

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2020/10124

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED YES/NO

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SIGNATURE

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DATE

In the matter between :

In the interlocutory application between:

**NDIVHONISWANI AARON TSHIDZUMBA
MBULAHENI OBERT MAGUVHE
MALESHANE AUDREY RAPHELA**

**First Applicant
Second Applicant
Third Applicant**

and

**SPECIAL INVESTIGATION UNIT
JAMES AGUMA
LEAH THABISELA KHUMALO
THERESA VICTORIA GELDENHUYS
THE SOUTH AFRICAN BROADCASTING
CORPORATION (SOC) LIMITED**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent**

In Re the main action between

SPECIAL INVESTIGATING UNIT

Plaintiff

and

**MBULAHENI OBERT MAGUVHE
NDIVHONISWANI AARON TSHIDZUMBA
JAMES AGUMA**

**First Defendant
Second Defendant
Third Defendant**

**MALESHANE AUDREY RAPHELA
LEAH TSHABISILE KHUMALO
THERESA VICTORIA GELDENHUYS
SOUTH AFRICAN BROADCASTING CORPORATION**

**Fourth Defendant
Fifth Defendant
Sixth Defendant
Seventh Defendant**

JUDGMENT

STRYDOM J

- [1] This is an interlocutory application brought in terms of Rule 27 by three applicants for the removal of a bar preventing them from filing their pleas in an action instated by the first respondent against them.
- [2] The first applicant is the second defendant in the main action, the second applicant is the first defendant in the main action and the third applicant is the fourth defendant in the main action. The relief they seek in their interlocutory application is directed towards the first respondent, the Special Investigation Unit ('SIU').
- [3] On 23 July 2020, the applicants were barred by notice served on the applicants' attorney by email.
- [4] The three applicants filed their notices of intention to defend as follows:
- 4.1 The first applicant on 2 June 2020;
 - 4.2 The second applicant on 25 June 2020; and
 - 4.3 The third applicant on 5 June 2020.

- [5] In terms of the notices of intention to defend, the applicants appointed the same attorney and it was recorded that they would “*also accept service of all processes by fax and/or email as per the details appearing below*”. The service email address which was recorded in the three notices was rasmotlatsi@motlatsiseleke.com.
- [6] The first applicant’s plea was due on or before 1 July 2020, the second applicant’s plea was due on 23 July 2020 and the third applicant’s plea was due on 6 July 2020.
- [7] On 23 July 2020 the SIU served notices of bar on the nominated email address as referred to above.
- [8] On 23 June 2020, the third applicant’s attorney filed a notice in terms of Rule 35(14) *inter alia* requesting a copy of an investigative report referred to in the particulars of claim. The first respondent’s attorney replied to this notice on 23 July 2020.
- [9] On 25 August 2020, a date after the applicants were barred from filing a plea, the second applicant’s attorney filed a notice in terms of Rule 35(14) which was replied to on behalf of the first respondent on 9 September 2020.
- [10] Pursuant to the notice of bar dated 23 July 2020, the applicants failed to file their pleas and were effectively barred from 1 August 2020.
- [11] On 21 October 2020, the SIU applied for default judgment against the applicants. According to the applicants, this was the first time that they became aware that a notice of bar was served on their attorneys by way of email. It should be noted that this was stated by the deponent of the affidavit in support

of the Rule 27 application deposed to by the first applicant. In this affidavit it is stated that the attorney of the applicants, Mr Seleke of the firm Motlatsi Seleke Attorneys, never received the notice of bar. There are no confirmatory affidavits filed by either the second and third applicants, nor by Mr Seleke. Accordingly, the allegation that the office of Mr Seleke never received the notice of bar remains hearsay evidence.

[12] On 2 November 2020, the applicants delivered a notice in terms of Rule 30 in which they gave notice of their intention (within 10 days) to apply to set aside the SIU's notice of bar and application for default judgment as "*irregular steps*". The applicants however failed to apply to remove the alleged irregularity after the 10 day period provided for in Rule 30.

