitted to caution the respondent what the consequences would be in the event of her failure to remove the causes of complaint. The consequences of a failure to remove the causes of complaint which must be specifically spelt out in the notice in terms of rule 30 (2) (b) is an application in terms of rule 30 (1), which must be instituted within fifteen days after the expiry of the ten-day period within which the causes of complaint ought to have been removed.

[7] The respondent did not react in any manner whatsoever to this notice in terms of rule 30 (2) (b), quite understandably in my view in that she was never called upon to remove the causes of complaint, which means, when simply put, she was never afforded an opportunity to correct what the applicant considered to be incorrect.

[8] On 23 January 2018, the applicant instituted an application in terms of rule 30(1) of the rules *inter alia* for the setting aside of the respondent's particulars of claim as constituting an irregular step together with other ancillary orders including an order affording the respondent a period of 10 days following the service of the order upon her to deliver her amended particulars of claim as well as an order that the respondent be ordered to pay the costs of the application.

[9] On 30 January 2018 the respondent delivered a notice of her intention to oppose the application. On 13 February 2018 the matter was set down on the unopposed roll. However, in the applicant's instance, the matter was removed from the roll with the applicant being ordered to pay the wasted costs occasioned by the adjournment. On 22 February 2018 the applicant applied for a date on the opposed roll for the hearing of the application in terms of rule 30 (1). On 08

March 2018 the applicant delivered a notice of set down of the rule 30 (1) application setting the matter down on the opposed roll for 10 May 2018. Confronted with the application in terms of rule 30 (1) on the 09 May 2018 the respondent delivered heads of argument.

[10] For the present purposes it only suffices to mention the points which are raised *in limine* in those heads of argument. The respondent contends that in terms of the provisions in rule 30(2) an application may only be made if the applicant has, within 10 days of becoming aware of the irregular step afforded the other party the opportunity of removing the cause of complaint within 10 days and the application is delivered within 15 days after the expiry of the 10-day period.

[11] The respondent goes on to argue that in the present matter the applicant's initial notice was served on 5 December 2017 and the 10-day period therefore lapsed on the 19 December 2017 and the application therefore had to be filed on or before 12 January 2018 which the applicant had failed to do. The respondent further argues that the application is fatally flawed in that the applicant's purported notice in terms of the provisions of rule 30 (2)(b) does not comply with the provisions of the rule in that it does not stipulate what steps the respondent ought to have taken and what the consequences would be in the event of her not taking such steps.

[12] It is trite that the time periods which are referred to in rule 30 must be strictly adhered to.<sup>1</sup> The applicant having chosen to give notice objecting to the way the respondent's particulars of claim were couched, it was required to do so strictly in accordance with the rule of court which was applicable namely, rule 30 (2)(b) by affording the respondent 10 days within which to rectify the causes of complain so identified. The applicant did not do so and consequently its

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<sup>1</sup> *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 802G.

notice in terms of rule 30 (2)(b) cannot be seen as anything but is on its own an irregular step. The respondent further contended that since the application was instituted out of time such an application had to be dismissed without any further ado where no condonation was sought.<sup>2</sup>

[13] On 10 May 2018 the matter was adjourned *sine die* with the applicant being ordered to pay the wasted costs occasioned by the adjournment including the costs of the employment of two counsel. Confronted with these legal difficulties the applicant was constrained to institute an application for condonation for the late delivery of its application in terms of rule 30 (1) which application it duly delivered on 11 May 2018. For the purposes of this judgment what happened after the delivery of the applicant's application for condonation is unnecessary and therefore would not be ventured into.

#### Applicable legal principles on a condonation application

[14] Now turning to the issue of the applicant's condonation application, it is important to first identify the legal principles applicable to such an application.

[15] In accordance with the provisions of rule 27 (1) of the Rules, this Court may in the absence of an agreement between the parties, upon application on notice and on good cause shown, make an order extending or abridging any time period prescribed by the Rules or by an order of court or fixed by an order extending or abridging anytime for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

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<sup>2</sup> *Minister of Law and Order v Taylor* NO 1990 (1) SA 165 (ECD) at 168 B - C.

