



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

CASE NO: 44522/2018

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 23 September 2022

In the matter between:

NETHONONDO: PHINEAS

NETHONONDO: MASHANGU ESTHER

MASHUDU'S GARDEN DÈCOR

and

NATHCRON CC

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

RESPONDENT

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed application for the upliftment of a notice of bar and condonation for the late filing of a plea in terms of Rule 27 of the Uniform Rules of Court.

[2] In these proceedings, the Applicants were represented by Mr P. W. Makhambeni for the Applicants and Mr S. B. Nel for the Respondent.

[3] At the outset both Counsel agreed that the Court should condone the late filing of the answering affidavit and the replying affidavit in these proceedings. I accordingly, granted such condonation.

BACKGROUND FACTS

[4] The Respondent had a summons issued out of this Court wherein certain relief was claimed.

[5] The Applicants were to file a plea within the time periods stated in the summons which they failed to do and after some time these proceedings were initiated.

LEGAL FRAMEWORK

[6] Rule 27 of the Uniform Rules of Court provides 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 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.

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

ANALYSIS AND EVALUATION

[7] For the Applicants to succeed they need to have complied with the abovementioned Uniform Rule of Court. Our Courts¹ have given guidance in applying Rule 27. In this regard the phrase “good cause” has been interpreted to mean:

“...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”.

[8] In **Melane v Santam Insurance Company Ltd**² the Court in dealing with the issue of whether or not sufficient cause had been shown in not complying with the rules of court stated the following:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court 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 thereof, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

¹ Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 @ 353

² 1962 (4) SA 531 (A) @ 532C - F

[9] In **Brummer v Gorfil**³ the Constitutional Court added, in my view, an extra consideration that a Court must assess, namely, the interests of justice. The following was stated:

“This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant’s explanation for the delay or defect.”

[10] It is further clear that the Applicants must file an affidavit which explains the delay in filing their plea. In this regard the explanation must be sufficiently full to enable the Court to be able to assess and really understand how the delay came about. The explanation must also cover the entire period of the delay⁴.

[11] The question before this Court therefore is whether the Applicants, in this application for condonation and upliftment of the notice of bar, have measured up to the requirements set out above.

³ 2000 ZACC 3 @ para 3

⁴ Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd 2012 (2) SA 637 (CC) at 640 H - I

[12] The Respondent submits that they have not because the Applicants have not explained in detail the reasons for the delay as well as not explaining sufficiently the whole period of the delay, especially relating to the period when the Notice of bar was received and the burglary at the Office of the Attorneys.

[13] The Respondent submits further that the explanations about the burglary are self-contradictory and should not be believed by the Court. In this regard the Respondent points to the founding affidavit wherein it is mentioned at paragraph 26 that the Attorney was finalising the insurance claim whereas the affidavit in the docket of the burglary⁵ mentions that there was no insurance.

[14] The Respondent further states that the burglary issue should have been confirmed by the person laying the charge, namely, Mr Rudzani Gumi, but there is no confirmatory affidavit from Mr Rudzani Gumi and this factor adds to the point that the burglary of the computers should be disbelieved by this Court.

[15] The Applicants in turn submit that they have complied with the requirements for condonation and upliftment of the notice of bar. In this regard they submit that there were issues at the Office where the former secretary had emailed the plea but as a result of the burglary, they are unable to prove that the email was sent to the Respondent's Attorneys especially since the Respondent denies having received same.

[16] The Applicants submit that the Respondent has not shown the Court that they would be prejudiced by the granting of the relief claimed which prejudice cannot be cured by a costs order against the Applicants.

⁵ Caselines: 021-66

[17] The Applicants submit that they have a *bona fide* defence which is outlined in the plea and a ventilation of the dispute between the parties should be allowed by this Court.

[18] It should be stated at this stage, which in my view is an important factor in this case, that the delay and cause of the delay in this case arose because of the actions or omissions of the representatives of the Applicants. It is trite that an Applicant in given circumstances cannot hide behind the conduct of their legal representatives. The question though is, is this case one of those cases.

[19] In **Saloojee and Another NNO v Minister of Community Development**⁶ the following was stated in respect of a litigant being held to the failures of his 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 on 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 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 consequences of the failure are."

⁶ 1965 (2) SA 135 A @ 141 C - E

[20] The important principle enunciated above is that each case will be depend on its own circumstances. In my view, one of the circumstances would be where a litigant has a strong prospect of success in a given case. Furthermore, it is not for the Court adjudicating an application for condonation to dissect the defence or defences that a litigant has proffered but must assess *prima facie* that the litigant has proffered a *bona fide* defence. I am satisfied that the Applicants have proffered such defence.

[21] It is my view that the conduct of the legal representatives of the Applicants should not be held against the Applicants in the circumstances of this case as the Applicants would not have known about what was happening in the Offices of their Attorneys until such time as they were told.

[22] A further factor to be taken into account is the length of the delay. In my view the delay in this case cannot be categorized as an inordinate delay; in other words, the delay cannot be said be years or even six months for that matter. The plea was served out of time but on or about 11 March 2019. This delay, in my view, does not represent an inordinate delay.

[23] Mr Makhambeni, who argued this matter on behalf of the Applicants but did not draft the Heads of Argument, made a submission that this Court should apply the *audi alteram partem* principle in permitting the notice of bar to be uplifted. It should be stated immediately, that this principle finds no application in this case and the submission has no merit. Firstly, because this submission was not raised in the pleadings and secondly, the Applicants had the chance to respond to the Respondent's claim but such response was not submitted timeously and I do not see the relevance of the said principle in the circumstances of this case.

[24] A principle that does find application in this case is the interests of justice principle as stated in the **Brummer** case. There is more cogency in this argument applying to the circumstances of this case rather than the clutching at straw legal principle such as the *audi alteram partem* principle.

[25] On a conspectus of all the circumstances in this case, I am of the view that condonation should be granted and that the notice of bar must be uplifted for the reasons set out above. It follows further that if condonation is granted that the notice of bar must be uplifted.

COSTS

[26] It is trite that the party that is successful is entitled to their costs unless exceptional circumstances can be shown why this should not be applied. This application, however, is one that requests an indulgence from the Court. The opposition from the Respondent, in my view, cannot be said to be spiteful and vexatious nor frivolous. In fact, important issues were raised by the Respondent which this Court had to assess.

[27] In the circumstances, the Applicants must pay the costs of this application.

CONCLUSION

[28] In the result and as stated, on a conspectus of all the evidence, the Applicants have satisfied this Court that the relief claimed is warranted except in relation to the costs.

[29] Accordingly, the following Order shall issue:

- a). The failure by the Applicants to deliver their plea within the time period prescribed by the Uniform Rules of Court, is hereby condoned;
- b). The Notice of Bar dated 13 February 2019 is hereby uplifted;
- c). The Applicants are granted leave to defend the action by the Respondent/Plaintiff under the above case number;
- d). The Applicants are to pay the costs of this application, the one paying the others to be absolved.

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **23 September 2022**.

Date of virtual hearing: 15 March 2022

Date of judgment: 23 September 2022

Appearances:

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