IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: **21846/18**

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

26/01/2023
DATE SIGNATURE

In the matter between:

JAMES OPENSHAW ZERVAS	**Applicant**
and	
FREDERICK CHRISTOFFEL GREEFF	**Respondent**
In Re:	
FREDERICK CHRISTOFFEL GREEFF	**Plaintiff**
And	
SCENIC ROUTE TRADING 502 CCt/a DEVCO GROUP (IN LIQUIDATION)	**1st Defendant**
JAMES OPENSHAW ZERVAS	**2nd Defendant**

JUDGEMENT

MNYOVU A J:

INTRODUCTION

[1] This is an application by the Applicant who is the second defendant in the main action. The relief is sought for the upliftment of bar, and that the second defendant be granted leave to deliver a plea and/ or counterclaim.

[2] For the sake of convenience, I will refer to the parties as in the main action.

POINTS IN LIMINE

[3] The second defendant's counsel in the arguments raised three points *in limine* that the court should take regard for the upliftment of the bar, the first point *in limine* being:

(a) the defective notice of set down and service in that no proper notice of set down was served on second defendant and to the liquidators of the first defendant, there is non-compliance with the Uniform Rules of Court, the parties were served with date application form; and

(b) considering that period of three years has lapsed, from the time notice of intention to defend, up until the plaintiff delivers its Rule 28 Notice by email, is irregular steps in these proceedings.

The second point *in limine* being:

(a) failure to comply with the provisions of rule 18(1) in that neither the original particulars of claim, nor amended particulars of claim are signed, as required by the *Rule - which provides that a combined summons, and every other pleading except a summon, shall be signed by both an advocate or attorney with right of appearance,* whereof, the amended particulars by the plaintiff to seek judgement constitutes irregular steps.

The third point *in limine* being:

(a) Superannuation in that, considering that the second defendant delivered a Notice of of intention to defend the action on 11 May 2018, thereafter, the plaintiff only took a further step to prosecute the action on 01 July 2021, when by delivering the Rule 28 Notice by way of email, thus there is an inordinate delay in excess of three years which is unexplained by the plaintiff. Therefore, the second defendant raises that an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant dismissal of an action.

[4] The respondent also raised two points *in limine,* the first point *in limine* being :

(a) Lack of *bona fide* defence, the plaintiff challenges second defendant's allegations that he was not made aware on the signing of Suretyship for the loan amount. The plaintiff disputes the contention, as the second defendant was at all times privy to the negotiations of the terms and conditions of the loan agreement, and as such the Suretyship agreement was drafted by the second defendant's attorney on his instructions.

(b) the plaintiff, further challenges the second defendant that he does not owe him, as he failed to bring any action for the recovery of a claim.

(c) in that, plaintiff denies that it is indebted to the first and second defendant, even if defendant had such claim , it would not constitute a *bona fide* defence.

The second point *in limine* being:

(a) Failure to provide to sufficient reasons for default. The second defendant alleges that he relied on the incorrect advice given by his attorney, as a reason for his default.

(b) The plaintiff alleges that the second defendant is obstructive and vexatious as he has merely launched this application n solely to delay the proceedings, he is in wilful default of the proceedings, he has failed to satisfy the criteria for application for the upliftment of bar.

MAIN APPLICATION

[5] The plaintiff instituted action against the first and second defendant on 26 March 2018. It is common cause that the parties concluded a written loan agreement, with an accompanying written suretyship agreement in terms whereof the second defendant bound himself as Surety and co-principal debtor for the first defendant's obligations in terms of the written loan agreement on 26 February 2015. The plaintiff demanding the payment of the balance of the loan amount of R446 079.06 and interest thereon.

[6] The summons was served on 23 April 2018, Notice of intention to defend was filed on 11 May 2018. No plea was served by the first and second defendant to the plaintiff's attorney. Rule 28 Notice was served to the first defendant's liquidators being introduced to the main action and to the second defendant on 01 July 2021. The amended pages were then served on 27 July 2021, following the service, Notice of Bar was served on 26 August 2021. Application for default judgement was served on 16 September 2021. Notice of set down was served on 14 October 2021 for default judgement hearing on 29 October 2021.

[7] The second defendant having directed to the plaintiff's attorneys, that he will receive the pleadings by email, the second defendant received the pleadings and he attended the hearing in person, on 29 October 2021, the second defendant requested postponement to seek a legal representative, as he was unrepresented, the court granted postponement *sine die*, in favour of the second defendant.

[8] On 8 April 2022, the plaintiff notified the liquidators of the first defendant and second defendant about the date of an application of default judgement by email. The matter was heard on 25 April 2022 in which my brother Justice du Plessis AJ stood it down to 29 April 2022 for the second defendant to deliver an application to uplift the bar in terms of Rule 27.