[16] The approach which the courts have always taken in determining whether good cause has been shown is the one which was enunciated by Holmes JA where the following was stated:

‘In deciding whether sufficient cause has been shown, the basic principle is that the [c]ourt has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion...’<sup>3</sup>

[17] The factors which are usually weighed by the court in considering applications for condonation were restated in the matter of *Federated Employers Fire Co. and General Insurance Co. Ltd & Another v McKenzie*<sup>4</sup> to include the degree of non-compliance, the explanation therefore, the importance of the case, the prospects of success, the respondent’s interest in the finality of his judgement, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

#### Condonation is not there for the mere asking

[18] It is trite that condonation is not there for the mere asking.<sup>5</sup> A party is required to make out a case entitling it to the court’s indulgence. It must give a full, detailed, and accurate account of the causes of the delay covering the entire period of the delay.<sup>6</sup> Where the delay is due to the intentional disregard, indifference or gross negligence of party’s legal representatives, condonation may be refused.<sup>7</sup> In the end, the explanation for the delay must be reasonable enough to excuse the default.<sup>8</sup>

<sup>3</sup> *Melane v Santam Insurance Co-Ltd* 1962 (4) SA 531 (A) at 532 C - F.

<sup>4</sup> 1969 (3) SA 360 (A) at 362F-G.

<sup>5</sup> *Department of Transport & Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 52.

<sup>6</sup> *Ethekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) para 28.

<sup>7</sup> *Burton v Barlow Rand Ltd, t/a Barlows Tractor and Machinery Co* 1978 (4) SA 794 (T).

<sup>8</sup> *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) para 22.

Condonation application must be filed without unreasonable delay

[19] Condonation should be applied for without delay when a litigant becomes aware that condonation is required.<sup>9</sup> In *SA Express Ltd v Bagport (Pty) Ltd*<sup>10</sup> although in the context of an appeal Plasket JA re-affirmed this trite position and confirmed that an appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible.

[20] As much as the applicant's attorneys must have realised that the application in terms of rule 30 (1) was out of time they failed to bring the application as soon as possible as would have been expected of prudent attorneys. They waited to be prompted by the respondent's heads of argument which were delivered on 09 May 2018 with the matter having been set down for hearing on 10 May and only on 11 May did they institute the application for condonation for the late filing of their notice in terms of rule 30 (2)(b) and application in terms of rule 30 (1).

[21] What compounds the applicant's position is that despite having been prompted by the respondent's heads of argument which were delivered on 09 May 2017 that condonation was a pre-requisite, the applicant persists in its replying affidavit that the respondent's insistence to the filing of the condonation application was unreasonable.<sup>11</sup> The applicant persisted with this

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<sup>9</sup> *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671B-D; *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138H; *Mulaudzi v Old Mutual Life Assurance Co South Africa Ltd and Others* 2017 (6) SA 90 (SCA) para 26.

<sup>10</sup> 2020 (5) SA 404 (SCA) para 14.

<sup>11</sup> See: Indexed papers: paragraph 9: page 86.



contention despite having been referred to reported cases emanating from this division which make the position abundantly clear that condonation is a pre-requisite.<sup>12</sup>

### Conduct of representatives

[22] In *Saloojee*<sup>13</sup> Steyn CJ stated the following in relation to delays occasioned at the instance of legal representatives:

‘I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with his attorney. There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.’

[23] In *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others*<sup>14</sup> Hoexter JA also re-emphasised the oft-repeated judicial warning that there is a limit beyond where a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered.

[24] What lies at the centre of this application are delays which were occasioned either by the office of the state attorney in dispatching the summons and the particulars of claim in this matter

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<sup>12</sup> See: *Taylor NO* (note 2 above) at 168B where Kannemeyer JP stated—

‘I am satisfied that all that amendment to the Rule does, and all that it was intended to do, is to alter the unsatisfactory situation under the original Rule where time could start to run against the aggrieved party before he knew that a step tainted with irregularity, had in fact been taken. In the present case, giving the above meaning to the words ‘becoming aware’, the application to set aside the summons was brought out of time. The applicant has not sought condonation in this respect and the application must be dismissed.’

<sup>13</sup> *Saloojee* (note 9 above) at 141 C - E.

