



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

CASE NO: 62925/2014

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
16 March 2018
DATE	SIGNATURE

16/3/18

In the matter between:

VUYANI BOLDWIN MASEKO

1st Plaintiff

KHANYI MOKGOSI O.B.O ZANGI MOKGOSI

2nd Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT

MIA, AJ

- [1] The applicant (plaintiff in the main action) seeks default judgment in respect of a claim for damages in the total amount of R1000 000.00 plus interest arising from the alleged unlawful arrest and detention of the first and second applicants for a period of five (5) hours at the Vosloorus Police Station on 9 September 2011. Before dealing with the application for default judgment I am required to deal with an application by the defendant in the main action requesting :

1.1 That the late filing of the applicant's plea to the respondent's particulars of claim be condoned;

1.2 That the barring of the applicant to file a plea to the respondent's particulars of claim be removed;

1.3 That the applicant be ordered to pay the costs of this application on an unopposed basis.

[2] I will refer to the parties as they are cited in the main action. The plaintiff opposed the application for condonation. I propose to deal with the background facts to the application for condonation before dealing with the application for default judgment.

[3] The deponent to the founding affidavit for the application for condonation, Ms Amanda Gxogxa, joined the State Attorney's office on 1 July 2015. She was required to take over the files of a colleague Ms Puso who resigned on 31 August 2015. At that stage the defendant had already been barred from delivering its plea. Her perusal of the file indicated that summons was issued on 25 August 2014 and served on the State Attorney on 28 August 2014. The attorney allocated to deal with the matter was a Mr Maponya. A notice of intention to defend was filed on 2 October 2014. The plea was due on 29 October 2015. The plea was not filed. On 11 December 2014 the plaintiff served a notice of bar. The notice of bar did not come to the attention of Mr Maponya. Mr Maponya filed a notice in terms of Rule 30A on 15 January 2015. Mr Maponya left the office of the State Attorney Pretoria for a senior position in Mafikeng on 31 January 2015. Ms Puso then took over the file. It appears that no further action was taken until she resigned on 31 August 2015.

- [4] When Ms Gxogxa took up her appointment she took over 500 files and had to determine the status of each of the files. She realised there was a notice of bar in the present matter and enquired whether there was a default judgment. She received no response. She noted that there was an application for condonation for the late filing of a notice in terms of section 3 of Act 40 of 2002. On 10 September 2015 she received instructions to bring an application to remove the bar and to defend the matter. Her instructions were that there was no record of the minor child being arrested which necessitated her pursuing the defendant's defence herein. She made attempts to communicate with the attorney to reach agreement on the issue of the late filing of the plea. On 6 October 2015 an application for default judgment was received.
- [5] The plea is late by a period of approximately one year. Both state attorneys who previously dealt with the matter have since left the office of the State Attorney. There are no affidavits filed by Mr Maponya or Ms Puso explaining why the plea was not filed timeously. When Ms Gxogxa took over the matter progress commenced in the matter resulting in the present application for condonation to get the issue of the bar to pleading lifted.
- [6] In terms of Rule 27(3) the court may, condone any non-compliance with the rules where the applicant has shown good cause. This discretion must be exercised judicially having regard to the facts of each case and being fair to both sides. Where there is a slight delay, a good explanation may compensate for weak prospects of success. The persuasiveness of any factor will vary according to the circumstances, including the particular rule that has been infringed. The court will also consider in each matter whether good or sufficient cause has been shown for the relief sought. Inherent in the inquiry into good cause is whether the application is *bona fide* and this includes the applicant's prospects of success.

- [7] Of the factors relevant to the prospects of success is the degree of non-compliance¹. In the present instance there was a delay of more than 12 months. Ms Lupuwana submitted that the State Attorney's office was extremely under resourced and dealt with many matters and was flooded with similar claims for wrongful arrest or detention. The first state attorney believed a Rule 30A notice was applicable and it appeared that Ms Puso who resigned had not attended to the matter. Mr Roodt however had furnished instructions.
- [8] She submitted further that the court had to consider the prospects of success and having regard to the amount of the award requested in the amount of R500 000 per litigant the prospects of success for the plaintiff were not good in view of the period of detention being five hours. In the alternative she submitted that on this basis at least the applicant ought to be afforded the opportunity to challenge the merits with regard to the amounts. This contributed to the prospects of success of the applicant in the application for condonation.
- [9] Ms Lupuwana submitted further that the respondent did not pursue the matter with any haste and thus the application for condonation ought to be granted to afford the parties the opportunity to ventilate the issues fully before the court. She referred to the decision in *Wright v Morgan* 1958(3) SA 731 at 734 where the court per Potgieter J, stated
- "I do not think that the attorneys are guilty of any negligence in being unable to have all that done within 24 hours and being only one day late. Although therefore I have no doubt that the two sets of attorneys were negligent (if applicant's allegations are true), I cannot find that their negligence reached such a degree of culpability as to debar their client from

¹ *Gumede v Road Accident Fund* 2007 (6) SA 304 (C); *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] 2 All SA 462 (SCA); *Subramanian v Standard Bank Ltd* [2013] JOL 30321 (KZP) at [12].

relief and I come to this conclusion because there is no automatic bar as notice to plead must first be served before defendant is barred from pleading. I was of opinion, therefore, that defendant was entitled to relief."

