Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

[redacted] 03 June 2024
SIGNATURE **DATE**

CASE No. 16815/22

In the matter between:

INTSHEBE PROPS 7 (PTY) LTD Plaintiff/Respondent

(Registration number: 2007/016330/07)

and

EKURHULENI METROPOLITAN MUNICIPALITY First Defendant/Excipient

KEECH FURNACE TECHNOLOGIES Second Defendant

(Registration number: 2016/509805/07)

JUDGEMENT

Barit AJ

Introduction

[1] In this matter the First Defendant has excepted to the Plaintiff's particulars of claim on two bases. Firstly, the particulars of claim fail to disclose a cause of action. Secondly, on the basis that the particulars of claim are vague and embarrassing. A preliminary matter is whether the First Defendant should granted condonation for late filing.

[2] The relief sought:

a. The Plaintiff (the Respondent in this application) seeks the exception and condonation to be dismissed with costs.

b. The First Defendant (the Excipient in this application) seeks granting of condonation for late filing; for the exceptions to be upheld and for the particulars of claim to be struck out.

[3] The Plaintiff (and the Respondent in this Application) is INTSHEBE PROPS 7 (PTY) LTD (Registration number: 2007/016330/07) ('Intshebe'), a private company with limited liability duly registered and incorporated in terms of the Companies Act 71 of 2008 and with its registered address at 1 Nantes, 13 Albany Street, New Redruth, Alberton, Gauteng..

[4] The First Defendant (and the Excipient in this Application) is EKURHULENI METROPOLITAN MUNICIPALITY ('the Municipality'), a Category A municipality as described in section 155(1) of the Constitution of the Republic

of South Africa, 1996; a metropolitan municipality as defined in section 1 of the Local Government: Municipal Structures Act 117 of 1998 and contemplated in section 2 of the Local Government: Municipal Systems Act 32 of 2000, being an organ of state within the local sphere of government exercising legislative and executive authority within its area as determined in terms of the Local Government: Municipal Demarcation Act, 1998. The first defendant is situated at Head Office, 15 Queen Street, Germiston.

[5] The Second Defendant is KEECH FURNACE TECHNOLOGIES (PTY) LTD (Registration number: 2016/509805/07) ('Keech'), a private company with limited liability duly registered and incorporated in terms of the Companies Act 71 of 2008 and with its registered address at 3 Kreupelhout Street, Wadeville, Germiston, Gauteng.

[6] Intshebe is the registered owner of business premises at 3 Kreupelhout Street, Wadeville, Germiston, Gauteng. Further, Intshebe is the account holder with the Municipality for services.

The Dispute

[7] The dispute before the court is based on an Acknowledgement of Debt (AOD). On the strength of this AOD, the Plaintiff alleges that the document 'constitutes:

a. A stipulatio alteri in its' favour and that there are accepted benefits flowing from it; and/or

b. A consolidation and ring-fencing of the debt owed by Intshebe to the municipality; and/or

c. A compromise that extinguished any claim the Municipality had against Intshebe'.

[8] Intshebe maintains that as a result of this the Municipality is precluded from recovering the historic debt forming part of the AOD from the Plaintiff and/or discontinuing the supply of electricity or services to the premises.

[9] Intshebe issued summons against the Municipality and Keech. The Municipality subsequently excepted to the averments of Intshebe, as they do not contain averments which are necessary to sustain a cause of action. Further they cannot plead to the particulars of claim, as they are vague and embarrassing, specifically as they contain aspects foreign to the document that they rely on, namely the AOD. Intshebe has opposed the applications for exception.

Background

[10] Keech (the 2nd Defendant) hired the business premises from Intshebe from where they were trading and were the sole occupants of the premises. Keech was, however, ordered to vacate the premises due to payment issues. Keech did so leave during July 2021. Intshebe then rehired the premises.

[11] On or about 29 June 2020, Keech and the Municipality concluded a written agreement titled 'Acknowledgement of Debt' (AOD). In terms of this agreement, Keech is liable to the municipality for R2,478,908.27. In addition to this, Keech

had to pay current municipal services which would become due from time to time.

Municipal Bylaw:

[12] Section 3(4) of the Bylaw provisions of the Electricity Bylaw of the City of Ekurhuleni Metropolitan Municipality adopted in terms of the Local Authority Notice 487 and published in Provincial Gazette No 102, dated 24 April 2002 provides as follows:

"Owners and consumers liability-

> The owner and the consumer shall be jointly and severally liable for compliance with any financial obligation, except provided in section 34(2) or other requirement imposed upon them by these Bylaws".