<sup>14</sup> 1985 (4) SA 773 (A) at 787G - H.

to the applicant's attorneys, and/or by the members of the staff in the offices of the applicant's attorneys in forwarding the relevant files with the summons and particulars of claim to the relevant attorneys in the offices of the applicant's attorneys and/or the attendance of this matter by the relevant attorneys and senior partners in the offices of the applicant's attorneys after the relevant files were forwarded and allocated to them. It would therefore be fitting of me also to echo the oft-repeated judicial warning that there is a limit beyond which a party cannot rely on their legal representative's lack of diligence or negligence.

[25] These are therefore the lenses through which I must consider this application when exercising my discretion on whether to grant condonation for the late delivery of the applicant's notice in terms of rule 30 (2)(b) as well as an application in terms of rule 30 (1). I am cognisant that these factors are not individually decisive but are inter-related and must be weighed against each other. I now turn to consider each of the factors.

#### The length of the delay

[26] The applicant delivered its notice of intention to defend the matter on 04 December 2017 and its notice in terms of rule 30 (2)(b) was delivered on 05 December 2017. The applicant contends that if its notice in terms of rule 30 (2)(b) was held not to have been delivered timeously, with the period within which it ought to have been delivered reckoned from the date of issue of summons then the application would only be six days late. I do not understand that to be the respondent's gripe with the notice. The respondent's gripe with the notice is in relation with the regularity of the notice. I am therefore prepared to assume in the applicant's favour

that its notice in terms of rule 30 (2)(b) was timeously delivered and only to that extent the applicant did not need to apply for condonation.

[27] However, that does not bring an end to the applicant's difficulties. The question is, was the applicant's notice in terms of rule 30 (2)(b) regular and prepared strictly in accordance provisions of rule 30. In order to answer that question, I am constrained to have to examine the applicant's notice in terms of rule 30 (2)(b) and whether it complied with clear and strict provisions of rule 30 as the applicant either in the papers before me or during argument Solomonically avoided to address that issue. In my considered view the applicant's notice in terms of rule 30 (2)(b) was not regular and prepared strictly in accordance provisions of rule 30. To bring the applicant's notice in terms of rule 30 (2)(b) within the purview of compliance with rule 30 it should have concluded as follows:

*“NOW THEREFORE in terms of Rule 30 (2)(b) the Defendant affords the Plaintiff an opportunity of removing the causes of complaint within (10) ten days after the delivery of this notice.*

*TAKE NOTICE FURTHER THAT should the Plaintiff fail to remove the causes of complaint within the period stipulated above, the Defendant will apply to the above Honourable Court for an order that the Plaintiff's particulars of claim dated 23 October 2017 be set aside in terms of Rule 30 (1).”*

[28] As I said before, the applicant's failure in its notice in terms of rule 30 (2)(b) to afford the respondent an opportunity of removing the causes of complaint within ten days and to warn her of the consequences of not removing such causes of complaint should have been the end of the matter as such notice itself would constitute an irregular step susceptible to be set aside. In my view it was completely unwise of the applicant's attorneys to persist with this application on the face of this glaring omission on the applicant's notice in terms of rule 30 (2)(b) and to allow what is primarily a minor child's claim to be delayed for more than four years. I highly doubt that the applicant's application in terms of rule 30(1) even if it was not opposed would have

succeeded or granted with such a glaring omission in the notice in terms of rule 30 (2)(b). On this point alone it would have been enough of me to refuse condonation and dismiss this application with costs. However, I would proceed to consider other factors which are relevant in the determination of an application for condonation.

[29] On 23 January 2018 the applicant instituted an application in terms of rule 30(1) of the Rules. The parties are not consonant on when was the applicant required to have instituted its application in terms of rule 30(1). The applicant contends that the fifteen-day period within which the applicant had to institute the rule 30(1) application began to run on 20 December 2017 and the application ought to have been instituted on 15 January 2018. The respondent on the other hand contended that the fifteen-day period within which the applicant had to institute the rule 30(1) application began to run on 19 December 2017 and the application ought to have been instituted on 12 January 2018. The applicant's calculation is with respect incorrect. I am therefore in agreement with the respondent that the rule 30(1) application ought to have been instituted on or before 12 January 2018. The applicant's application was only delivered on the 23 January 2018.

