



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

5 MAY 2022

Date

Judge M.L. Senyatsi

Case no: 28974/2016

PARTSON SEBATA

Plaintiff

and

MEC: HEALTH GAUTENG PROVINCIAL GOVERNMENT

Defendant

***Case Summary:* CONDONATION APPLICATION, NON-COMPLIANCE WITH
TIMEFRAMES OF COURT ORDER**

JUDGMENT

SENYATSI J

[1] Following this matter having been certified ready for trial and the trial date having been set, Applicant brings an application for condonation of non-compliance with the timeframes set out in the 1 April 2021 order. Applicant is the Defendant and Respondent is the Plaintiff in the main action. For convenience sake, the parties will be referred to in the main action.

[2] The main action concerns a claim arising out of a medical negligence in terms of which the Plaintiff alleges to have suffered damages as a result of the Defendant's employees negligent conduct by failing to diagnose a fracture of femur to his neck following an incident. The Plaintiff fell while jogging and attended for assistance at the Far East Rand Hospital for medical emergency assistance. The Plaintiff alleges that Defendant's medical staff failed to diagnose the fracture sustained on his neck due to their alleged negligence.

[3] The Defendant was ordered by court on 1 April 2021 to deliver notices in respect of the expert witnesses he intended calling in the trial. The notices were delivered, but outside of the time, limits as ordered by court. The expert notices by the Defendant were in fact in delivered in respect of the expert witnesses Defendant intended calling on the following dates:

- (a) Dr. Vlok – Orthopaedic Surgeon on 12 May 2021 for Rule 36(9)(a) Notice and on 18 May 2021 for Rule 36(1) of (2) Notice;
- (b) Dr. Malokomme- Psychiatrist on 12 May 2021 in respect of Rule 36(9)(a) Notice and on 18 May 2021 in respect of Rule 36(1) and (2) Notice;
- (c) Ms. Shivambu – Occupational Therapist on 21 May 2021 in respect of Rule 36(9)(a) Notice and on 18 May 2021 in respect of Rule 36(1) and (2) Notice;
- (d) Mr. Malaka – Industrial Psychologist on 21 May 2021 in respect of Rule 36(9)(a) Notice.

The Defendant was 3 court days late in delivering the Rule 36(1) and (2) expert notices. The attorney acting on behalf of the Defendant, admitted that he inadvertently omitted to deliver Rule 36(9)(a) notices and became aware of the omission ten days later. The Rule 36(9)(a) Notice were 15 days out of the court time limit as ordered by the court order on 1 April 2021.

[4] On 24 May 2021, the court separated the issues of liability and quantum in the proceedings at the case management meeting and certified the matter trial ready for 2 to 3 days duration to make a determination on the issue of liability.

[5] Because of the separation of issues, the Defendant states that he intended to call one expert to testify on his behalf at trial, namely Dr Vlok, the orthopedic surgeon. He delivered notice to this effect on 2 August 2022.

[6] The Defendant further states that he had briefed a private law firm to act on his behalf. He appointed the State Attorney towards the latter part of 2020 to act on his behalf in the matter. The Defendant was advised by the State Attorney of the importance of appointing expert witnesses after the 1 April 2021 court order.

[7] After the Office of the State Attorney was instructed to act in the matter, the new legal representatives instructed a firm of consultants to source experts on behalf of the Defendant and the list of experts was made available on 18 May 2021 with dates that the experts were available to consult the Plaintiff. It was at that stage that the Rule 36(1) and (2) notices were delivered and already, the notices were out of the time limit set by the 1 April 2021 court order.

[8] The Defendant also states that he intends amending the plea. It should be stated that pleas has been uploaded in the case file. Defendant also seeks leave of the court to amend his plea.

[9] A supplementary affidavit was filed by the Defendant in respect of the application for leave to amend his plea. The Defendant states in the supplementary affidavit that he wishes to seek leave to amend the plea in so far as the amendment relates, to the issue of liability. He contends that in notice of intention to amend the plea was delivered to the Plaintiff a month before trial date.

[10] The application for condonation and amendment of the plea are opposed by the Plaintiff. He denies that a good cause has been shown by the Defendant as required by the Rule of Court to condone the late filing of the expert notices.

