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Circulate to Magistrates:	NO
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**IN THE HIGH COURT OF SOUTH AFRICA  
NORTHWEST DIVISION, MAHIKENG**

**CASE NUMBER: 755/2021**

In the matter between: -

**UMSO CONSTRUCTION (PTY) LTD**

Plaintiff

and

**RUSTENBURG LOCAL MUNICIPALITY**

Defendant

CORAM: MFENYANA J

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **22 April 2024**.

**ORDER**

- (1) The application for condonation for the late filing of the summary judgment is dismissed with costs.

## **JUDGMENT**

### **MFENYANA J**

- [1] The applicant, Umso Construction (Pty) Ltd, who is the plaintiff in the main action approaches this Court, seeking condonation for the late filing of its application for summary judgment. The parties shall be referred to as they are in the main action. The application is opposed by the defendant.
- [2] In its heads of argument, the defendant contended that the plaintiff's heads of argument were filed out of the timeframes stipulated in the Practice Directives. It is an established principle that heads of argument are for the benefit of the court. While non-compliance with the Practice Directives is frowned at by this Court, I, in the specific circumstances of this case, and for expedience, considered it prudent to deal with the issue and dispose of it, also in view of the expedient nature of a summary judgment application.

- [3] The facts giving rise to the application are summarily that sometime during 2021 the plaintiff issued a summons against the defendant for payment of an amount of R15 903 750.72 for professional services it allegedly rendered to the defendant. Following an amendment to the particulars of claim, the defendant, on 31 May 2022 filed its plea. According to the plaintiff, the plea fell due on 16 May 2022, prompting the plaintiff to serve a notice of bar upon the defendant on 26 May 2022. The plea was received by the plaintiff on 2 June 2022.
- [4] On 4 July 2022 the plaintiff served its application for summary judgment on the defendant, invoking the procedure provided in rule 32 of the Uniform Rules of Court. That Rule entitles a plaintiff, after delivery of a plea by the defendant, to apply to court for summary judgment within 15 days.
- [5] The application for summary judgment ought to have been delivered on 22 June 2022 and it was delivered 7 days out of time.
- [6] In the affidavit in support of the condonation application, the

deponent, Mr Brett Ashely Murison (Murison) states that the plaintiff's intention had all along been to deliver the application for summary judgment on time, as it immediately became clear upon receipt thereof that the defendant's plea did not disclose a defence. However, due to an administrative error pertaining to the calculation of days, the application was filed out of time. On this basis, the plaintiff contends that the delay was not deliberate, and that being 5 days out of the time permitted in rule 32, the delay is not excessive. This computation of days by the plaintiff is premised on its incorrect averment that the plea had been served on 2 June as opposed to 31 May 2022.

[7] Murison further contends that the plaintiff's status as a company in business rescue contributed to the delay, as financial and operational considerations also played a role. In addition, the plaintiff submits that the deponent was out of the country, and only became aware of the *bona fide* error on his return on 7 July 2022 and took immediate steps to rectify the situation.

[8] As regards prejudice, the plaintiff contends that no prejudice will be suffered by the defendant, as the applicable rule 32 in

its amended form requires the defendant to gather and prepare all relevant information in order to file its plea and affidavit resisting summary judgment. Thus, the plaintiff further avers that condoning the delay, would not put any additional burden on the defendant with regard to preparation.

[9] In opposing the application, the defendant contends that the plaintiff's delay is inexcusable and lacks good cause as the plaintiff has given no reasonable explanation for it. In this respect, the defendant argues that Murison's explanation is factually incorrect and does not set out fully and comprehensively the reasons for the delay, covering the whole period for which condonation is sought.

[10] The defendant denies that its plea was served on the plaintiff on 2 June 2022 as asserted by Murison in his affidavit. It, instead avers that the plea was served on 31 May 2022 and provides proof of service, confirming this fact, and indicating the time of service as 12h40. Consequently, the *dies* for filing of the summary judgment application expired on 22 June 2022, making it seven days out time. The additional time of delay has not been accounted for by the plaintiff, the

defendant further contends.