[30] The applicant contends that it was merely six days late in the delivery of its application in terms of rule 30 (1) and submits that this is not a significant delay and any such delay was not prejudicial to the respondent. This delay whether it was six days or more must be considered together with other factors in particular the explanation for the delay, the applicant's prospects of success, prejudice and most significantly the respondent's interest in the finality of her judgement, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. It would be amiss of me if I were to only consider this period of six

days or more which has been described as insignificant and not to have regard to the prejudice which has been caused to the respondent and the unnecessary delay which has been caused in the adjudication of this matter on its merits which could have been avoided, had the applicant been willing to take a careful look at the rule 30 (2)(b) notice. What would have been an insignificant delay has resulted in this matter being delayed for more than four years merely because what ought to have been done within the prescribed time periods was not done by the applicant. Consequently, I cannot ignore the time period which has lapsed pursuant to the applicant's application in terms of rule 30 (1) having been instituted more particularly if the application was instituted solely for the purposes of delay.

[31] In looking at the length of the delay I am also obliged to consider the period between the service of the summons upon the office of the state attorney on 30 October 2017 and when the applicant's notice in terms of rule 30 (2)(b) was delivered on 05 December 2017. The time period before the delivery of the applicant's notice in terms of rule 30 (2)(b) is relevant in order to suss the applicant's attitude towards the respondent's claim. So too is the period after the institution of the application in terms of rule 30 (1). Had this period pre and post the delivery of the applicant's notice in terms of rule 30 (2)(b) and the applicant's application in terms of rule 30(1) been irrelevant it would not have been ventilated in the applicant's affidavit.

[32] Inordinate delays in litigation no doubt have serious repercussions for all who are involved in the litigation. These repercussions were aptly adumbrated by Didcott J, although in a different context in *Mohlomi v Minister of Defence*<sup>15</sup> as thus:

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<sup>15</sup> 1997 (1) SA 124 (CC) para 11.

‘Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end it is always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it.’

[33] Although Didcott J said this in a different context and that context having been in relation to the notices which have to be given before the institution of any litigation against state entities, his *dictum* is equally apt in this case and in any other case for that matter. This *dictum* specifically speaks to the prejudice which is suffered by all in litigation. I imagine that the prejudice inordinate delays in matters involving minor children allegedly born with cerebral palsy must be suffering is quite severe. This must be very distressing for care givers of such minor children. For they may have to live with the anxiety of not knowing whether the disabled minor child will live to see another day.

[34] Back now to the time periods. The period between the service of the summons upon the office of the state attorney on 30 October 2017 and 15 November 2017 is not accounted for. Ms Fundiswa Ncula who deposed to a confirmatory affidavit on behalf of the applicant simply alludes to the fact that on 07 and 08 May 2018 respectively she tried to contact the offices of the state attorney telephonically to ascertain the reason for the delay in sending the summons and particulars of claim to the applicant’s attorneys, however, her call went unanswered on both days.

[35] The other period which is unaccounted for is the period between the 15 and 30 November 2017. In relation to this time period Ms Ncula asserts that the summons and particulars of claim

were received by the applicant's attorneys on the 15 November 2017 as this is apparent from the covering letter from the office of the state attorney, dated 14 November 2017, and enclosing summons in 46 matters including this one. She further asserts that she received instructions from the Senior Manager: Legal Services, Mlungisi Mlambo to forward the summons and particulars of claim to the attorneys in the office of the applicant's attorneys on 30 November 2017, which she did on the same day. This was the first time that the summons and particulars came to her attention. She checked the records of the office of the applicant's attorneys, and there is no indication of what happened to the summonses and particulars of claim between 15 and 30 November 2017. Once again, this time period which is of critical importance is not accounted for by the applicant.

[36] At the risk of speculating, I surmise that part of the reasons why the consortium involving the applicant's attorneys was tasked to handle this kind of litigation on behalf of the applicant was to ensure efficient management of this litigation. One would then be left to wonder if what happened in this matter indeed amounts to an efficient management of this kind of litigation.

