



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF
THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996**

(REPUBLIC OF SOUTH AFRICA)

CASE NO: GP18/2021

In the matter between:

Crocia Events (PTY) LTD

Applicant/ Defendant

And

Special Investigating Unit

Respondent/ Plaintiff

JUDGMENT

Mode of delivery: this judgment was handed down electronically on 25 March 2022 by transmission to the parties' legal representatives by email, uploading on Caselines and publishing on Saflii. The time for handing down the judgment is deemed to be 10am.

Summary

Application for the upliftment of bar in terms of Tribunal Rule 14 – whether good cause for condonation is established by setting out a full and reasonable explanation for the delay and a bona fide defence.

Held - full and reasonable explanation for the delay not set out.

Held - application is bona fide - bona fide defence is set out – only three day's leave to file a plea is sought – application is not only brought to frustrate the respondent's (plaintiff) claim. These factors tilt the scale of discretion in the applicant's (defendant) favour.

Held – application succeeds with costs against the applicant.

MODIBA J:

[1] Crocia Events (Pty) Ltd (Crocia Events), the applicant in the present application and the defendant in the action, applies for the uplift meant of a bar in order to file its plea. If this relief is granted, Crocia Events also seeks leave to file its plea within 3 days of the date of this judgment. The Special Investigating Unit (SIU) as respondent in this application and the plaintiff in the action, opposes the application.

[2] For convenience, I refer to the parties by their names. With the parties' agreement, I consider the present application on the basis of the papers filed.

[3] The application is premised on the following common cause facts:

[4] The SIU issued a combined summons on 28 July 2021, seeking a declaration that the Department of Public Works (the Department) awarded a tender to Crocia Events irregularly. The tender relates to the provision of infrastructure for state or official funerals. The SIU alleges that it investigated the awarding of the tender as authorized by the relevant Presidential Proclamations read with section

4 of the Special Investigating Units and the Special Tribunals Act.¹ During the investigation, it found that the husband to the Director of Crocia Events allegedly influenced the awarding of the tender. It also found that Crocia Events allegedly breached the contract it concluded with the Department pursuant to the awarding of the tender, by overcharging for services rendered in respect of the official funerals of the late Ms. Winnie Madikizela-Mandela, Mr. Billy Modise and Mr. Zola Skweyiya. The SIU seeks to have the tender and the contract awarded pursuant thereto, set aside. It also seeks as just and equitable relief in terms of section 172(1)(b) of the Constitution, an order in terms of which Crocia Events pays an amount of R36,188,886.95 to the Department within 30 days of the judgment.

[5] The summons called on Crocia Events to deliver its notice of intention to defend together with its plea, within 10 days of service of the summons, failing which default judgment shall be sought without further notice to it.

[6] The SIU initially did not file a return of service reflecting how and when summons was served on Crocia Events. In its answering affidavit, it contends that it caused summons to be served on Crocia Events by email on 2 August 2021. On 09 September 2021, Crocia Events' Attorney replied to the email, acknowledging receipt of the summons and attaching a notice of intention to defend.

¹ Act 74 of 1996.

[7] On 7 October 2021, the attorney for the SIU send to Crocia Events' attorney an email with annexures to the particulars of claim attached to it, as she was not satisfied that these had been served together with the summons.

[8] On 26 October 2021, the SIU served a notice of bar on Crocia Events, placing it on terms to file its plea within 5 days of receipt of the notice of bar, failing which it would be barred from doing so. Considering that Tribunal Rule 13(3) automatically places a bar on a defendant who fails to timeously file a notice of intention to defend and a plea, this was a generous indulgence by the attorney for the SIU.

[9] Crocia Events also failed to meet the terms of the notice of bar. It did not file its plea within the period stated in the notice of bar. At the Case Management Meeting held on 9 November 2021, Crocia Event's legal representative advanced a request for an indulgence to file its plea. This request could not be entertained in the absence of a substantive application because Crocia Events had been effectively barred from filing its plea.

[10] On 16 November 2021, Crocia Events filed the present application. I then gave directives for the filing of further papers and for the application to be determined on that basis.

[11] The issues that arise in the present application have been fully ventilated in the answering affidavit subsequently filed by the SIU and a replying affidavit filed by Crocia Events.

[12] An application for uplifting a bar is essentially an application for the extension of time or an application for condonation for non-compliance with the Tribunal Rules. In the High Court, applications of this sort are regulated by Uniform Rule 27. Tribunal Rule 14 mirrors this Uniform Rule in material respects. It is for that reason that when determining the present application, I am guided by the authorities in respect of Uniform Rule 27.

[13] In an application of this nature, the court has a wide discretion which must, in principle, be exercised with regard also to the merits of the matter considered as a whole.² The exercise of the court's discretion involves a value judgment by the court seized with the matter based on the facts of that particular case.³

[14] Courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes 'good cause', lest they hamper unnecessarily the exercise of the discretion. The two requirements set out in paragraphs 15 and 16 below, for the favourable exercise of the court's discretion, have been consistently applied by the courts.

