IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, GQEBERHA]

CASE NO.: 2810/2020

In the matter between: -

AVBOB FUNERAL SERVICES **APPLICANT**

and

BONIWE EUNICE BUZANI **RESPONDENT**

JUDGMENT

ZONO AJ:

Introduction

[1] The applicant in the instant proceedings launched an application for the upliftment of the notices of bar respectively filed on 15 February 2021 and 18 October 2021. The application was instituted on 13 January 2023. The applicant tenders costs on condition that the respondent does not oppose the application. The applicant seeks costs in the event that the respondent opposes the application.

[2] The application is predicated on the provisions of Rule 27 which deal with the extension of time and removal of bar and condonation. Rule 27(1) clearly envisages that an application for the removal of bar is necessary only in the absence of agreement between the parties. See ***Gool v Policansky***[1]***.***

Legal principles

[3] The requisite for the grant of an extension of time or removal of bar have, through the years, been expressed in different ways. Two principal requirements for the favourable exercise of the court's discretion have crystalised out. The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives. See ***Silber v Ozen Wholesalers (Pty) Ltd.*** [2]A full and reasonable explanation which covers the entire period of delay must be given. See ***Van Wyk v Unitas Hospital and Another***[3]***.***

[4] It is not sufficient for the applicant to show that condonation will not result in prejudice to the other party. An applicant must show good cause; the question of prejudice does not arise if it unable to do so. See ***Standard General Insurance Co. Limited v Eversafe (Pty) Limited***[4]***.***

[5] The court will refuse to grant the application where there has been a reckless or intentional disregard of the Rules of Court or the court is convinced that the applicant does not seriously intend to proceed. See ***Smith N.O. v Brummer***

[1] 1939 CPD 386 at 390.
[2] 1954 (2) SA 345 (A) at 353.
[3] 2008 (2) SA 472 (CC) at 477 E – G.
[4] 2000 (3) SA 87 (W) at 93G.

N.O.[5]*.* The application must be *bona fide* and not made with intention of delaying the opposing party. See ***Grant v Plumbers (Pty) Ltd***[6]***.***

[6] The second requirement is that the applicant should satisfy the court on oath that he has a *bona fide* defence or that his application is clearly not ill-founded. See ***Dalhouzie v Bruwer***[7]***.*** The applicant must show that his defence is not patently unfounded and that it is based upon facts which must be set out in the outline which if proved would constitute a defence. See ***Du Plooy v Anwes Motors (Edms) Bpk***[8]***.***

[7] In ***Smith N.O. v Brummer N.O.***[9] it was held that the tendency of the court is to grant a removal of bar where:

(a) the applicant has given reasonable explanation for his delay;

(b) the applicant is *bona fide* and not made with the object of delaying the opposite party's claim;

(c) there has not been a reckless or intentional disregard of the rules of court;

(d) the applicant's action is clearly not ill-founded; and

(e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs.

[8] This now bring me to the facts of the case. The counsel for the applicant conceded that there is no sufficient explanation given in the affidavit for the default.

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[5] 1954 (3) SA 352 (O) at 277 A – B.
[6] 1949 (2) SA 470 (O) at 476.
[7] 1970 (4) SA 566 (C) at 571.
[8] 1983 (4) SA 212 (O) at 217.
[9] 1954 (3) SA 352 (O) at 358A.

Analysis

[9] Whilst there is no explanation for the failure to file the necessary pleading by the defendant after the receipt of the Summons, similarly, there is absolutely no explanation for the failure to file same after the delivery of notice of bar on 18 October 2021. The consequence of not filing a subsequent pleading within five (5) days prescribed in the notice of bar was that the defendant was *ipso facto* barred from doing so.

[10] Surprisingly, almost a year after the filing of notice of bar on 7 September 2022 the defendant delivered its exception. It is reiterated that all this delay is not explained. The defendant does not account for its failure to file a subsequent pleading within the time prescribed by the Rules. This is clearly a long delay that is not explained.

