

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4692/2014

In the matter between:-

DIHLABENG LOCAL MUNICIPALITY

Applicant/Plaintiff

And

FREE STATE DEVELOPMENT CORPORTATION

Respondent/Defendant

HEARD ON:

19 FEBRUARY 2015

JUDGMENT BY:

G.J.M. WRIGHT, AJ

DELIVERED ON:

5 MARCH 2015

-
- [1] This is an application for summary judgment in the sum of **R 428 785, 32** together with interest *a tempore morae* and costs of suit. The application is opposed.

CHRONOLOGY

- [2] The Plaintiff issued a simple summons for payment of an amount due and payable in respect of certain services referred to as “*water, refuse, sanitation and rates, rendered by the Plaintiff to the Defendant at the latter’s special instance and request . . .*”
- [3] After due service of the summons on the Defendant, a Notice of Intention to Defend was filed on 4 November 2014. The Plaintiff served an application for summary judgment on the attorneys for the Defendant on 25 November 2014.
- [4] On 5 December 2014 the Defendant filed (i) a Notice of Bar and (ii) a notice in terms of Rule 23(1). Both these notices attempted to attack the manner in which the Plaintiff’s claim was set out in the summons. No opposing affidavit accompanied these notices.
- [5] The application for summary judgment was initially set down for hearing on 11 December 2014. On that date the matter was postponed to 29 January 2015 with the Defendant to pay the wasted costs occasioned by the postponement.
- [6] An affidavit opposing the application for summary judgment was eventually filed on 22 January 2015. It was not accompanied by a condonation application, despite being out of time with more than a month.
- [7] On 29 January 2015 the application for summary judgment was postponed to 19 February 2015. This was as a result of the late filing of

the opposing affidavit. The costs occasioned by the postponement stood over for later adjudication. Furthermore, the Defendant's notice in terms of Rule 23(1), as well as the Notice of Bar, was set aside as irregular steps.

[8] The Plaintiff's Heads of Argument pertaining to the Summary Judgment application was filed in terms of the practice of this Division on 11 February 2015. On 13 February 2015 the Defendant filed its Heads of Argument, as well as a supplementary opposing affidavit. The supplementary affidavit contained a request for condonation for the late filing of the Defendant's Opposing Affidavit as well as a request for the supplementary affidavit to be accepted by the Court. The supplementary affidavit then went further and referred to defences to the summary judgment application not previously dealt with in the Opposing Affidavit.

[9] The matter was then fully argued on 19 February 2015.

CONDONATION APPLICATION

[10] In terms of the rules of practice of this division the Defendant's opposing affidavit was to be filed on or before 5 December 2014. Should the time periods of Rule 32 itself have been followed, the opposing affidavit was to be filed by 9 December 2014. Instead it was only filed on 22 January 2015. The Defendant did not file a substantive condonation application but was content with a few averments contained in the supplementary affidavit. No explanation was ever provided as to why a proper and substantive condonation application was not prepared.

- [11] Mr Cilliers, arguing on behalf of the Plaintiff, insisted that, as there was no proper condonation application before court, that in itself provides enough reason for condonation to be denied. Ms Jacobs for the Defendant implored me to accept the averments contained in paragraph 2 of the supplementary affidavit as an actual application for condonation, calling the lack of a proper application an *oversight* by the Defendant's legal representatives.
- [12] The remedy available to a party who is out of time with a procedural step lies in Rule 27(1):
- “(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”
- [13] An application under Rule 27(1) shall in the specific terms of the subrule be “*upon application on notice*”. Such an application entails formal motion proceedings with a notice of motion supported by one or more affidavits. Compare: **Mahomed v Mahomed** 1999 (1) SA 1150 (ECD) at 1152 C.
- [14] Ms Jacobs vehemently argued that the prejudice to be suffered by the Defendant should summary judgment be granted without allowing the opposing affidavit and supplementary opposing affidavit, is of such a serious nature that this in itself tips the scale in favour of the granting of condonation despite the defects in form. Alleged prejudice weaved its way through every argument presented on behalf of the Defendant,

especially with reference to the alleged robust nature of summary judgment proceedings.

- [15] In the judgment of the Supreme Court of Appeal in the case of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture** 2009 (5) SA 1 (SCA) it was suggested (at para 33) that perhaps the time had come to stop describing summary judgment as a “*drastic*” remedy. Navsa JA enjoined defendants to rather concentrate on a proper application of the rules relating to summary judgment.
- [16] Ms Jacobs also opined during argument that, should I not feel inclined to grant condonation, I should grant a postponement in order to allow the Defendant the opportunity to place a proper application for condonation before the court. I specifically inquired whether the Defendant prefers to request a postponement rather than argue the matter. I was assured that the Defendant wishes to argue the matter on the papers as they stand and that the matter of a possible postponement was only mentioned to cater for the possibility that condonation should be refused because of the lack of proper form. The Defendant of course cannot both eat its cake and have it.
- [17] In this matter the application for condonation, if it can be called that, is totally defective in form. As such, there is no condonation application before court. The averments in the supplementary affidavit are not enough to turn the attempt at condonation into a proper application.
- [18] Even if I was to show leniency regarding the form in which the “application” for condonation was presented to this Court, the Defendant still needed to make out a proper case for condonation. The

Defendant failed to make out a proper case for condonation as will become clear from what follows.

