IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Reportable

Case no: D8121/2022

In the matter between:

PICK N PAY RETAILERS (PTY) LTD **PLAINTIFF / RESPONDENT**

and

RIYAAD ABDOOLA **FIRST DEFENDANT / EXCIPIENT**

ROYAL SMART TRADING (PTY) LTD **SECOND DEFENDANT / EXCIPIENT**

Coram: M E Nkosi J

Heard: 21 February 2024

Delivered: 11 March 2024

ORDER

1. The defendants' application in terms of rule 27(1) and (3) is dismissed and the defendants are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

2. Judgment is granted by default in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved for:

    2.1 Payment of the sum of R3 724 845.30;

    2.2 Interest thereon at the legal rate *a tempore morae*.

3. Costs of suit on the attorney and own client scale.

JUDGMENT

M E Nkosi J

Introduction

[1] For ease of reference, I will refer to the parties in the same way they are cited in the main action which preceded this application. This is an application in which the defendants seek an order condoning the late delivery of their plea in the matter and uplifting the plaintiff's bar in respect thereof, together with ancillary relief

allowing the defendants to deliver either an exception to the plaintiff's particulars of claim or their plea thereto within five days of the date of the said order, if granted by the court. In response, the plaintiff delivered a notice to oppose the defendants' application, together with a counter-application for default judgment against the defendants. The two applications were argued simultaneously on 21 February 2024.

Factual background

[2] The factual background to the matter, briefly stated, is that on 10 August 2022 the plaintiff instituted an action against the defendants claiming payment from them, jointly and severally, of all amounts which, according to the plaintiff, became immediately due and payable by the defendants to the plaintiff on termination of the franchise agreement between the plaintiff and the second defendant. The first defendant had bound himself as surety and co-principal debtor *in solidum* with the second defendant for the due and punctual fulfilment by the second defendant of all its obligations to the plaintiff.

[3] According to the sheriff's return, the summons was served on the defendants on 10 August 2022. On 16 August 2022, the defendants' notice of intention to defend was served by their attorneys on the plaintiff's attorneys. In terms of the rules of this court, the final date for the delivery of the defendants' plea in the matter was 13 September 2022, which was 20 days from the date of service of the notice of intention to defend. However, by 30 September 2022 the defendants had not delivered their plea, which resulted in the plaintiff's attorneys delivering a notice of bar on the defendants' attorneys, under cover of an email dated 30 September 2022, calling on the defendants to deliver their plea within five days of service of that notice, failing which they would be *ipso facto* barred from doing so.

[4] The five days for delivery of the defendants' plea in terms of the notice of bar expired on Friday, 7 October 2022. According to Mr Mathebula of the plaintiff's attorneys he received a telephone call from Mr Mayet of the defendants' attorneys on 7 October 2022, at approximately 1.00 pm, advising that they were experiencing a power outage at their offices and enquiring as to whether the plaintiff's attorneys would be prepared to accept service of their clients' plea by email after 4.30 pm that same afternoon. Mathebula's response, which is confirmed by Mayet, was that the plaintiff's attorneys had no objection to the defendants delivering their plea electronically at any time but not later than midnight on 7 October 2022.

[5] It is common cause that the plaintiff's attorneys did not receive the defendants' plea, or any other pleading for that matter, by midnight on 7 October 2022. According to Mayet's explanation, the defendants' attorneys had proceeded to transmit their clients' notice of exception to the plaintiff's attorneys before midnight on 7 October 2022. However, due to the sudden power outage at their offices the defendants' exception had been erroneously stored in the draft folder of their email and, therefore, was not transmitted to the plaintiff's attorneys. Mayet alleges that this came to the notice of the defendants' attorneys only on 11 October 2022 after he contacted the plaintiff's attorneys to confirm acknowledgement of receipt of the defendants' exception.