[13] It is common cause between the parties that after November 2020, until 25 January 2022, approximately 14 months, nothing further was done to set aside the notice of bar until the applicants filed this Rule 27 application to remove the bar.

[14] It should also be noted that pertaining to the second applicant, the notice of bar which was filed on 23 July 2020 was filed one day prematurely. As stated, the second applicant filed a Rule 30 notice in this regard but failed to pursue this any further. Consequently, the second applicant and the other applicants by proceeding in terms of Rule 27 expressly acquiescing in the irregularity of the SIU's notice of bar.

[15] If it was the case of the applicants and to the extent that they contend that the notice of bar was irregular either because it was served prematurely or should not have been served by way of email, the applicants' correct course of conduct

should have been to apply to set aside the alleged irregularity. This they failed to do, despite their intention at some stage to pursue the Rule 30 procedure.

[16] As a result of the filing of the current Rule 27 application, the Court must proceed from the premise of the regularity of the notice of bar and the service thereof and consider whether condonation should be granted allowing the applicants to file their pleas approximately two years after being barred on 1 August 2020.

[17] The relevant portions of Rule 27 provide as follows:

“1. In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time or doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

3. The court may, on good cause shown, condone any non-compliance with these rules.”

[18] It is trite that in condoning non-compliance with the Rules of Court a court has discretion to exercise. This is so because the applicants seek the indulgence of the court. In *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at para 23, the Constitutional Court put it thus:

“[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with

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

[19] At paragraph 15 of *Grootboom*, the court stipulated the factors that are taken into account in such an enquiry to include –

19.1 The length of the delay;

19.2 The explanation for, or cause for, the delay;

19.3 The prospects of success for the parties seeking condonation;

19.4 The importance of the issues that the matter raises;

19.5 The prejudice to the other party or parties; and

19.6 The effect of the delay on the administration of justice.

[20] Zondo J stated at paragraph [51] of *Grootboom* that:

“The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

[21] In *eThekweni Municipality v Ngonyama Trust* 2014 (3) SA 240 (CC), the Constitutional Court in similar vein found as follows at paragraph 28:

“As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay, and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay.”

[22] Considering the authorities quoted, the Court will have to consider the extent and explanation of the delay, the prospects of success and the prejudice to be suffered by the parties should the applicants be allowed to file a plea stating their defences in this matter.

[23] The explanation provided by the applicants for the lengthy delay from October 2020 to January 2022 is superficial and unconvincing. On a reading of the affidavit filed on behalf of the applicants, there is no actual or real explanation for the considerable delay.

[24] The applicants tried to hide behind a Rule 35(14) notice served by them to explain the delay. It was stated that they waited for the requested investigative report before they could plea. This explanation is without merit as the applicants were placed under bar before the 35(14) notice, which was in any event replied to.

[25] On the applicants' own version, they became aware of the notice of bar during or about October 2020. Their attorney decided to do something about it by filing

a Rule 30 notice on 2 November 2020. Thereafter nothing was done. That notice was abandoned.

[26] During argument before this court, it was in fact conceded that during the entire year of 2021 nothing was done.

[27] It should further be noted that in the affidavit filed on behalf of the applicants, nothing was stated about the Rule 30 notice which was filed. This was only referred to in the affidavit filed on behalf of the first respondent. Why this fact was concealed was never properly, or at all, explained before this court.

[28] In the applicants' affidavit reliance is placed on the Constitution and litigants' right to present their cases in court. In my view no constitutional right was breached in this case as the applicants were not deprived of their right to bring a timeous application either to set the alleged irregular notice of bar aside or to apply for condonation for the lifting of the bar.

[29] It was the applicants who flagrantly disregarded and abuse the rights afforded to them.

[30] As was stated in *Grootboom*, supra, in a case where the delay was inordinate, the court need not consider the prospects of success of the applicants in the action. The court will however consider the defences raised by the applicants.