- [19] First I find it necessary to deal with the timing of the request for condonation. It was at a very late stage that the attempt to apply for condonation was even made. It was apparently only done in reaction to the contents of the Plaintiff's Heads of Argument where the very lack of a condonation application was pointed out. The Defendant even admits as much in paragraph 2.1 of the Supplementary Opposing Affidavit.
- [20] It is trite law that an application for condonation should be lodged without delay and as soon as it is realized that there has not been compliance with a time period. See: **Commissioner for Inland Revenue v Burger** 1956 (4) SA 446 (A) at 449 G; **Beira v Raphaely-Weiner and Others** 1997 (4) SA 332 (SCA) at 337 D; **Minister of Agriculture and Land Affairs v CJ Rance** 2010 (4) SA 109 (SCA) at 118 A – B. A delay in applying for condonation might in itself be sufficient reason to deny the request. Any delay in making the application should be fully explained. See: **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) at 323 E - F.
- [21] Condonation of the non-observance of the rules of court is not a mere formality. (See: **Meintjies v H D Combrinck (Edms) BPK** 1961 (1) SA 262 (A) at 263 H – 264 B; **Salojee and Another NNO v Minister of Community Development** 1965 (2) SA 135 (A) at 138 E – F). The requirements for a successful application for condonation are well-known, namely (i) a satisfactory explanation for the delay and (ii) a *bona fide* defence against the plaintiff's claim. See in this regard **Du Plooy v Anwes Motors (Edms) Bpk** 1983 (4) SA 213 (O) at 216 H – 217 D. A

further requirement is often added, namely the question of prejudice. In essence, a party applying for condonation should show “good cause”.

- [22] In any application for condonation the minimum requirement is that an applicant must furnish an explanation of the default in a manner which is **sufficiently full** to enable the court to understand how it really came about. In **Silber v Ozen Wholesalers (Pty) Ltd** 1954 (2) SA 345 (A) at 353 A – H it was stated thus:

“An allegation that is too bald may for that reason carry little weight.”

- [23] In the supplementary affidavit the Defendant sets out its reasons for the late filing of firstly the opposing affidavit. In subparagraph 2.2 thereof it is alleged that:

“The Defendant received such application during December 2014 when the offices were manned by skeleton staff. The application did unfortunately not receive the treatment that it should have received since the recipients thereof was [sic] not aware of the urgency with which it had to be treated.”

- [24] This paragraph lacks various details such as when exactly the application was received from the Defendant’s attorneys, who the “recipients” in fact were and why it took till 22 January 2015 for the situation to receive attention. It also does not explain what communication, if any, there was between the Defendant’s attorneys and the Defendant to deal with the inappropriate time lapse. One would expect a reasonable attorney to have indicated the importance of the application at the time that the papers were made available to someone at the offices of the Defendant. Furthermore one would expect a

diligent attorney to keep track of the time periods involved and to follow up on the matter. The Defendant does not aver that the attorneys were in any way to blame for the delay and I have no reason to suspect otherwise.

[25] Should the allegations be accepted that during December the proper people were not available to deal with the matter, it still does not explain why the opposing affidavit was only filed late in January. Surely the offices of the Defendant were not “manned by skeleton staff” for more than a month.

[26] During argument Ms Jacobs purposefully attempted to shift the blame to the Defendant’s legal representatives, arguing that because of the festive season, the legal representatives may have failed to act as diligently as is to be expected and that their offices may have been closed. This argument is of course not supported by the allegations contained in the supplementary affidavit. The attorneys themselves did not file an affidavit confirming that this was indeed the situation. Also, this argument flies directly in the face of the clear wording of subparagraph 2.2 of the supplementary affidavit that makes it clear that it was the employees of the Defendant who allegedly did not act as diligently as was to be expected. During December the attorneys were dealing with the matter, albeit by way of the inappropriate filing of the notice of bar and the notice in terms of rule 23(1).

[27] It should not simply be assumed that, where non-compliance was due to the neglect of the attorneys, condonation will be granted. In **Saloojee & Another v Minister of Community Development** 1965 (2) SA 135 (AD) it was pointed out that “*There is a limit beyond which a*

litigant cannot escape the results of his attorney's lack of diligence . . ." (at 141 C – D). See also: **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) at 9 H.