[15] The applicant should show good cause for the delay by filing an affidavit setting out a full and reasonable explanation which covers the entire period of the delay to enable the court to understand how the delay really came about, and to assess the applicant's conduct and motives.⁴ It is not sufficient for the applicant to

² *Du Plooy* fn1 at 216H-217A. See also *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C-308A

³ *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 75F-H, 76C-D and 78B-79C

⁴ *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at 640H-I

show that relief granted in terms of this rule will not result in prejudice to the other party. The court will refuse to grant the application where there has been a reckless or intentional disregard of the rules of court, or the court is convinced that the applicant does not seriously intend to proceed.⁵ The application must be *bona fide* and not made with the intention of delaying the plaintiff's claim.⁶

[16] The applicant should also satisfy the court on oath that it has a *bona fide* defence. Regarding this requirement it has been held that the minimum that the applicant must show is that its defence is not patently unfounded and that it is based on disclosed allegations which, if proved at the trial, would constitute a defence.⁷

[17] Crocia Event's notice of intention to defend is interestingly dated 17 August 2021. This is the date the dies for filing that document and the plea would expire if summons were served on 2 August 2021.⁸ Although the notice of intention to oppose is dated 17 August 2021, the attorney for Crocia Events only sent it to the attorney for the SIU by email on 9 September 2021. I agree with the SIU that it is not unreasonable to infer that Crocia Events did receive the summons by email on 2 August 2021. However, on SIU's version, the service may have been rendered defective by failure to simultaneously serve annexures to the particulars of claim.

⁵ *Burton v Barlow Rand Ltd* 1978 (4) SA 794 (T) at 797D

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

⁷ *Ingosstrakh* fn 6.

⁸ Tribunal Rule 13(1) calls on a defendant to file its notice of intention to defend together with its plea, within 10 days of service of summons.

[18] Even if I accepted Crocia Events' version as to when summons was served, it is common cause that Crocia Events failed to comply with the requirements of Tribunal Rules 13(1) as reflected in the summons, in that it failed to file its notice of intention to defend within 10 days of receipt of the summons. It also failed to simultaneously file its plea.

[19] The complaint Crocia Events raises, that the SIU failed to serve annexures to the particulars of claim is a red-herring. It had filed a notice of intention to defend without raising this complaint. The SIU served the annexures on Crocia Events by email on 7 October 2021. Crocia Events acknowledged receipt of this email on 13 October 2021. It did not request an indulgence for the extension of time from the SIU. It only expressed the request to file the plea out of time at the 9 November Case Management meeting.

[20] In paragraph 13 of founding affidavit in the present application, titled *'IMPORTANCE OF THE MATTER AND REASONS FOR NON-COMPLIANCE'* Crocia Events fails to fulfill the promise expressed in this title. It advances no such reasons. Instead it reiterates its view that it has prospects of success, complains that the SIU is engaging in baseless and costly litigation and states that it is ready to dance to this music that the SIU has played.

[21] Although Crocia Events has displayed what, in the absence of a full and reasonable explanation for the delay, seems to be a reckless or intentional disregard of the Tribunal Rules, there is no basis on which to conclude that it does not seriously intend to proceed. The fact that its plea is effectively ready to

be filed and that it requires only three day's leave to file it leads to the inescapable conclusion that the application is *bona fide* and not made with the intention of delaying the SIU's claim.

[22] Crocia Events has set out a *bona fide* defence which if proved will constitute a sustainable defence at the trial. Although from its answering affidavit, the basis on which Crocia Events intends resisting the review and setting aside of the Department's decision to award a tender to it is not clearly set out, a *bona fide* defence in respect of the consequential relief sought by the SIU is adequately disclosed. If the defense is proved at the trial, the SIU may not succeed in obtaining the full monetary relief that it seeks as prayed for in paragraph 3 of its particulars of claim.

[23] These two latter factors tilt the scale of the Tribunal's discretion in Croatia Event's favour.

[24] Crocia Events only seeks costs in the event of opposition. The SIU opposes the application as entitled. Its opposition is not frivolous. Under these circumstances, there are no reasons to depart from the trite rule that a party who seeks an indulgence from the Tribunal bears its costs.

[25] For these reasons, the application stands to succeed with Crocia Events bearing the costs of the indulgence.

[26] Therefore, the following order is made:

ORDER

1. Failure by Crocia Events (Pty) Ltd (Crocia Events) to file a plea within the time prescribed by Tribunal Rule 13(1) is condoned.
2. The bar imposed on Crocia Events from filing a plea is uplifted.
3. Crocia Events is granted leave to file its plea by Wednesday 30 March 2022.
4. Crocia events shall pay the costs of the application.

JUDGE L. T. MODIBA
MEMBER OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicant: Adv. N.M. Mlilo.

Attorney for the applicant: Mr. M.G. Ndlovu, Mdluli Attorneys Inc.

Counsel for the respondent: Adv. A. Platt SC, assisted by Adv. M. Matera.

Attorney for the respondent: Ms. S. Zondi, Office of the State Attorney, Pretoria

Date of hearing: Not applicable, Application determined on written submission.

Last date of filing of heads of argument: 30 November 2021.

Date of Judgment: 25 March 2022