#### The explanation for the delay

[37] As I said before there has been no explanation for the period between 30 October 2017 to 14 November 2017 when the summons was served upon the offices of the state attorney up to the time when the summons and the particulars of claim were dispatched to the applicant's attorneys to attend to this matter and 45 other matters. There is also no explanation for the period between the 15 and 30 November 2017. The only explanation which has been proffered is in relation to the period between 30 November 2017 and 23 January 2018.

[38] It is not in dispute that the applicant's notice in terms of rule 30 (2)(b) was delivered on 05 December 2017. What this means is that the respondent had ten days to remove the causes of complaint, had the notice not been defective, reckoned from 06 December 2017. This ten-day period would have lapsed on 19 December 2017. The fifteen-day period within which the applicant had to institute its application in terms of rule 30(1) therefore commenced to run on 20 December 2017. The applicant has not indicated how it has calculated the *dies* for it to conclude that the rule 30(1) application ought to have been instituted on 15 January 2018. If the fifteen-day period is reckoned from 20 December 2017, fifteen days would have lapsed on 12 January 2018.

[39] The applicant asserts that the period between 19 December and 16 January is regarded as *dies non* for pleadings and although it does not apply to other notices, unless the matter is urgent, general cognisance is taken of the fact that this period is in recess when many attorneys' offices are closed. In that regard the deponent to the applicant's affidavit was advised by her correspondent attorneys (in a different matter) that many of the firms in the Eastern Cape were closed for Christmas holidays and that they were experiencing difficulties serving documents. This is far from being correct as this period only applies in respect of notices of appearance to defend and to oppose; and not to pleadings and other notices of the like nature.

[40] The deponent to the applicant's affidavit refers to a senior partner who was responsible for the matter only having returned on 11 January 2018. However, and quite conspicuously she does not mention who this senior partner was nor did she cause this senior partner to depose to a confirmatory affidavit to confirm what the deponent states. To that end I am constrained to have



to reject these assertions as nothing but inadmissible hearsay evidence. It is trite that a confirmatory affidavit is necessary where a deponent refers to crucial evidence originating from another person.<sup>16</sup> What further exacerbates the applicant's difficulties is that if one considers the rule 30(1) application it is a replica of the applicant's notice in terms of rule 30 (2)(b). The only difference is what constitutes the face of the application and the end of the application. The portion which is the face of the application comprises what constitutes the order sought. It constitutes the first page and goes up to half of the second page. What is then contained from half of page two up to half of page 16 is the replica of the grounds as contained in the applicant's notice in terms of rule 30 (2)(b). Then half of page 16 constitutes the ending of the application. Page 17 sets out the addresses of the attorneys and that of the Registrar. Effectively three pages had to be drawn up and superimposed on what was a notice in terms of rule 30 (2)(b). The deponent to the applicant's affidavit should have been able and could easily have prepared the rule 30(1) application and had it delivered on or after 20 December 2017 as she was required in terms of rule 30 (2)(b) but chose not to do so. Alternatively, the deponent to the applicant's affidavit must have been able and could easily have prepared the rule 30(1) application without the intervention of a senior partner, and had it delivered on or before 15 January 2018 which she contends was the date the rule 30(1) application ought to have been instituted. She chose not to do so.

[41] Further and in any event with all things being equal in view of the simple task which had to be performed the deponent was well within her rights pursuant to the return of the senior partner on 11 January 2018 to prepare the rule 30(1) application as there was nothing much to be done and have it presented to the senior partner for his or her consideration after hours. As if

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<sup>16</sup> *Drift Supersand (Pty) Ltd v Mogale City Local Municipality* [2017] ZASCA 118 (22 September 2017) para 31

that was not enough the deponent to the applicant's affidavit does not say that her correspondent attorneys attempted service upon the respondent's correspondent attorneys and found the offices closed. In my considered view what has been proffered as an explanation does not amount to a reasonable, acceptable, and satisfactory explanation. Accordingly, I reject such explanation.

#### Prospects of success

[42] The prospects of success are immaterial if no reasonable and acceptable explanation has been provided for the delay. Equally if there are no prospects for success, no matter how good the explanation for the delay, an application for condonation should be refused.

