

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BISHO**

REPORTABLE

CASE NO: 496/2020

DATE HEARD: 4 AUGUST 2022

DATE DELIVERED: 16 AUGUST 2022

In the matter between:

**MEMBER OF THE EXECUTIVE COMMITTEE
DEPARTMENT OF EDUCATION
HEAD OF DEPARTMENT, DEPARTMENT
OF EDUCATION**

1ST APPLICANT

2ND APPLICANT

and

DESPATCH PREPARATORY SCHOOL

RESPONDENT

JUDGMENT

NOTYESI AJ

INTRODUCTION

[1] The applicants have launched this application in terms of rule 27(3) of the uniform rules of the court seeking for an order condoning their late filing of the defendant's plea. The application is opposed by the respondent on the basis that the applicants have failed to make out a case for the grant of condonation. The applicants are the defendants in the main action and the respondent is the plaintiff.

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

BRIEF BACKGROUND

[3] The plaintiff has instituted an action against the defendants seeking payment of monies allegedly owing in respect of fee exemptions imposed in terms of the South African Schools Act (“**SASA**”). The summons was issued on 2 September 2020. Service of the summons was effected upon the defendants on 4 September 2020. The defendants served and filed their notice of intention to defend on 7 October 2020.

[4] Pursuant to the service of the appearance to defend, the defendants did not file their plea and thus prompted the plaintiff to file a notice of bar. The notice of bar was served on 11 November 2020.

[5] For the reasons that are not immediately clear, on 26 November 2020, the plaintiff, before a plea could be filed, delivered notices in terms of rule 35 and rule 37. Following delivery of the aforesaid notices, the plaintiff served an agenda for pre-trial conference, in which he set out issues for which the defendants must agree. On 7 April 2021, the plaintiff served what purports to be a rule 37 minute.

[6] Subsequent to all the above steps taken by the plaintiff, the defendant served and filed his plea on 13 April 2021. The defendant, upon realising that he was under bar, simultaneously delivered the plea, with the condonation application and the leave for the upliftment of the bar. The condonation application is opposed by the plaintiff.

[7] The defendant’s basis of the application could be summarized as follows:

7.1 Pursuant to receipt of the summons at the head office in Zwelitsha, the case was allocated to Tania Marili Snayers, the person who deposed to the affidavit in pursuit of condonation;

7.2 Once the matter was allocated to Tania M Snayers, she started to conduct investigations and enquiries from the relevant officials at the district office in Port Elizabeth. During those investigations of the matter, Ms Snayers experienced a series of challenges because the matter dates back

from 2017. She could not obtain the relevant documents and records which would be necessary for a decision on whether to defend or settle the matter.

[8] According to Ms Snayers, her challenges in filing the plea, were, in addition to those problems relating to the absence of documents and records, compounded by the unavailability of some officials who had knowledge about the matter. Some of the officials, according to Ms Snayers, had already taken leave and others relocated to other places. Whilst Ms Snayers was confronted with the above challenges, there was an outbreak of the Corona virus resulting in the lockdown of the country.

[9] Ms Snayers was only able to consult with witnesses who had knowledge on the matter during March 2021 and whereafter, on 24 March 2021, she instructed the State Attorney to brief a counsel. The consultation with the counsel took place on 7 April 2021. On the strength of the counsel's advice and opinion, the defendants were confident to defend the matter and a plea was accordingly prepared.

[10] In response to the defendants' case for condonation, the plaintiff contends, in the main, that the defendants have not provided a reasonable explanation for the delay and that, the defendants' application is not *bona fide*, but a mere stratagem to delay the plaintiff's claim and that the plaintiff would be severely prejudiced if the defendants are granted condonation and leave to file their plea. In addition to those submissions, the plaintiff avers in the answering affidavit, that the defendants have been guilty of a reckless and intentional disregard for the rules of court and that the defence proffered by the defendants is weak.

CONDONATION

[11] Rule 27 deals with extension of time and removal of bar and condonation. In terms of sub rule 3, the court may, on good cause shown, condone any non-compliance with the rules. In terms of section 173 of the Constitution¹, the High Court has inherent power to protect and regulate its own processes taking into account the interest of justice. Rule 27 provides for different situations in which the rule can be invoked, and these are:

¹ Constitution of the Republic of South Africa, 1996, (Act No: 108 of 1996)

“(a) in the absence of agreement between the parties, the extension or abridging of any time-

(i) prescribed by the rules;

(ii) prescribed by an order of court;

(iii) fixed by an order of court extending or abridging any time (subrule (1));

(b) the extension or abridging of any time referred to in paragraph (a) above, before or after the time prescribed or fixed (subrule (2));

(c) the recalling, varying or cancelling of the results of the expiry of any time prescribed or fixed, whether such results flow from the terms of any court order or from the rules (subrule (2));

(d) condonation of any non-compliance with the rules (subrule (3));

(e) the revival of a rule *nisi* which has been discharged by default of appearance by the applicant (subrule (4)).²”

[12] The applicant who seeks condonation is required to provide a full, detailed and accurate account of the reason for the delay to enable the court to understand and assess such delay. If the delay is time related, the date, duration and the extent of the problem that occasioned such delay, should be set out.³ In other words, a full and reasonable explanation, which covers the entire period of delay, must be given. The second requirement is that the applicant should satisfy the court that he has a *bona fide* defence.