[10] She referred also to *Service Motor Supplies (1956) Pty Ltd v Fouche and Another* 1960(3) SA 672 (W) where the Court held that, as the request for particulars involved the lifting of the bar, that the applicant was entitled to apply for an extension of time within which to plead. Although the applicant had not shown sufficient cause for indulgence, the court held since the applicant was entitled to certain of the particulars, the Court should avoid delay and further costs and order such legitimate particulars to be given with leave to the applicant to file a replication and plea in reconvention.

[11] In addition to the quantum the defendant delved into the merits and submitted that the mere decision not to prosecute by the State was no indication that there was no cause for the police officers to act to arrest the plaintiff. There was also no record of arrest of the minor child and thus there was the dispute about whether the minor had been arrested. There was prejudice to the public purse with the high incidence of such claims and there was no further prejudice to the plaintiff's who had not pursued the matter with haste.

[12] Mr Biyana appearing for the plaintiff submitted that the defendant had not shown good cause for condonation and upliftment of the bar. On the issue of the reasons for the delay there was an inordinate delay of over a year. There was no affidavit from either Mr Maponya or Ms Puso explaining the reasons for the delay. He conceded however that the litigants could not be punished for the delay on the part of the attorney. He submitted that there was no defence against the claim on behalf of the minor child. Even though there was a dispute, the photographs attached were clear and the State would experience difficulty resisting

this claim. He therefore requested that the matter proceed with regard to the minor child. He submitted further that the regulation attached to the National Road Traffic Act prohibited being a pedestrian on a national road but did not specify a penalty for the offence. It certainly did not warrant an arrest in the circumstances.

- [13] In *Road Accident Fund v Britz obo Britz* (76318/2013) [2017] ZAGPPHC 762 (3 November 2017) the court stated at paragraph [11]

"It is clear from Rules 30 and 27 that time limits and abridging thereof is central to the Rules. The role of the Rules in the litigation process must therefore be placed in context. The Rules are formulated to govern procedural matters in the litigation process within specified time limits. They are meant to bring matters to a point where an executable order can be given by a competent court in an expeditious manner. The Rules are designed to remove the burden of regulating procedural matters from the Court. The rules are meant for the Court and not the Court for the rules. The common law jurisdiction of the high court further allows a high court to govern its own procedures and with Rule 27, to condone non-compliance with any of the rules. The time limits provided for in the Rules are, therefore, not inflexible. However, in interpreting the Rules of Court, Schreiner JA in *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) said:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

- [14] In considering the application for condonation I am mindful of the delay but it is evident that there is no *male fide* intention to delay the proceedings. Rather the defendant seeks to deal with the real merits of the matter. In considering whether there is real prejudice to the plaintiffs I have considered the period of time that has passed and that

they have not necessarily pursued the claim with haste. The defendant has been candid with this court with regard to the delay and the reasons therefore. There is an increase in the number of claims for damages as a result of unlawful arrest. It is not appropriate that such matters be dealt with by way of default judgment especially where the defendant challenges certain aspects on the merits. In such circumstances and where the public purse is affected condonation which allows the merits of the matter to be ventilated is in the interests of justice. Certainly on the monetary value claimed there appears to be reasonable prospects of success especially as the attorney for the plaintiff requested default judgment for the amount of R150 000 instead of the R500 000 claimed and conceded that the amount was within the discretion of the court.

[15] I put to Mr Biyana that there were certain issues regarding the detention of the minor child which ought to be put before the court in determining the amount. He conceded this aspect. It is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully. It is not desirable that a matter be dealt with in a piece meal fashion as requested and that default judgment be granted in respect of one of the plaintiffs and postponed in respect of the other in the event that condonation is granted. It is desirable that all parties be given the opportunity to state their case as comprehensively as possible. In view hereof the defendant has shown that there is good cause why condonation be granted and the bar be lifted to enable the defendant to file its plea.

[16] In view of my decision to grant condonation and the consequent relief flowing there from it is appropriate to postpone the application for default judgment.

- [17] The plaintiff is seeking condonation for non-observance of court procedure and thus is seeking the indulgence of the Court. The length of the delay is also a lengthy delay. The applicant also failed to file affidavits of the attorneys dealing with the matter prior to Ms Gxogxa attending to the matter. In view hereof I am of the view that they should pay for the costs of the application.

ORDER

- [18] For the reasons above the following order is made:

- 1.1 The late filing of the defendant's plea to the plaintiff's particulars of claim is condoned;
- 1.2 The barring of the defendant's filing of a plea to the plaintiff's particulars of claim is removed;
- 1.3 The defendant is to file its plea within 15 days from the grant of this order;
- 1.4 The defendant is ordered to pay the costs of this application.
- 1.5 The application for default judgment is postponed sine die.



S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the applicant	:	Adv LL Biyana
Instructed by	:	Legal Aid South Africa
On behalf of the respondent	:	Adv T Lupuwana
Instructed by	:	The State Attorney, Pretoria
Date of hearing	:	26 February 2018
Date of judgment	:	16 March 2018