[11] Some five (5) months after the filing of the exception which was obviously a "*pro non scripto"* on 13 January 2024 the applicant launched this application. The only explanation given for the late launching of the application is that, it was as a result of this court's advice when refusing to hear an exception which was a *pro non scripto*.

[12] The only contention proffered by the applicant is that there is no prejudice that will be suffered by the respondent if this application is granted. I do not agree. The respondent is *dominis litis* in the main action. In the main action he is entitled to a speedy trial. That is his constitutional rights embedded in section 34 of the Constitution. It is trite law that the justice delayed is justice denied. That is prejudice. The respondent came to this court for the resolution of his dispute as speedily as possible.

[13] The applicant, with a sigh of despair, sought to canvass a point that the applicant, who is the defendant in the main action has a *bona fide* defence. Whilst that is not a consideration according to the legal authorities referred to above, the contention is not without difficulties.

[14] An exception that is a *pro non scripto* was only a knee jerk reaction to the respondent's anxiousness to finalise his case. It purported to assail respondent's summons or particulars of claim on the basis that they are vague and embarrassing. At the same time it acknowledges that there is a claim founded on contract which existed between the parties. Similarly, the applicant understands the respondent's claim to be based on the principle of duty of care founded on delict. Negligent conduct of the applicant's employees who were acting within the course and scope of their employment with the applicant is pertinently pleaded in the particulars of claim. The applicant's failure to take a duty of care is equally pleaded in the particulars of claim.

[15] Having understood the nature and the factual basis of the respondent's case, the applicant failed to plead to the pertinent averments set out in the particulars of claim. It would only be by means of a plea that the applicant would have been able to disclose its *bona fide* defence. Alternatively the defence relied upon by the applicant in the main application would have been pertinently set out in the founding affidavit supporting this application. That did not happen. There is no where this court could assess the strength of applicant's case. The submission about the *bona fide* defence was only made from the bar. Even there, no nature and basis thereof was canvassed. This submission stands to fail.

[16] I alluded to the fact that the exception was only an afterthought and knee jerk reaction to the respondent's action to drive his case to finality. I base this on the allegations made by the applicant on his papers. It is clear on the applicant's founding papers that the applicant's attorneys had always wanted to plead.

[17] Paragraph 10 of applicant's plea is couched as follows:

> "*10. In an attempt to extract a plea from the applicant … the respondent …. served a notice of bar on the applicant on or about 15 February 2021."*

[18] A similar allegation is made in paragraph 24 as follows:

> *"24. Thereafter, in an attempt to extract a plea from the applicant on its amended particulars of claim, the respondent served the applicant with yet another notice of bar on 18 October 2021."*

[19] Lastly, paragraph 34 alleges as follows:

> *"34. The applicant's attorneys of record were in the process of taking instructions from the applicant before serving its Rule 23 notice when it was served with the respondent's first notice of bar."*

[20] It is conceded by applicant's counsel in court that, an attorney does not need to take instructions to prepare an exception, but instruction could only be sought and obtained from client in respect of the merits/facts for purposes of a plea.

[21] I come to a conclusion that the applicant has failed to give this court sufficient reasonable explanation that covers the entire time of the delay to file a subsequent pleading. It is, up until now, unknown why a subsequent pleading was not filed. The conduct of the applicant was characterised by reckless or

intentional disregard of the rules of this court. I find so because there is no explanation about the delay. There is absolutely no defence disclosed in this matter that could assail applicant's case on trial.

[22] In the light of paragraphs [17] and [18] above I find that this application is *mala fide* and is made with an object of delaying the respondent's claim.

Order

[23] In the circumstances the following Order shall issue:

23.1 The application for the upliftment of the bar dated 12 February 2023 is hereby dismissed.

23.2 The applicant is ordered to pay costs of the application.

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A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

Matter heard on : **25 January 2024**

Judgment Delivered on : **30 January 2024**

APPEARANCES:

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