[13] Generally, a bar may be removed by consent of parties under rule 27, although there is no obligation on the party who has barred to consent to the removal.

DISCUSSION

² Erasmus Superior Court Practice Second Edition Van Loggerenberg Volume 2 notes under rule 27 and the cases cited therein – [original service] D1-321

³ Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at 477E- G, See Erasmus *supra* at D1 - 323

[14] The parties approach to litigation in this application is unsatisfactory and raises concerns. Firstly, the plaintiff, having served a notice of bar on 11 November 2020, proceeded to issue rule 35 and rule 37 notices, and in the process, drafted rule 37 minutes. There was no basis for all these steps in the absence of a plea. The effect of a notice of bar is that the defendant, if he still fails to deliver a plea, would then not be in a position to deliver his plea until such time that the bar has been uplifted.

[15] In this case, the plaintiff enthusiastically filed all these notices notwithstanding its own resolve of barring the defendant to the extent of opposing the grant of the condonation application and the upliftment of the bar. All the notices were premature.

[16] The defendants' supporting affidavit for condonation and upliftment of the bar is woefully lacking and slovenly drafted. Necessary averments are inelegantly and insufficiently set out. There is no detailed explanation which covers dates, duration and extent of the problems raised by Ms Snayers. Ms Snayers is merely making nebulous statements in relation to the challenges that she had occasioned in relation to the filing of the plea. This court expected that the defendants would have given a detailed account regarding their failure to heed the notice of bar after they timeously filed a notice to defend.

[17] The deafening silence on the reasons why the defendants could not even communicate their challenges to the plaintiff is also of concern. I am not satisfied that the defendants have given a satisfactory explanation regarding the failure to file a plea for the duration of five months. However, the matter must not end there, for, I must still consider the strength of the defence proffered by the defendants on the merits.

[18] The defendants have raised a special plea to the plaintiff's claim. Their special plea is that there is non-compliance with the provisions of section 3(2)(a) read with section 3(3)(a) of Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("**the Act**"). This defence is valid and dispositive of the plaintiff's claim, if successful during the trial. Secondly, the defendants, in their plea, raises an issue of policy interpretation in their resistance of the plaintiff's claim. That defence

raises an important issue of policy consideration and carries, on its own, public interest.

[19] On the basis of the above, in my view, the defendants are raising a strong defence to the plaintiff's claim. I also do take into account that the plaintiff did not apply for default judgment subsequent to the service of the notice of bar and expiry of time in connection thereto.

[20] I agree with Mr Mayekiso, counsel for the defendants, in his submissions that the effect of refusing the condonation and the upliftment of the bar, would amount to denying the defendants an opportunity to place their defence before court. In the circumstances of this case, such a step would not be in the interest of justice and the defendants' rights under section 34 of the Constitution would be unjustifiably infringed.

[21] In my view, this is a case in which, although the explanation is inherently poor, but nonetheless, condonation should be granted. I also take into account that the plaintiff has effectively conducted itself as if it has abandoned its notice of bar when it decided not to apply for default judgment after the expiry of the period in the notice of bar, but instead, decided to issue notices under rule 35, rule 37, agenda for a pre-trial conference and minutes of the pre-trial conference. The plaintiff's conduct, carefully considered, leads to one conclusion, that it has intended for a fully ventilated trial of issues. That conclusion finds support from the plaintiff's own showing. The plaintiff's opposition of the condonation is opportunistic and unreasonable. No default judgment has been obtained in which instance, it could be reasonably inferred that the plaintiff is defending such judgment and would be prejudiced in the circumstances.

CONCLUSION

[22] I am satisfied that the defendants have made out a case for the grant of condonation and the upliftment of the bar. This conclusion is not reached lightly in view of my remarks about the poor explanation given by the defendants for the non-compliance with the rules. This aspect will impact on costs.

COSTS

[23] The defendants are seeking indulgence of the court. The general rule in such cases is that ‘the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted, because of the application, such costs to include the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous’. I do take into account in this regard, that the defendants did not seek for consent of the plaintiff regarding the upliftment of the bar. There were no correspondences in which the defendants explained the challenges it faced. The challenges were only set out in the supporting affidavit, which on its own, is so poorly prepared and woefully lacking in detail. The defendants should pay the costs.

ORDER

[24] In the result, it is ordered that:

1. The application for condonation of the late filing of the defendants’ plea is granted;
2. The notice of bar dated 11 November 2020, is hereby uplifted and the defendants are granted leave to file their plea in the main action within a period of 15 (fifteen) days of the date of this order, should they be so inclined or advised; and
3. The defendants’ shall pay all costs occasioned by the condonation application and the upliftment of the bar, which costs must exclude the preparation of the plaintiff’s answering affidavit.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the plaintiff	:	Ms Burger
Instructed by	:	Nolands Law Attorneys
		c/o Hutton & Cook
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Ref: Mr G C Webb

Counsel for the defendants : Mr Mayekiso
Instructed by : State Attorney
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Ref: 679/20-P10 (Mrs Yako)