[9] The application is being opposed by the plaintiff/ respondent.

[10] The court must adjudicate on the issues in dispute that the second defendant will be relying the defences namely:

(a) that he was not aware that he signed the suretyship agreement;

(b) that he and first defendant do not owe the plaintiff any monies;

(c) enforcing the loan agreement would be against public policy and

(d) the plaintiff had to be registered as credit provider at the National Credit Regulator in terms of the National Credit Act 34 of 2005.

[11] The issues requiring determination in this application by this court is

(a) whether applicant has shown good cause from founding affidavit for the upliftment of bar by providing a reasonable explanation for his default and demonstrating a *bona fide* defence.

[12] The aspect of good cause was reiterated in *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) by adding two requirements. Firstly, the applicant should file an affidavit satisfactorily explaining the delay. Secondly, the applicant should satisfy the court on oath that he has a *bona fide* defence. Thirdly, the granting of indulgence sought must not prejudice the plaintiff.

[13] In the present case, the second defendant/applicant on his founding affidavit set reasons for his default to file his plea, as follows, after receipt of summons on 23 April 2018, he instructed Willem Lacante of Lacante Henn Inc to defend the action on his behalf and first defendant, he alleges that his initial failure to file the plea was because of receiving incorrect advise from his erstwhile attorney of record Steynberg Law Inc, that the liquidation of the first defendant precluded the plaintiff /respondent from taking further steps against him personally, in that, he doesn't have *locus standi* to act on behalf of first defendant.

[14] The second defendant further alleges that he was advised by his legal representative that the liquidators of the first defendant have requested the plaintiff to submit its claim against the insolvent estate and was made to sincerely believe that the plaintiff was obliged to first exhaust their remedies against the insolvent estate, as directed by the liquidators of the first defendant, as such, he sent the proof to the plaintiff confirming that there is R12 million to be collected in the insolvent estate of the first defendant. In support of this, the second defendant rely on relevant correspondences and copy of report from the liquidators of the first defendant.

[15] After the advice he did not instruct any legal representative to file the plea. The second defendant contended that after delivery of the Notice of intention to defend, nothing transpired from this matter, until 1 July 2021, more than three years later when he received a Rule 28 Notice from the plaintiff, amending particulars of claim. He was constantly attending another case instituted by the plaintiff against him and first defendant, for monies owed by various debtors (prior liquidation).

[16] The second defendant further contended that after receiving notice of enrolment of plaintiff's application for default judgement, he properly consulted with legal representatives to uplift the bar, he submitted that he was not in wilful default and was never his intention to disrespect the rules and procedures of the court. He struggled with caselines.

[17] The second defendant submitted that he has *bona fide* defence in plaintiff's claim, in that, he was not aware that he was signing as a surety for the first defendant's obligations in terms of the loan agreement, he was not aware that he was being held liable personally, he further alleged that between parties it was never distinguished between conduct, including payments made, their personal capacities or on behalf of PPM and first defendant, the second defendant further submitted that he does not owe the plaintiff any money, he paid over R2 million to the plaintiff and the plaintiff owes him.

[18] The second defendant contended that the plaintiff's conduct has caused him to suffer damages, by enforcing the loan agreement to him.

[19] As alluded in paragraph 4, the plaintiff alleges on its answering affidavit it is blatant attempt by the second defendant to once again mislead the court, the second defendant is grasping straws to evade civil his civil liabilities in terms of suretyship agreement, furthermore, as much the second defendant denies that he is indebted to the plaintiff, in fact, plaintiff owes both second and first defendant overpayments, the second defendant failed to institute civil proceedings for recovery of such claims against the plaintiff.

[20] Furthermore, the plaintiff alleges that even though the second defendant relied on the alleged incorrect advice given by its erstwhile attorney, the second defendant failed to provide sufficient reasons for his default, such reason cannot be accepted as the truth in this court, as there was no evidence to support such an allegation. The plaintiff describes the second defendant as a seasoned litigant who has been represented by different attorneys in various

matters, therefore, the second defendant is well aware of legal process, he launched the application to merely delay these proceedings, its his nature to avoid liability for debt due, owing. For the above reasons, the second defendant does not have *bona fide* defence, he is in wilful default in these proceedings before this court. There are compelling reasons for the non-compliance by the second defendant. Therefore, the second defendant is not entitled to the upliftment of bar.

ARGUMENTS

[21] As alluded in paragraph 3, the counsel for the second defendant submitted that in his arguments, pertaining on point in *in limine,* in addition to the *bona fide* defence raised, the second defendant will also be entitled to invoke common law remedy to have action dismissed for want of prosecution, if he can prove that, firstly, there is a delay in the prosecution of the action, secondly, the delay is inexcusable; and he is seriously prejudiced thereby, in support of their argument, the second defendant relied on the various following authorities. In essence as the plaintiff's cause of action is based on events which transpired during 2015, summons issued in 2018, the second defendant is entitled to apply to the court to dismiss the action on the above grounds.