[11] The Plaintiff stated that when the case was being managed by a private law firm, the Defendant's Rule 36(9)(a) Notice was served on 26 September 2019, which advised the Plaintiff that Dr. Ngcobo, an Orthopedic Surgeon would call him on behalf of the Defendant. However, when the first Rule 36(1) and (2) notice was served, it directed the Plaintiff to submit himself to Dr. Preedy for medical examination on 19 November

2019. The second Rule 36(1) and (2) notice which was served on 1 March 2021 advised the Plaintiff to submit himself to Dr. Vlok on 3 March 2021. The appointment was cancelled by the Defendant's legal representatives. The email cancelling the appointment was written by the Office of the State Attorney.

[12] Examination on the 5th July 2021 for medical attention. The reasons raised, the court ought not to exercise its discretion in favour of the Defendant.

[13] In answer to the Plaintiffs contention, the Defendant submits that for the purpose of this application, non-compliance with the rules prior to 1 April 2021 court order is irrelevant and implores this court to exercise its discretion in favour of the Defendant for non-compliance with the 1 April 2022 court order.

[14] The Defendant furthermore contends that after receiving the Defendant's expert notice on 24 August 2021, the notice was forwarded to the Plaintiff's expert, Dr. Marin the orthopedic surgeon. Following that, a draft joint minute was prepared by Dr. Marin and forwarded to Dr. Vlok who then provided his input to the joint minute which was signed on 20 September 2021.

[15] The Defendant stated that the Plaintiff consulted with Dr. Vlok on 5 July 2021 as a result of which the Rule 36(9)(b) notice in respect of Dr. Vlok was sent to the Plaintiff's legal representatives on 24 August 2021.

[16] The issue for determination is whether given the chain of events that unfolded in this matter, the Defendant has shown a good cause for the court to exercise discretion in his favour by granting condonation of non-compliance with the 1 April 2021 court order in so far as the time limit set therein are concerned. Furthermore, the court has to determine whether a good case has been made by the Defendant for the court to allow the amendment of the plea.

[17] A court possesses a wide discretion when deciding whether or not an applicant for condonation has shown a good cause, which it should apply fully conscious of the merits of the matter seen in their entirety.¹ This approach was endorsed by the

¹ See *Gumede v Road Accident Fund* 2007 (6) SA 304 (C)

Constitutional Court in *Ferris v First Rand Bank Ltd*² where the court held that precision is not the only consideration in determining whether an application for condonation may be granted or not. The test for condonation is whether it is in the interest of justice to grant it.

[18] The pertinent factors to determine the interest of justice are the Applicant's prospects of success and the importance of the issue to decide.

[19] The wide discretionary power that the court has must be exercised circumspectly and judiciously.³

[20] The approach on the discretion of the court was also endorsed in *Grootboom v National Prosecuting Authority and Another*⁴ where the court held as follows:

"I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummer⁵ and Van Wyk⁶, the standards for considering an application for condonation is the interest of justice. However, the concept 'interest of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes the nature of the relief sought, the extent and cause of the delay; the effect of the delay. On the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasize that the ultimate determination of what is in the interest of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant."

[21] It is now also trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling him or her to the court's indulgence. The Applicant must give a full explanation for the non-compliance with the

² 2014 (3) SA 37 CC at 43G – 44 A

³ See *Vlok NO v Sun International South Africa Ltd* 2014 (1) SA 487 (GSJ).

⁴ 2014 (2) SA 68 (CC) at para 22

⁵ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZA CC 3, 2000 (2) SA 837 (CC).

⁶ *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24: 2008 (2) SA 472 (CC).

rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.⁷

[22] It is common cause between the parties that the court order of 1 April 2021 was not complied with. It is also common cause that as contended for by the Defendant, the Rule 36(9)(a) and the Rule 36 (1) and (2) were outside of the limit by three court days.

[23] It is also common cause that Rule 36(9)(b) was outside of the limit by sixteen days. The Plaintiff protests and opposes the condonation application on the ground that he is prejudiced by the delay in finalizing the trial which had already been certified. Whilst it is true that there should not be unreasonable delay in getting the litigants' disputes dealt with by court, it can also not be denied that the court has to strike a balance between the interests of both parties. I do not agree that a further delay that has been caused by the circumstances as proffered by the Defendant is unreasonable.

