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

CASE NO: 2019/40372

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between:

MASEHLA, TEBOGO MATHIBENG	Applicant
and	
GANCA, NOLUSIBA	First Respondent
GANCA, SIMO-SIHLE	Second Respondent

In re

GANCA, NOLUSIBA	First Plaintiff
GANCA, SIMO-SIHLE	Second Plaintiff
and	
MASEHLA, TEBOGO MATHIBENG	First Defendant
MATHIBENG, ADAM CHINAME	Second Defendant
MOODLEY, RHONA	Third Defendant

JUDGMENT

MOORCROFT AJ:

<u>*Summary*</u>

Rule 27(1) of uniform rules – good cause – bona fides – reasonable explanation and bona fide defence

Bar –application for removal of bar – no reasonable explanation for three-year delay

<u>Order</u>

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] For the sake of convenience I refer to the parties as they are referred to in the action. The applicant in this application is the first defendant in the action and is referred to as such.

The contract of sale

[4] The plaintiffs (as purchasers) and the first and second defendants (as sellers) entered into a contract of sale of immovable property in December 2016. The sellers were going through a divorce at the time and were liquidating their assets as part of the process.

[5] The contract of sale was subject to a voetstoots ("as is") clause. A number of specific defects were listed in clause 18 of the contract and the sellers undertook to remedy these listed defects.

An addendum to the contract was signed in October 2016. In terms of the addendum the defendants as sellers would no longer be responsible for the listed defects and the purchase price was reduced.

The plaintiffs took occupation of the property on 1 January 2017.

[6] The plaintiffs allege that they never received an electrical compliance certificate as they were entitled to in terms of clause 14 of the contract and in January 2017 they learned that there were no approved building plans in respect of the improvements on the property. Approved building plans is a prerequisite for the erection of structures on land and the failure to have plans approved when building may amount to a continuous offence.

They also became aware of a number of latent defects after moving into the house, and aver that the sellers knew of these defects but failed to point these out to the

plaintiffs as they were obliged to do.

The bar

[7] The plaintiffs caused a summons to be served on the defendants on 20 November and 2 December 2019. The first defendant entered appearance to defend the action on 6 December of that year. A plea was not forthcoming and a notice of bar was served on 9 March 2020. Receipt of the notice of bar is not in dispute.

[8] The plaintiff's particulars of claim were amended in 2021 but the amendment did not elicit a response from the first defendant.

The application to remove the bar

[9] The first defendant now seeks to remove the bar three years later. In January 2023 the first defendant requested the plaintiffs to agree to the removal of the bar and the request was refused. The present application followed on 6 February 2023 and the answering affidavit was filed on 25 March 2023.

The answering affidavit was filed out of time and condonation is being sought by the plaintiffs for the late filing. The answering affidavit was filed some 33 days after receipt of the application and in terms of the notice of motion the plaintiffs were granted ten days to give notice of an intention to oppose the application and fifteen days to file their answering affidavits. They were late by some eight days.

The plaintiff explain that the second plaintiff was working in the United Kingdom and a new attorney had taken over the matter at their attorneys' offices. There is no reason why condemnation should not be granted as no prejudice was shown. The short delay in filing the answering affidavit is insignificant in the context of the long period that has elapsed since the notice of bar was given.

[10] The plaintiff's application for default judgement was removed from the roll on 19 April 2022 because of non-compliance with requirements for enrolment, but only after a notice of set down had been served on the first defendant. It evoked no response. The matter was then enrolled for 12 September 2022 on which occasion the first defendant appeared in person. The matter was postponed.

[11] Four months later the first defendant's attorney came on record and the application was launched.

Rule 27(1)

[12] Rule 27(1)[1] provides that in the absence of agreement between the parties the court may on good cause shown make an order extending or abridging any time for doing any act or taking any step in connection with proceedings of any nature whatsoever. The rule therefore provides the machinery for the removal of a bar upon good cause shown.

Good cause comprises two elements, a *bona fide* defence and a reasonable explanation for the delay. The purpose of the rule is not to come to the aid of a reckless litigant or one who acts with an intentional disregard for the rules of court; the purpose is rather to accommodate the *bona fide* litigant.

[13] A satisfactory explanation must be given with sufficient particularity. This does not mean that an applicant for condonation must prove its claim or rebut a plaintiff's claim as it would at trial.

It must also be established that the granting of the order will not prejudice the other parties in a way that cannot be compensated by a suitable cost order.[2]

[14] The first defendant blames the failure to timeously defend the action on the fact

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1 See the discussion by Van Loggerenberg *Erasmus: Superior Court Practice* RS 17, 2021, D1-321 to D1-328B.

2 *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C) 112H to 113A.

that she was not able to procure the services of a legal representative to assist her and she only managed to do so in December 2022. There is however no explanation as to why she was unable to obtain the services of an attorney during the period March 2020 to December 2022, a period of 21 months.

[15] In the founding affidavit the first defendants deals with the reasons for the delay as follows in paragraph 42 of the founding affidavit:

> *"The plaintiffs' combined summons were served on me on 02 December 2019. Thereafter, I served the notice of intention to defend on time on 06 December 2019. On 12 September 2022, the plaintiffs applied for default judgement against me, and I went to appear in court personally to defend the application, as I was then not legally represented. On this day I informed the honourable court that I was a lay person and that I was in the process of procuring attorneys that would assist me in responding to the combined sermons that were served on me."*

[16] The first defendant waited another four months to brief attorneys and it was only in December 2022 that the attorneys contacted the plaintiffs' attorneys. She at all times knew of the importance of proper legal advice and already in 2019 before the litigation commenced she confirmed in correspondence that she was being advised by an attorney.

[17] Justice delayed is justice denied. In the absence of a reasonable explanation for the long delay the application must be dismissed.

[18] In respect of the *bona fide* defence the first defendant relies on the voetstoots close in the sale agreement and to a list of defects. The plaintiffs deny that the list of defects formed part of the agreement and state that it was only furnished in April 2017, some seven months after the agreement were signed in September 2016. The plaintiffs aver that the first defendant was aware of the latent defects and could not rely on the voetstoots clause.

It is the case for the first defendant that list of defects was in existence when the contract was signed and that it formed part of the written contract; it follows that the

contents were known to the first defendant at the time when the contract was entered into, and this is confirmed the signatures of the first and second defendants appearing on the document.

The document was however not signed by the plaintiffs who did sign the contract itself. The document is not referred to in the body of the contract. It is a free-standing document.

Prescription

[19] The first defendant also relies on prescription. The summons were served three years and two months after the contract was entered into and the three-year prescription period in section 11(d) of the Prescription Act, 68 of 1969 is applicable. Prescription only begins to run when the *“creditor becomes aware of the existence of the debt”*[3] and the plaintiffs explained that the defects only became visible after they had taken occupation on 1 January 2017.

Conclusion

[20] I conclude that the first defendant failed to show good cause for removal of the bar. I therefore make the order as set out in paragraph 1 above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

[3] Section 12(2) of the Prescription Act.

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **16 OCTOBER 2023**.

COUNSEL FOR THE APPLICANT:	T QHALI
INSTRUCTED BY:	NYAPOTSE INC
COUNSEL FOR THE RESPONDENTS:	N TERBLANCHE
INSTRUCTED BY:	COETZEE ATTORNEYS
DATE OF HEARING:	3 OCTOBER 2023
DATE OF JUDGMENT:	16 OCTOBER 2023