[22] Further, the second defendant relied on the well-known authority of *Smith NO v Brummer NO and Another,* 1954 (3) SA 352 (O) at 358A to substantiate their arguments pertaining to *upliftment of bar,* stating five factors where court have tendency to grant a removal of bar.

[23] As alluded in paragraph 10 above, the counsel representing the second defendant submitted that as indicated in the replying affidavit of the second defendant, the second defendant will no longer be relying on the non-registration of the plaintiff as accredit provider,

and concede that the provisions of National Credit Act of 34 of 2005 are not applicable to the written loan agreement.

[24] Counsel representing the second defendant further submitted that, while the second defend, was aware that he signed the suretyship agreement, he was not aware of the consequences of the suretyship agreement in that plaintiff may proceed against him simultaneously and/or separately from the first defendant as a result of having renounced the benefit of excussion in the agreement of suretyship.

[25] Counsel representing the defendant further submitted that the amount claimed by the plaintiff in terms of Clause 5 of the written loan agreement contains the repayment terms of the loan agreement. Having regard to those repayments made to the plaintiff, an amount in excess of R2 757 286.30 was paid by the first and second defendants, in support to these payments, the second defendant submitted to the founding affidavit the schedule of annexure "A" indicating R 2 757 286.30. these payment schedules were undisputed.

[26] Furthermore, counsel representing second defendant submitted that the second defendant would rely on the defence that the plaintiff should not be allowed to enforce its claim, as it would be against public policy to enforce an action in circumstance where plaintiff caused damages to the defendants.

[27] The second defendant in support of his argument pertaining to reasons for his default relied on the following authorities:

(a) *Grant v Plumbers (30)* the Honourable Court had to deal with a rescission of judgement wherein the applicant was under the mistaken impression that judgement was only being sought against the company of which he was the managing director, and not against him personally.

[28] In addition to second defendant's reasons for default and delay, the counsel representing second defendant submitted that plaintiff took an excess time period of three years where he took no steps to prosecute the matter. The plaintiff served Rule 28 notice and the amended pages, as well as Notice of bar, and the application of default judgement in 2021. Further, it was submitted that the plaintiff did not serve and file a proper Notice of set down as is required by the Uniform Rules of Court and the Practice Directives of the division, the plaintiff only serve the date of application form indicating only the first defendant's particulars. It is submitted that the second defendant was not in wilful default, and did not wilfully disobey the rules of the court.

LAW

[29] Uniform Rule 27- Subsection (1) stipulates that 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 anytime, Subsection (3) condone any non-compliance with these rules. Good cause shown has been expressed in *Du Plooy v Anwes Motors (Edms) Bpk* 1983(4) SA 212 (O) the court held that in addition to showing "good cause" for the delay an applicant also should also disclose a defence. The applicant had to furnish a reasonable explanation for the delay. The applicant had to show that the application had been made *bona fide* without intention of delaying the action.

[30] As alluded on paragraph 11, in considering the conspectus of all relevant factors- the facts, it is inherent in law firstly, to consider Section 34 of the Constitution, it allows any party the opportunity to fully ventilate a matter and have access to courts. In deciding whether good cause for the delay was shown by the second defendant. The second defendant was surety and co-principal debtor on behalf of first defendant at the time the legal proceedings were being instituted in terms of Suretyship Agreement.

ANALYSIS AND REASONING

[31] The second defendant disclosed the reasons of his default, in his founding affidavit. I have summarised them in par 13,14, and 15 above, I need not to repeat the content. It is my view that these reasons are irrelevant for this matter, as the first respondent was not liquidated at the time the proceedings were instituted.

[32] To consider whether the second defendant has shown good cause from founding affidavit for the upliftment of bar by providing a reasonable explanation for his delay. The court took into consideration that Rule 28 Notice was served on 01 July 2021, three years later after the institution of the claim. The amended particulars of claim were then served on 27 July 2021, following the service, Notice of Bar was served on 26 August 2021, the second defendant still labouring under the mistaken belief that the plaintiff had to lodge a claim against the first defendant's estate, however, the second defendant have to persuade or convince this court, with reasonable explanations, as what steps did, he take, from receipt of amended particular of claims

[33] Further from above, the court take into consideration that, the second defendant in its point *in limine* indicated that the plaintiff failed to comply with provisions of rule 18(1) in that neither the original particulars of claim are signed, as required by the rule, however, the second defendant does not give reasons why he did not file the special plea to Rule 28 within time limits. The court cannot speculate whether the special plea was not filed because the original particulars of claim were not signed, or not.