[24] The assessment of the matter and the papers point out to the fact that the change of the legal representatives of the Defendant, had an effect on the management of litigation. It is also apparent that once the office of the State Attorney was instructed to handle the litigation their advice to the Defendant was that an expert was required to lead evidence on his behalf. I am therefore satisfied that the good cause has been shown by the Defendant as required by the Rules to warrant condonation.

[25] As regards failure to file the notices on time Mr. Maile proffered an explanation that it was his fault and oversight to file the required notices on time. It is irrelevant that the factual matrix of prior to 1 April 2021 were not set out in the founding papers for the purpose of considering this condonation application. The focus is and should be the factual matrix post the 1 April 2021 and this in my respectful view was dealt with quite candidly by the Defendant.

[26] As to the prospects of success of the pleaded defence and the amendment thereof, I am of the view that the merits will be better dealt with if the trial court has a benefit of hearing the expert opinions of both the Plaintiff and the Defendant's orthopedic surgeons as to why the femur fracture diagnose was not made when the

⁷ See Von Abo v President of the Republic of South Africa [2009] ZACC 15; 2009 (5) SA 345 (CC).

Plaintiff sought medical attention for the first time at the Far East Rand Hospital. From the papers, it is clear that the fracture was not diagnosed as alleged by the Plaintiff in his particulars of claim. The trial court will be put in a better position by hearing evidence of both parties' experts and denying the Defendant to lead evidence by his expert will not be beneficial to the trial court.

[27] It is therefore, in my respectful view, considering the importance of this matter to both litigants, that the application for condonation of the filing of the notices outside of the limit set by the court should be favourably considered. The case involves a significant claim against the Defendant and will if successful, be paid out of the public purse. It is for that reason as well that the condonation should be favourably considered.

[28] I now deal with notice to amend the plea, which is also opposed by the Plaintiff. The notice was delivered on 9 September 2021, indicating the Defendant's intention to amend the plea. The amendment was caused by the expert opinion provided by Dr. Vlok on behalf of the Defendant and deals principally with the liability of the Defendant.

[29] The Plaintiff filed notice of objection to the amendment of plea on 27 September 2021 and stated that he would be prejudiced by the intended amendment because the matter had already been certified trial ready for 12 October 2021.

[30] The approach to be adopted by a court faced with an opposed application to amend a pleading is trite. The amendment of pleading is regulated by Rule 28(1) of the Uniform Rules which provides as follows:

“(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceeding shall notify all other parties of this intention to amend and shall furnish particulars of the amendment.”

[31] Our court have held that this rule is an enabling rule and amendment should generally be allowed unless in good cause for not allowing an amendment.⁸ The

⁸ See *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and others* 2019 ZACC 41; 2020 (1) 327 (CC).

Constitutional Court which based its approach on *Moolman v Estate Moolman*⁹ where it was held that:

“The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fides or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to was filed.”

[32] If regard is had to the proposed amendment and the reasons advanced by the Plaintiff to oppose the proposed amendment, I do not see how the Plaintiff would be prejudiced by the amendment. The proposed amendment can only serve, in my view, to put the Defendant’s Plea in its proper perspective given the expert notice filed in terms of which Dr. Vlok will lead evidence on behalf of the Defendant. It follows therefore that the amendment should be allowed.

ORDER

[33] The following order is made:

- (a) The Applicant’s non-compliance with the timeframes set out in the 1 April 2021 court order is condoned.
- (b) The amendment of plea in terms of notice of amendment dated 9 September 2021 are hereby allowed.
- (c) The Respondent is ordered to pay the costs.

⁹ 1927 CPD 27 at 29

M. L. SENYATSI
JUDGE OF THE HIGH COURT

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| Heard: | 13 October 2021 |
| Judgment: | 5 May 2022 |
| Counsel for the Plaintiff: | Adv MP Hlabyago |
| Instructed by: | Tlaweng Lechaba Inc. |
| Counsel for the Defendant: | Adv M R Latib |
| Instructed by: | Mr. Maile for the State Attorney |