The upshot of the AOD as maintained by the Intshebe's heads of argument (para 38 and 39) is that the AOD materially altered the position of Intshebe in relation to the Municipality.

Application for Condonation

[13] The Municipality in its condonation applications is seeking condonation for the late filing of the Municipality's exceptions in terms of Rule 23(1)(b) of the Act.[1] If condonation is granted, the Court may then consider the merits of the Municipality's Defence.

[1] Supreme Court Act 59 of 1959.

[14] In the draft order proposed by Intshebe, an order in which the municipality's application for 'condonation' with respect to late filings (the first date 11 August 2022 and the second 13 September 2022) be dismissed. Further, in the joint practice note of the parties to this matter the question is placed on record as to whether 'the first defendant' (i.e. the municipality) should be granted condonation.

Legal Principles

[15] There is a standard for considering an application for condonation. Numerous factors are considered (as will be seen from the cases referred to below), but the decision to grant condonation will always depend on the facts of the case.

[16] In the case of *Van Wyk v Unitas Hospital,*[2] the Constitutional Court stated:

> "Whether it is in the interests of justice to grant condonation depends upon the facts and the circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent in court of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and <u>prospects of success</u>" (my underlining).

[17] In the matter of *Grootboom v National Prosecuting Authority and Another* [3] it was stated:

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[2] *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at 477 A-B.

[3] *Grootboom v National Prosecuting Authority and Another [2014] BLLR 1 (CC).*

"[22]… The standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition … It includes the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success (my underlining).

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's direction. Of great significance, the explanation must be reasonable enough to excuse the default" (my underlining).

[18] In the matter of *Melanie v Santam Insurance Co. Ltd* [4] the following was said:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon 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 therefor, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related: they are not individually decisive, for that would be a piecemeal approach

[4] *Melanie v Santam Insurance Co. Ltd, (1962) SA 531 (A) at 532 C-F.*

incompatible with a true discretion, so of course that there are no prospects of success and 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 the 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 a long delay" (my underlining).[5]

[19] That the prospects of success, play a critical role with respect to whether condonation should be granted or not, can be further seen from the judgement of *Minister of Agriculture and Land Affairs v C.J. Rance (Pty) Ltd.*[6] Here, the Supreme Court of Appeal said:

"The prospects of success of the intended claim play a secondary role – "strong merits may mitigate fault; in the matter so <u>no merits may render litigation pointless</u>. The court must be placed in a position to make an assessment on the merits in order to balance that factor with the cause of the delay as explained by the applicant. A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An <u>applicant thus acts on his own peril when a court is left in the dark on the merits of the intended action</u>, e.g. where an expert report central to the applicant envisaged claim is omitted from the condonation papers" (my underlining).

[5] In *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 L.C. at 211F-H, Myburgh JP stated with respect to "prospects of success", the following: "… without prospects of success, no matter how good the explanation for the delay the application for condonation should be refused".

[6] *Minister of Agriculture and Land Affairs v C.J. Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at para 37.*

[20] In Mulaudzi v Old Mutual Life Insurance Company (South Africa) Ltd,[7] it was stated:

"In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*,[8] it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.[9] This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion,[10] unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration" (my underlining).

[21] The following, based on the case law, are some of the aspects:

(a) The extent of the delay;

(b) The cause of the delay.

(c) The nature of the relief sought.

(d) The reasonableness of the explanation for the delay.

(e) The effect of delay on the administration of justice and other litigants.

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[7] 2017 (6) SA 90 (SCA) paras 34-35.
[8] [1988] ZASCA 171; 1989 (2) SA 124 (A) at 131E.
[9] *Moraliswani v Mamili* [1989] ZASCA 54; 1989 (4) SA 1 (A) at 10E.
[10] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789 C.

(f) The prospects of success.

(g) The importance of the issue to be raised.

The Merits

[22] From the decided cases it can be seen that the granting of condonation (after other factors pertaining to condonation have been taken into account), relies on the prospects of success in the main action. This in turn, depends on the merits of the case. In the dicta of Minister of Agriculture and Land Affairs v CJ Ranse (Pty) Ltd[11] the Supreme Court of Appeal stated "No merits may render litigation pointless". Hence it is important to look at the facts pertaining to the main action.