[11] Importantly, the defendant contends that the explanation offered by the plaintiff pertains to events after the time had elapsed for filing of the summary judgment application, which Murison attributes to an “alleged and unexplained *bona fide* administrative error” and also says the delay was caused by the plaintiff being in business rescue” and provides no further explanation. The defendant avers that the explanation should be rejected as it is also contradictory.

[12] Concerning the length of the delay, the defendant avers that the delay is significant as it is almost half of the number of days allowed to file the application. It contends that the plaintiff has no reasonable prospect of success in the main action and contends further that this aspect is not addressed by the plaintiff in its application for condonation.

[13] The defendant avers that the plaintiff has failed to inform this Court why it contends that the plea against which summary judgment is sought, does not raise a triable issue, and has further failed to set out the issues raised in the plea. Of importance, the defendant denies that its plea raises no

triable issue and contends that what is apparent from it is that the plaintiff's claim as set out in its particulars of claim, is unsustainable. In this regard, the defendant briefly sets out details of the plaintiff's claim, as well as its plea and the disputes it raised therein. It avers that these issues and defences are valid and sustainable.

[14] It is trite that condonation will not be had for the mere asking<sup>1</sup>. An applicant for condonation seeks indulgence from the court. Such applicant must set out fully and comprehensively, the reasons for the delay not only in not timeously delivering the application for summary judgment, but also the delay in seeking condonation for non-compliance.<sup>2</sup> The applicant in this case has not done this. It glibly stated that Murison had been travelling between 24 June to 7 July 2022, and only became aware and attended to the matter immediately thereafter. It is noteworthy that the plea had been served on 31 May 2022, some 16 days before Murison's voyages began. By that time the time permitted in the Rules for filing of the application had already lapsed on

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<sup>1</sup> See in this regard: *Uitenhage Transitional Local Council v South African Revenue Service* 2004(1) SA 292 (SCA).

<sup>2</sup> *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017(6) SA 90 (SCA).

22 June 2022.

- [15] The plaintiff's explanation sheds no light on why it did not consider it necessary to attend to the application prior to Murison's departure, as by his own admission and computation, albeit incorrect, it had been determined that the expiry of the *dies* would coincide with his travels.
- [16] As pointed out by the defendant, no explanation has been offered why the matter could not be attended to by another legal resource in Murison's office or why counsel could not be briefed sooner, or why the business rescue practitioner or a director of the plaintiff could not depose to the affidavit.
- [17] Notably, Murison asserts in his affidavit that he only became aware of the *bona fide* error on his return on 7 July 2022. The difficulty with this assertion is that at this time, the application for summary judgment had already been delivered on 4 July 2022. This renders the explanation improbable if not blatantly false. This pattern carried on throughout the application. The explanation falls short of the requirements of rule 27 which enjoins an applicant for



condonation to show good cause for its failure to comply with the Rules.

[18] Such demonstration of good cause in turn triggers the exercise of the discretion of the Court. No good cause has been shown to exist by the plaintiff in this case for this Court to exercise of its discretion. That would inevitably bring into focus the plaintiff's prospects of success. I have already stated that the plaintiff says no more about its prospects of success, save to merely state that it has prospects of success.

[19] It is also trite that if the other facts of a matter, taken in totality, render the application for condonation 'obviously unworthy of consideration', the court is not bound to consider prospects of success.

[20] The belated attempt by the plaintiff to set this out in its heads of argument does not alter the situation in any way. It is a well-established rule that a party stands or falls by its papers. In the case of an applicant that case should be set out fully in its founding affidavit.

[21] The ineluctable conclusion in this matter is that the plaintiff

either flagrantly breached the Rules of Court or did not approach the Court with clean hands or take the Court into its confidence regarding the reasons for the delay.

[22] The application is a classic example of abuse of process of court, where condonation is sought and anticipated to be granted for the mere asking of it. To find otherwise would result in a patent miscarriage of justice.

[23] Bearing in mind the plaintiff's failure to provide any credible explanation for the delay, there exists no ground for the granting of condonation.

### **ORDER**

[24] In the result, the application for condonation for the late filing of the summary judgment application is dismissed with costs.

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S MFENYANA

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Date reserved:	20 October 2023
Date of judgment:	22 April 2024