[31] The applicants allege that the claim of the SIU has prescribed. The undisputed fact is that the SIU was only mandated in terms of proclamation to investigate the affairs of the SABC and institute civil proceedings if irregularities are found, on 17 September 2017. The main action was issued on 26 March 2020, well within the three year prescription period.

[32] The SIU was established by the President in terms of Proclamation R.118 of 31 July 2001 and mandated to investigate certain allegations relating to the affairs of the South African Broadcasting Corporation SOC Limited (the SABC) and institute civil proceedings emanating from the said allegations in terms of proclamation No. R.29 of 1 September 2017.

[33] This empowered the SIU to –

33.1 Investigate allegations on the grounds envisaged in section 2(2) of the Special Investigating Unit and Special Tribunals Act 74 of 1996. The applicants became entitled and empowered to institute the proceedings against the applicants in this court and in its own name in accordance with the provisions of ss 4(1) and 2(2), read with s 5(5) of this Act.

[34] Accordingly, it is the view of this court that the claim by the SIU against the applicants has not prescribed, as envisaged in the Prescription Act

[35] The applicants also raise as a defence the applicability of section 77(7) of the Companies Act 71 of 2008 (“the Companies Act”). This subsection sets a time bar of three years for a claim against a director. Section 77(7), read in the context of the entire section, only applies to a claim that is premised on a breach of the provisions of the Companies Act or of a company’s Memorandum of Incorporation and only in respect of loss sustained by the company.

[36] The claim of the SUI does not seek to recover any loss, damage, or costs from the applicants, in terms of any section of the Companies Act. The SIU is entitled and empowered to institute the claim in its own name in accordance

with the provisions of sections 4(1) and 2(2), read with section 5(5) of the Special Tribunals Act No 74 of 1996.

[37] The claim of the SIU is premised on the allegations that SABC's Governance and Nomination Committee had no authority to approve the payment of a "success fee" to Mr Motsoeneng because the SABC's Delegation of Authority Framework ("DAF") only has powers of recommendation and was always subject to Board approval. Thus, the SIU's case against the applicants is that they breached the provisions of DAF and sections 50 and 57 of the Public Finance Management Act. This claim is advanced by the SIU and not the SABC. The reference in the particulars of claim that the applicants breached section 76 of the Companies Act is not the bases for the claim of the SIU suing in its own name. The claim in terms of sections 50 and 57, as pleaded in paragraph 24, is standing on its own and supports a cause of action.

[38] A further defence raised by applicants is that another court already found Mr Motsoeneng to be liable to repay the same amount claimed from the applicants to the SABC. It was argued that the matter of the applicants became moot.

[39] This can only be the case if the amount ordered to be paid by Mr Motsoeneng was in fact paid. On the evidence before this court the amount was not paid but Mr Motsoeneng applied for leave to appeal that order. The causes of action also differ. The claim against Mr Motsoeneng was premised on an illegal decision which resulted in receipt of a payment to him. The claim against the applicants is premised on a breach of their fiduciary duties to have made the decision for payment. The SIU was entitled to sue the applicants despite other proceedings which was pending against Mr Motsoeneng.

[40] These claim are for the same amount which was paid to Mr Motsoeneng and the SIU would not be entitled to execute against any party for more than what remains outstanding at the date of execution.

[41] The prospect of the applicants to successfully raise these defences are slim and is outweighed by the lack of explanation for the long delay to uplift the bar preventing the applicants to plea. The summons was issued on 26 March 2020, which is more than two years ago, and this matter needs, in the interest of justice and in the interest of the administration of justice, to be advanced to finalization.

[42] Accordingly, the application for the removal of the bar and for condonation to allow the applicant to file their pleas are dismissed with costs. The respondent asked for default judgments to be granted but this is not the application before this court.

[43] The applicant also asked for default judgment but this application is not before court for decision and should not be granted as part of the court's order.

[44] The application is dismissed with costs.

**RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Date of Hearing: 26 July 2022

Date of Judgment 23 August 2022

APPEARANCES

On behalf of the Applicant: Adv. GM Maboló

On behalf of the Respondent: MS. P. Cirone