

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **3rd March 2023** Signature:

CASE NO: 9255/2020

In the matter between:

NATHANIEL HOLDINGS (PTY) LIMITED

Plaintiff

and

XTREME INTELLIGENCE SYSTEMS (PTY) LIMITED

Defendant

Coram: Adams J

Heard: 27 February 2023

Delivered: 03 March 2023 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 3 March 2023

Summary: Practice – Uniform rule 27 – pleading – bar – removal of – when granted – defendant barred from pleading to particulars of plaintiff's claim – defendant not aware of notice of bar until application for default judgment served on it – requirements for bar to be uplifted – 'good cause' to be shown by applicant – constituted by reasonable explanation for default and *bona fide*

defence – Court has inherent jurisdiction to grant such application – application granted.

ORDER

- (1) The plaintiff's notice of bar in terms of Uniform Rule of Court 26 dated 13 May 2020 be and is hereby set aside and the resultant bar against the defendant delivering its plea is hereby uplifted.
 - (2) The defendant is granted leave to deliver its plea within five days from the date of this order.
 - (3) There shall be no order as to costs relative to this application.
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JUDGMENT

Adams J:

[1] In this opposed application for the upliftment of a bar, I shall refer to the parties as referred to in the main action, in which the plaintiff sues the defendant, on the basis of a written 'Service Level Agreement' dated 25/31 January 2019, for payment of the sum of R938 603, which, according to the plaintiff, represents the agreed fee in respect of services rendered by the plaintiff at the defendant's special instance and request. The defendant is the applicant in this application and the plaintiff is the respondent.

[2] The defendant applies for an order uplifting the bar and for an order granting it leave to deliver its plea. The application is brought in terms of the provisions Uniform Rule of Court 27, which in the relevant part provides as follows:

'27 Extension of time and removal of bar and condonation

- (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.

- (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.
- (3) The court may, on good cause shown, condone any non-compliance with these rules.
- (4)'

[3] The issue to be decided in this application is simply whether the defendant has made out a case for the upliftment of the bar as provided for in the aforesaid rule. Crystallised further, the question to be considered by this court is whether the defendant has shown 'good cause' to have the bar uplifted. This issues is to be decided against the factual backdrop of the matter as set out in the paragraphs which follow.

[4] The summons in the main action was issued on behalf of the plaintiff on 17 March 2020 and was served on 23 March 2020 on the defendant, who, through their erstwhile attorneys (Webbers) delivered notice of appearance to defend on 27 March 2020. On 13 May 2020, unbeknownst to the defendant, the plaintiff's attorneys served a notice of bar in terms of Uniform Rule of Court 26 on Webbers, who omitted to advise the defendant of same. More tellingly, Webbers failed to deliver a plea on behalf of the defendant within the five days prescribed by the said notice of bar. Instead, on 11 June 2020 Webbers withdrew as the defendant's attorneys of record.

[5] On 5 October 2021 the plaintiff caused to be served on the defendant an application for default judgment due to the defendant's failure to deliver its plea. This was the first time that the defendant realised that they have been barred from delivering a plea and that the plaintiff was in the process of applying for default judgment against it. On 4 November 2021, the defendant instructed their present attorneys of record (Pagel Schulenburg Incorporated), who immediately placed themselves on record as defendant's attorneys. On 8 November 2021, defendant's attorney addressed a written communiqué to the plaintiff's attorneys, confirming that they had been instructed in this action and requested

the plaintiff to agree to the upliftment of the bar. On the same day, the plaintiff's attorneys responded and confirmed that they then had instructions not to agree to the upliftment of the bar. The plaintiff was also insisting on proceeding with the default judgment application, which was set down for hearing on the 9 November 2021, being the following day.

[6] On 9 November 2021, the default judgment application was postponed in order to allow the defendant to apply to have the bar uplifted. After this date, there were attempts between the parties to amicably settle the matter. The attempts were in the form of a number of telephonic discussions between the legal representatives of the parties, as well as written 'without prejudice' settlement offers between them. During the settlement discussions, there was a request by the defendant's legal representatives that the proceedings be stayed pending the settlement negotiations. During early December 2021, with a further view to settlement, the parties contemplated convening a 'round table meeting', which finally materialised on 28 January 2022, on which date the 'roundtable meeting' was held between the parties. The delay in convening the said meeting is reasonably explained by the defendant by reference to the December holidays intervening and their offices closing during mid-December 2021.