[34] The second defendant raised a point in *limine* on the defectiveness of the Notice of set down as irregular step, as it was not served properly to the defendants, it is my view that, the Notice of set down was served for hearing of application for default judgement, and that the second defendant consented to exchange of pleadings by email with the plaintiff 's attorneys

from the inception of proceedings when the second respondent received Rule 28 Notice, this court does not see an irregular step with that effect.

[35] The second defendant raised third point *in limine* which the court should also take into consideration, that the second respondent delivered a Notice of intention to defend on 11 May 2018, thereafter plaintiff only took a further step to prosecute the action on 01 July 2021, by delivering Rule 28 Notice by email, is an irregular step , thus is an inordinate delay in excess of three years and constitutes an abuse of process and warrant to dismissal. In this context the second defendant, after filing Notice of Intention to defend on 11 May 2018, the second defendant explains that he was constantly attending another case instituted by the plaintiff against him and first defendant, for monies owed by various debtors (prior liquidation).

[36] The other explanations raised by the second defendant on its founding affidavit are that when he received Rule 28 Notice, he had long forgotten about the case, he had severe difficulty in gaining access to caselines, however, as much as, the second defendant was legally represented at all times, the court still has to establish whether that the good cause was shown for the delay, the second defendant is in wilful default,

[37] To consider whether the second defendant is in wilful default, the court took into consideration that the second defendant has been involved in this matter from the time he received Rule 28 Notice, he has been exchanging the correspondences with the plaintiff's attorneys, until he received, notice of court date by email, for application of default judgement, and attended the hearing. This court is satisfied that the second defendant was not in wilful default, he was always engaged in these proceeds, it is my view that both parties could have been in negotiations before taking the matter for application of default judgement.

[38] The court has to establish whether the second defendant has demonstrated or disclosed his *bona fide* defence. Initially, the second defendant submitted to this court that, at the time Suretyship agreement was concluded, he was not aware with terms and conditions of the signed the suretyship agreement, in that he was a co-principal debtor. Later, in the proceedings the counsel representing the second defendant submits to this court that, the second defendant was aware of the suretyship agreement but was not aware of the consequences of the suretyship agreement in that plaintiff may proceed against him simultaneously and/or separately from the first defendant as a result of having renounced the benefit of excussion in the agreement of suretyship. The court is on the view that this submission lacks *bona fide* defence.

[39] The second defendant further submitted to this court that he will rely on a defence that he does not owe the plaintiff any money, he has already paid excess over R2 million to the plaintiff and the plaintiff owes him, and submitted the spreadsheets showing proof of payment, the plaintiff does not challenge the second defendant but stand by it papers that the second defendant is indebted to him. It is my view that the defence raised by second defended is not ill founded, the evidence before this court cannot be ignored, should the second defendant file his plea and counterclaim.

[40] The second defendant further submitted to this court that he would rely on the defence that the plaintiff should not be allowed to enforce its claim, as it would be against public policy to enforce an action in circumstance where plaintiff caused damages to the defendants. It is my view that this context cannot be relied to as a *bona fide* to this claim.

[41] As alluded in paragraph 12, the court take into consideration that the responded indicated on its answering affidavit, should the second defendant be granted an order and uplift the bar he would be severely prejudiced. I do not agree with that averment, I am of the view

this application is not prejudicial to the plaintiff, if the plaintiff had not delayed the prosecution for a period in excess of three years, the main action could have finalised.

CONCLUSION

[42] I cannot see how it can be argued that the second defendant can be denied to uplift the bar, in the matter where it should have been long finalised, therefore I find it prudent to deviate from the general rule, as the plaintiff has caused delays in these proceedings in an excess of three years. The second defendant has been engaged with the plaintiff from inception of the case, I am satisfied that the second defendant has shown good cause of his default and is not in a wilful default. It will be in the interest of justice that the second defendant be given an opportunity to uplift the bar and file his plea, as there are prospects of success, to prove its counterclaim from the plaintiff. The issues between parties can only be clarified and ventilated on paper, after second defendant has file full set of pleadings and discovery had been exchanged. I am satisfied that defendant has disclosed a *bona fide* defence.

[43] In conclusion, I make the following order:

43.1 the application to uplift the bar is granted;

43.2 The defendant is ordered to file its plea within 5 days of this order,

44.3 Costs are in the main action.

B.F. MAYOVU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	Adv. A Mar'e
Instructed by	:	
	:	E Neethling Attorneys
Counsel on behalf of Respondent	:	Adv N. G. Louw
Instructed by	:	
		Warrener De Agrela and Associates
Date heard	:	11 October 2022
Date of Judgement	:	26 January 2023