[43] If one considers the fact that the applicant's notice in terms of rule 30 (2)(b) is defective as it was not done strictly in compliance with rule 30 as it does not afford the respondent an opportunity of removing the causes of complaint within ten (10) days, this simply means that the applicant has no prospects of succeeding in its application in terms of rule 30(1) or put differently never stood any chance of having the application granted by the court even if it was not opposed. Consequently, the notice itself is irregular. In the circumstances there would have no need whatsoever for any the time to have been wasted up to this far had the applicant taken counsel that the notice is non-compliant. I therefore find that this application was instituted solely for the purposes of delay. So, based on this ground alone the applicant does not have any prospects of success on the merits of the application.

[44] When the court enquired from the applicant's counsel as to the respects in which the applicant would be prevented from being able to plead to the particulars of claim merely by a

failure of the respondent to set out what her occupation was in the particulars of claim. The applicant's counsel correctly conceded that the applicant could not possibly be prevented from being able to plead to the particulars of claim merely based on that omission.

[45] While the second complaint is in relation to the summons not disclosing that the respondent is suing in her personal capacity and in her representative capacity as the mother and the natural guardian of the minor child the applicant does not seek to have the summons set aside. This is strange in the sense that this fact is not disclosed in the summons and it is disclosed in the particulars of claim. So, if the applicant's complaint was genuine, it should have also sought to have the summons set aside.

[46] The applicant's fourteenth complaint in essence relates to the respondent's claim in her personal capacity for emotional shock having prescribed. When the court specifically enquired from the applicant's counsel why should this complaint not form part of a special plea, he was not forthcoming.

[47] If one considers all the other the complaints those complaints relate to substance rather than form. Since the court has a discretion which must be exercised judicially and on consideration of what is fair to both sides even if the applicant's application in terms of rule 30(1) was instituted timeously, I would have exercised my discretion not to grant it. The applicant's objections overall are of a technical nature in relation to less than perfect procedural steps and they do not work any substantial prejudice to the applicant.

### Prejudice

[48] There has clearly been prejudice to the respondent in this case in that a defective notice in terms of rule 30 (2)(b) which does not strictly comply with the provisions of rule 30 has been allowed to hamstring and detain what is primarily a minor child's claim from advancing. This procedural step which is premised on a defective foundation was meant to compel the respondent to correct what was perceived as defects in her own pleadings. However, when defects were pointed out to the applicant in this very document which contained the applicant's complaints at the very early stages of the litigation, namely on 09 May 2018, the applicant refused to backdown and fought to the bitter end in relation to what is glaringly obvious. This interfered with a case which could have been adjudicated expeditiously and inexpensively on its real merits. It has resulted in what is primarily a minor child's claim being delayed for more than four years and surely to the prejudice of the disabled minor child. This kind of litigating is unacceptable and must be condemned.

[49] For all the reasons I have enumerated above the applicant's application for condonation stands to fall. Although I have cursorily adverted to the merits of the applicant's application in terms of rule 30(1) under prospects of success since, I am not inclined to grant the applicant condonation it therefore goes without saying that I would not proceed to consider the merits of the application.

### Costs

[50] The general rule regarding costs is that the costs follow the event. I do not see any reason why I should depart from that rule.

[51] I enquired from the parties whether it would not be appropriate that I should direct the applicant to deliver its plea within a particular timeframe, if I was not disposed to grant condonation. The applicant's counsel submitted that that issue must be left out to be dealt with in terms of the rules. The respondent's counsel on the other hand submitted that I should direct the applicant to file its plea within 20 days. In view of the delay of more than four years since summons were issued in this case and this case primarily being a minor child's claim it is in the interests of justice that I direct the applicant to deliver its plea within 20 days from the date of this judgment.

Order

[52] In the result, I make the following order:

- (a) The application for condonation is dismissed with costs.
- (b) The applicant is directed to deliver its plea within 20 days from the date of this judgment.

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M. M. CHITHI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the applicant	:	Adv. Dwayi
Instructed by	:	Norton Rose Fulbright SA Inc. 15 Alice Lane, Sandton c/o Smith Tabata Attorneys 34 Stanford Terris Mthatha
Counsel for respondent	:	Adv. Badli
Instructed by	:	Mpambaniso Attorneys 63 Grey Street Queenstown c/o Makaula Zilwa Attorneys 8 Raziya Street Mthatha
Heard on	:	13 October 2022
Delivered	:	22 November 2022