Stipulatio Alteri

[23] Part of the contentions by Intshebe is that the AOD constitutes a stipulatio alteri. "A stipulatio alteri is a contract between 2 parties (Say A and B) that is designed to enable a 3rd party (say C) to come into a contractual relationship with B (the promisor). By accepting the offer B is bound to C and A drops out of the arrangement".[12] "The fact that C may gain an advantage from the contract between A and B does not suffice".[13]

[24] In the matter before this Court the AOD does not mention the words stipulatio alteri anywhere. It is purely a promise to pay by one party to another a fixed

[11] *Minister of Agriculture and Land Affairs v C.J. Rance (Pty) Ltd 2010 (4) SA 109 (SCA) at para 37*.
[12] Crookes and Another v Watson and Others 1956 (1) SA 277 (A) 291; and Joe Melamed & Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 (A) 172.
[13] Barnett and Another v Abe Swersky and Associates 1986 (4) SA 407 (C).

sum of money; alternatively a series of monetary amounts. The Plaintiff is attempting to take advantage by attaching words that do not exist in the AOD. The AOD on a reading, is plain and simple and further is an undertaking by Keech to pay the Municipality, without excluding the account holder (Intshebe) from liability.

[25] Intshebe is attempting to use the AOD to take advantage of what it considers to be an advantageous situation. Further, it attempts to extend a meaning to the AOD which would never have been the intent of the parties when signing. Fancy words are now used to even extend that advantageous situation to include what Intshebe is referring to as 'historic debt', 'ring-fencing' and 'compromise'.

[26] For two parties to make an agreement which a 3rd party can just use to absolve itself from its' liability would be open to abuse. The attempted use by Intshebe to bring in the concept of stipulatio alteri has nothing whatsoever to do with the facts of the case before this court. Hence, the attempt by Intshebe to rely on the concept of stipulatio alteri has no merit whatsoever.

The Exception

[27] The Municipality excepts to the particulars of claim of the Plaintiff on the grounds that they do not disclose a cause of action and in addition are vague and embarrassing. Hence, on those grounds the case should be disposed of as pleaded.

[28] The Municipality maintains that in the original particulars of claim in this matter, it was not alleged as to what the cause of action against the Municipality was and uses merely vague words to attempt to get a court order to the prejudice of the Municipality where no nexus existed as no causal connection was disclosed. Intshebe does not point out any authority that an AOD could be read to include concepts (e.g. stipulatio alteri) not in the AOD which could be used to prejudice one of the signatories to the AOD. The bringing in of words not in the AOD must be seen as disingenuous and totally confusing.

[29] Intshebe maintains that by Keech signing an AOD with the Municipality, and the Municipality accepting such AOD from Keech, the Municipality can no longer claim payment from Intshebe. Based on the above, Intshebe is approaching this Court as a premature measure to stop the Municipality from attempting to get payment from Intshebe.

[30] The Municipality states that Intshebe's allegations are legally and factually nonsensical and untenable. Further, the particulars of claim do not state who has the right to enforce it. However, Intshebe is applying for a declaratory order against the Municipality.

[31] The main thrust of the particulars of claim appears to revolve around the concept of stipulatio alteri, and other vague concepts which Intshebe attempts to link to the AOD.

[32] The Municipality questions how it is supposed to plead in the light of such not even being part of what Intshebe is relying on being contained within the AOD. Further Intshebe is seeking a declaratory order, without any real causal connection to the AOD, though depending on it.

[33] A problem with the particulars of claim is that one cannot determine on what basis the AOD 'constitutes' a stipulatio alteri in favour of Intshebe. Further, how do 'consolidation', 'ring-fencing' and 'compromise' that found the underlying 'cause of action', equate with an AOD. It must be noted that Intshebe has brought in these concepts as pertaining to the AOD, even though the AOD does not mention them.

[34] It is hence not clear from which of the different concepts is the Municipality meant to be precluded from recovering a monetary debt owed to it. Yet, with respect to the vague and embarrassing situation Intshebe is seeking a declaratory order.

[35] A question to be asked is whether the accountholder (Intshebe), looking at the 'benefit' derived from the AOD, and hence attempting to bring in the concept of stipulatio alteri, being in fact the right to be discharged from its legal obligation to pay the Municipality for electricity consumption. If this is so – and it appears to be the only answer – Intshebe is proceeding in a muddled and confusing manner.

[36] What is further confusing is whether Intshebe regards the 'historic debt' as also to include debt which has nothing to do with Keech's tenancy at Intshebe's premises. Further, the particulars of claim remain silent on whether Keech paid and, if so, what amount they paid.