[6] In response, Mathebula confirmed that he was called by Mayet on Tuesday, 11 October 2022, to enquire as to whether the plaintiff's attorneys had received the defendants' exception. He said he advised Mayet that no pleadings were served on the plaintiff's attorneys on 7 October 2022 or in the days that followed, to which Mayet responded by giving him an undertaking that he would investigate the matter and revert to him 'urgently'. This was followed by an exchange of emails between

Mathebula and Mayet later that afternoon, including a document emailed by Mayet to Mathebula at 6.25 pm titled *'PNP RS Exception'* dated 7 October 2022 and signed *'AMS Mayet'*.

[7] The meta-data and document properties of the exception received by the plaintiff's attorneys from the defendants' attorneys was queried by Mathebula as misleading on the basis that it shows that the document was created on 11 October 2022 at 12:37:01. This, according to Mathebula, suggests that the defendant's exception was transmitted to the plaintiff's attorneys only moments before Mayet called him supposedly to enquire as to whether the said exception that was allegedly sent on 7 October 2022 was received by the plaintiff's attorneys.

The law

[8] At the outset, it must be borne in mind that the Uniform Rules of Court are there for a reason, and must be complied with by the litigants at all times. Where the Rules stipulate time limits for the delivery of pleadings, the litigants are expected to comply with the stipulated time limits, unless they reach an agreement for the extension thereof. In the absence of an agreement, a litigant who seeks an extension must make an application to court, on good cause shown, for an extension.[1] In instances of non-compliance with the Rules other than those prescribing time limits, the court is empowered in terms of rule 27(3) to condone non-compliance with any such Rule on good cause shown.

[9] It is, of course, trite that when it comes to an application for the upliftment of bar the court has a wide discretion which must be exercised by it in accordance with

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[1] Uniform rule 27(1).

the circumstances of each case. To this end, it was held by the court in *Smith, NO v Brummer, NO and Another; Smith, NO v Brummer*[2] that the courts tend to grant such applications where '(a) the applicant has given a reasonable explanation of his delay; (b) the application is *bona fide* and not made with the object of delaying the opposite party's claim;[3] (c) there has not been a reckless or intentional disregard of the Rules of Court; (d) the applicant's action is clearly not ill-founded and (e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs.'

[10] It was further stated by the court in *Smith*[4] that the absence of one or more of these circumstances might, depending on the circumstances of each case, result in the application being refused. For instance, the court will refuse the application 'where the negligence or inattentiveness is, in the opinion of the Court, of so gross a nature that, having regard to the other circumstances, the applicant is not entitled to the indulgence prayed for'.[5] However, the court will not refuse the application if the delay in delivering a pleading is attributable to the negligence on the part of the applicant's attorney. This is because it will not be in the interests of justice to penalise the litigant for the sins of his or her attorney, particularly, if the applicant has reasonable prospects of success if the application is granted.[6]

The defendants' application for condonation

[11] In the present case, the defendants were late with the delivery of their plea, which was due to be delivered by no later than 13 September 2022 in terms of the

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[2] *Smith, NO v Brummer, NO and Another; Smith, NO v Brummer* 1954 (3) SA 352 (O) at 358A-B.
[3] See also *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476.
[4] *Smith* above fn 2 at 358B.
[5] Ibid at 353A.
[6] *Ferris and Another v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) para 10.

Rules. They were then allowed an extension by the plaintiff's attorneys to deliver their plea by no later than midnight on 7 October 2022, and an undertaking was given by Mayet of the defendants' attorneys that they would do so, but they never did. The explanation given by Mayet for not doing so would have been more plausible if his follow-up telephone call to the plaintiff's attorneys was made first thing on Monday morning, 10 October 2022. Instead, he does not appear to have bothered to check with the plaintiff's attorneys for the whole day on Monday as to whether they had received the defendants' exception. He only did so on Tuesday, 11 October 2022, and there is no explanation as to why he did not do so on Monday.

[12] In fact, it is apparent from the correspondence exchanged between the plaintiff's and the defendants' attorneys that what the plaintiff's attorneys expected to receive from the defendants' attorneys by midnight on 7 October 2022 was the defendants' 'plea', not their 'exception'. Besides, even the exception that was delivered late by the defendants' attorneys is problematic in that it is totally without merit. All it does is to raise a number of technical issues which, in my view, should have been properly raised in a request for further particulars for trial in terms of rule 21(2). For the sake of completeness, I think it would be appropriate to mention the actual 'queries' raised by the defendants in their 'exception' to the plaintiff's particulars of claim.