[7] Subsequent to this meeting, the negotiations continued. And on 3 March 2022 the plaintiff's attorneys rejected a final settlement offer, which had been made by the defendant. By then the settlement negotiations had clearly failed and the plaintiff indicated that it was intending to proceed with the litigation in the matter. On 10 March 2022 the present application was launched by the defendant.

[8] That brings me to a discussion of the principles applicable to the upliftment of a bar. It is trite that the subrule requires 'good cause' to be shown, which gives the court a wide discretion which must, in principle, be exercised with regard also to the merits of the matter seen as a whole. What constitutes 'good cause' is, in sum, a demonstration by an applicant (the defendant in this case) that the following two requirements have been met: (a) The first is that the

applicant should file an affidavit satisfactorily explaining the delay. 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. And the application must be *bona fide* and not made with the intention of delaying the opposite party's claim. (See for example: *Smith NO v Brummer NO*¹; *Ingosstrakh v Global Aviation Investments (Pty) Ltd*²). (b) The second requirement is that the defendant should satisfy the court on oath that he has a *bona fide* defence. (See *Body Corporate v Bassonia Four Zero Seven CC*³). The minimum that the defendant must show is that his defence is not patently unfounded and that it is based upon facts (which must be set out in outline) which, if proved, would constitute a defence.

[9] *In casu*, I am satisfied with the explanation for the default given by the defendant. It is not disputed that its erstwhile attorneys did not advise the defendant of the fact that it had been barred from pleading by the service of a rule 26 notice of bar. As soon as the foregoing came to the attention of the defendant, it immediately took steps to rectify the situation. Defendant has therefore, in my view, complied with the first requirement.

[10] As regards the requirement that the defendant must demonstrate that it has a *bona fide* defence to the claim by the plaintiff, it is the case of the defendant that the plaintiff failed to comply with the prescripts of the agreement in that it failed to deliver the requisite breach notification prior to instituting action. Plaintiff's claim is thus, so the defendant avers, premature.

[11] Moreover, so the case of the defendant goes, the plaintiff did not perform in terms of the agreement nor did it comply with the terms thereof. It is therefore not entitled to payment for services that it did not render. What is more, so the defendant alleges, the agreement is *void ab initio* as the defendant did not act in good faith in that it failed to disclose its relationship with a direct competitor of the defendant and utilised the property of this competitor in order to fulfil part of its obligations towards the defendant. This is a breach of an express term of the

¹ *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A;

² *Ingosstrakh v Global Aviation Investments (Pty) Ltd* 2021 (6) SA 352 (SCA) at para [21];

³ *Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454F–G;

agreement, which required the parties to act reasonably, *bona fide* and in good faith. It is unknown what confidential information and trade secrets were provided by the plaintiff to this competitor, so the defendant alleges, however the mere fact that the plaintiff was contracted with the competitor and failed to disclose this to the defendant, amounted to a breach of good faith.

[12] I am therefore persuaded that the defendant has demonstrated that it has a *bona fide* defence to the plaintiff's claim.

[13] For all of these reasons, the defendant's application for the upliftment of the bar should succeed.

Costs

[14] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See *Myers v Abramson*⁴.

[15] *In casu*, the defendant did however require from the court an indulgence, and should at the very least be liable for the costs of the unopposed application. On the flipside is the fact that the plaintiff should not have opposed this application.

[16] I am therefore of the view that the appropriate costs order would be one in terms of which each party bears its own costs in relation to this application to uplift the bar. I intend granting an order to that effect.

Order

[17] In the result, the following order is made: -

- (1) The plaintiff's notice of bar in terms of Uniform Rule of Court 26 dated 13 May 2020 be and is hereby set aside and the resultant bar against the defendant delivering its plea is hereby uplifted.
- (2) The defendant is granted leave to deliver its plea within five days from the date of this order.
- (3) There shall be no order as to costs relative to this application.

⁴ *Myers v Abramson* 1951(3) SA 438 (C) at 455

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON: 27th February 2023

JUDGMENT DATE: 3rd March 2023 – judgment handed down electronically

FOR THE PLAINTIFF: Advocate R Bhima

INSTRUCTED BY: Motsai Attorneys Incorporated,
Northcliff, Johannesburg

FOR THE DEFENDANT: Advocate Mabunda

INSTRUCTED BY: Pagel Schulenburg Incorporated,
Bryanston