[37] As the Municipality in terms of legislation does not recognise the AOD as anything other than a promise to pay the Municipality what was part of a debt owed, which promise was made by Keech, no benefits have been flowing to the Municipality as a result. Further, Intshebe does not aver that Keech has paid.

[38] The Municipality in terms of legislation is owed by either the owner of the property or/and the tenant. For one party (the tenant) to merely promise a partial payment, does not absolve the accountholder (Intshebe) from further liability or the Municipality from collecting what is owed.

[39] The application for the particulars of claim to be struck out is successful. The particulars of claim are both vague and embarrassing, and do not disclose a cause of action. The Municipality will clearly be prejudiced if it is required to plead to Intshebe's particulars of claim.

Conclusion

[40] Intshebe maintains that their claim is clearly defined in their particulars of claim, read together with its annexures. Further, that a proper cause of action is disclosed and that no vagueness causing embarrassment exists.

[41] The crux of the matter is that the Municipality is faced with an action against it, by an account holder to write off certain indebtedness based on an AOD signed by a former tenant of the account holder. The AOD is now being used in the account holder's pleadings as a stipulatio alteri and/or compromise and/or waiver consolidation and/or 'ring-fencing of historic debt', though there is no causal connection between these words/terms and the AOD.

[42] Nowhere in the pleadings does it state that the meaning attached to the AOD by the Plaintiff was ever brought to the attention of the Municipality. Hence, an absence of a cause of action. Further, the Municipality does not know what to plead. This results from the AOD being manipulated by the use of words in the Plaintiff's action which are foreign to the AOD – on which the Plaintiff bases its claim. This, on the face of it, is to write off a debt owed by Intshebe. All this renders the Particulars of Claim confusing. Further, by Intshebe bringing in 'benefit' makes it more bewildering as it is vague as to who is benefiting.

[43] Intshebe is attempting to allow a Keech to take over its debt, and then Intshebe (in this instance the Plaintiff) simply being able to walk away and say 'I do not owe you any more'. Such would be open to abuse. This then proceeds to a further extent, as Intshebe is attempting to link the AOD to include other amounts not being part of the AOD. This in itself is confusing, and without any merit.

[44] In the result, the Municipality is granted condonation for the late filing,[14] and further the exceptions are upheld and the particulars of claim are struck out.

Costs

[45] With regard to the matter of costs, I refer to the case of *Ferreira v Levine NO and Others; and Vryenhoek and Others v Powell and Others* [15] :

> *"The Supreme Court has over the years developed a flexible approach which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise indicated, is in the discretion of the Presiding Judicial Officer, and the second, that the successful party should as a general rule, have his or her costs. Even the second principle is subject to the first".*

[46] In this matter costs in the entire matter follows the successful party having their costs. Hence, the costs order against the Plaintiff on a party and party scale, including the costs of 2 counsel, for both the condonation applications and the exceptions, including the striking out of the particulars of claim.

Judgement

[47] In the result:

Both the applications for condonation by the Municipality are granted;

[14] In this matter, the application for condonation for late filing was successful based on a number of the numerous factors being present for a successful application. Amongst them is: (1) the extensively detailed and reasonable explanation for the delay for each of the condonation applications; (2) the interests of justice; (3) the prospects of success for the Municipality's application for exception; (4) the cause of the delay; (5) that there was no prejudice.

[15] *Ferreira v Levine NO and Others; and Vryenhoek and Others v Powell and Others 1995 (4) BCLR 437 (W)*.

Both exceptions are upheld;

The Particulars of Claim are struck out.

Costs are awarded against the Plaintiff on a party and party scale, including the costs of two counsel.

Order

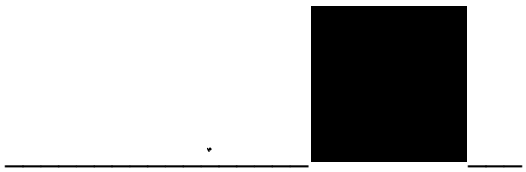
[48] In the circumstances, I make the following order:

48.1 The applications for condonation are granted with costs;

48.2 The exceptions are upheld with costs;

48.3 The striking out application is granted with costs;

48.4 Costs are awarded against the Plaintiff/Respondent are on a party and party basis, including the costs of two counsel.



BARIT AJ

Acting Judge of the High Court
of South Africa

Gauteng Division, Pretoria

APPEARANCES

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Instructed by:	Chiba Attorneys Inc.
Date of Hearing:	13 April 2023
Date of Judgement:	03 June 2024