[13] In essence, the 'exception' is based primarily on four grounds. The first ground is that the plaintiff failed to specify which method, between the two provided for in the franchise agreement, was used by the plaintiff to calculate the *'franchise fees'* claimed by it; the second ground is that the plaintiff's particulars of claim omitted to stipulate the services which were rendered by the plaintiff to the second defendant amongst those provided for in clause 8 of the franchise agreement; the

third ground was that the plaintiff's claim against the first defendant on the basis of a written deed of suretyship in terms of which he bound himself as surety and co-principal debtor *in solidum* with the second defendant was in contradiction of the second defendant's liability to provide security for the first defendant's obligations in the form of a general notarial bond by a financial institution nominated by the plaintiff as contemplated in clause 25 of the franchise agreement, and; the fourth ground is that the weekly statement relied upon by the plaintiff in its particulars of claim do not indicate the cut-off dates for services rendered which, in turn, rendered the calculation of interest claimed by the plaintiff on overdue amounts unascertainable.

[14] It was held by the court in *Lewis v Oneanate (Pty) Ltd and Another*[7] that in order to succeed, an excipient has the duty to persuade the court that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. However, based on my perusal of the plaintiff's particulars of claim none of the queries raised by the defendants in relation thereto has any merit or substance. In my view, the plaintiff's particulars of claim contain a clear and concise statement of the material facts upon which it relies in compliance with the Rules.[8] The plaintiff also sets forth in its particulars of claim the nature of its claim and the conclusions of law deduced by it from the facts stated therein.[9] Contrary to what is suggested by the defendants in their 'exception', I agree with Mr *Ploos van Amstel*, who appeared for the plaintiff, that there is simply no merit in any of the queries raised by the defendants in their exception and that this application was brought for the purpose of delaying the plaintiff's claim.

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[7] *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F-G.
[8] Uniform rule 18(4).
[9] Uniform rule 20(2).

[15] In the circumstances, the inescapable conclusion to be drawn from the delivery of a meritless exception by the defendants, after almost 20 days of an inexplicable delay in the delivery of their plea in terms of the Rules, is that they have no valid defence to the plaintiff's claim. It would seem that their application is *mala fide* and made with the sole purpose of delaying the determination of the plaintiff's claim by the court. Furthermore, their attorneys have also failed to provide this court with a reasonable and satisfactory explanation for the delay in the delivery of the defendants' plea.[10]

The plaintiff's counter-application for default judgment

[16] This brings me to the plaintiff's counter-application for default judgment against the defendants. With the defendants having been effectively *ipso facto* barred from delivering a plea to the plaintiff's claim, the plaintiff's action against the defendants remains undefended. Contrary to what is alleged by the defendants in their exception, I am satisfied that the plaintiff's particulars of claim disclosed a cause of action. A cause of action was defined in *McKenzie v Farmers' Co-Operative Meat Industries Ltd*[11] as:

'Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

Order

[17] Therefore, I accordingly make an order in the following terms:

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[10] *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 572A-B.
[11] *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23.

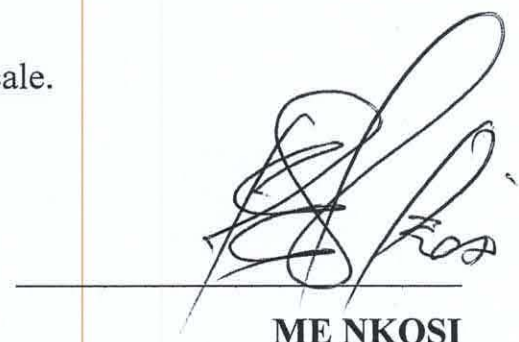
1. The defendants' application in terms of rule 27(1) and (3) is dismissed and the defendants are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

2. Judgment is granted by default in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved for:

   2.1 Payment of the sum of R3 724 845.30;

   2.2 Interest thereon at the legal rate *a tempore morae.*

3. Costs of suit on the attorney and own client scale.



ME NKOSI

JUDGE

Appearances

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