- [28] The Defendant has failed to properly explain the reasons for the late filing of the opposing affidavit and has not placed any blame on his legal representatives. The present case presents itself as an instance where sympathy for a litigant must yield to the more important principle that flagrant disregard for the rules of court cannot be tolerated.
- [29] It was argued on behalf of the Defendant that, should the explanation for the late filing of the opposing affidavit be found lacking, condonation may still be granted as the Defendant succeeded in showing that it has a *bona fide* defence and also because the Defendant will suffer prejudice should summary judgment be granted without reference to the opposing and supplementary affidavits. Ms Jacobs went so far as to argue that it is sufficient if the Defendant only succeeds with two of the three requirements for condonation. She was unable to provide me with any case law to support this last submission.
- [30] In order to satisfy the second requirement for condonation, namely the existence of a *bona fide* defence, the minimum that must be shown is that the defence is not patently unfounded and that it is based upon facts (which must be set out in outline) which, if proved, would constitute a defence.
- [31] It was argued by Ms Jacobs that the Defendant has a *bona fide* defence against the Plaintiff's claim. It was firstly suggested that the Plaintiff's claim is not a liquidated amount in money. The reasons advanced for

this argument centre firstly on the possibility that at least part of the claim has prescribed. This is dealt with in the supplementary affidavit in the following tentative manner:

“The total amount claimed by the Plaintiff may include such prescribed debt . . .”
[own emphasis]

[32] The Defendant further alleges that it did not receive any accounts and can therefore not adjudicate whether the amount claimed is in fact correct. In the Opposing Affidavit this is expressed in the following manner: “*Respondent was not furnished with any accounts and no demand for the alleged outstanding rates and taxes amounts.*” And also: “. . . *the Defendant would like to ascertain the veracity of the amounts claimed during a trial*”. The Defendant then goes further in its supplementary affidavit and state that “*the Defendant would like to ascertain the veracity of the amounts claimed during a trial.*” The very manner in which the Defendant’s allegations are worded suggest that the Defendant wishes to speculate and go on the proverbial fishing expedition.

[33] A bald denial of a plaintiff’s claim or an averment of lack of knowledge does not satisfy the requirement that a defendant must fully disclose the nature and grounds of his defence and the material facts relied upon therefore. See: **Herb Dyers (Pty) Ltd v Mahomed** 1965 (1) SA 31 (T); **Van Zyl v Wheeler** 1964 (3) SA 758 (O) at 760; **Gruhn v Pupkewitz & Sons (Pty) Ltd** 1973 (3) SA 49 (AD) at 58; **Herbst v Solo Boumateriaal** 1993 (1) SA 397 (T).

[34] The Defendant makes the vague averment that it has never received any accounts from the Plaintiff regarding any services rendered to it by the Plaintiff. The Defendant does not however aver that the Plaintiff did not render services.

[35] Where a defendant wishes to oppose an application for summary judgment by filing an affidavit to satisfy the court that he has a *bona fide* defence, such affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon therefore. See: **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 425 G – 426 E.

“The word ‘fully’ ... connotes in my view that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.”

[36] It is not sufficient for a defendant to state that he or she has no knowledge of the allegations in the plaintiff’s summons, nor to state that the plaintiff’s allegations must be subject to grave suspicion. See: **Van Zyl v Wheeler** 1964 (3) SA 758 (O) at 760; **Herb Dyers (Pty) Ltd v Mahomed** 1965 (1) SA 31 (T) at 32. The same applies to a mere denial of the correctness of the amount claimed. See: **Jacobsen Van Den Berg SA (Pty) Ltd v Triton Yachting Supplies** 1974 (2) SA 584 (O).

[37] With reference to a condonation application relating to the late filing of a notice of appeal, it was stated in **Darries v Sheriff, Magistrate’s Court, Wynberg and Another** 1998 (3) SA 34 (SCA) at 41 C – D that:

“...prospects of success is but one of the factors relevant to the exercise of the Court’s discretion, 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. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.”

- [38] It is not sufficient for a party applying for condonation to show that condonation will not result in prejudice to the other party. An applicant for relief under Rule 27 must show good cause and the question of prejudice does not arise if it is unable to do so. See: **Standard General Insurance Co Ltd v Eversafe (Pty) Ltd** 2000 (3) SA 87 (W) at 95 E – F. In the present matter, the Defendant failed to show such good cause for the granting of condonation. Any prospects of success that the Defendant’s defences may have, pale into insignificance when seen against the background of (i) the lack of a proper condonation application, (ii) the lack of reasons for the late filing of the opposing affidavit, and (iii) the late attempt at applying for condonation.
- [39] The Respondent requires leave for the supplementary affidavit to be accepted. In the Defendant’s Heads of Argument reliance was placed on the case of **Bank of Lisbon v Botes** 1978 (4) SA 724 (WLD). It was not argued that the facts and circumstances of the present case are similar to those in the **Bank of Lisbon** case.
- [40] A court seldom allows the filing of supplementary opposing affidavits in summary judgment proceedings. In **Gani v Crescent Finance Corporation (Pty) Ltd** 1961 (1) SA 222 (W) a request for a postponement to enable the filing of a supplementary affidavit was

granted because of the particular circumstances of that case, namely that the defendant's affidavit was by mistake technically defective. A court has a discretion in an appropriate case to allow an additional affidavit by a defendant in order to improve a defective attempt to set out a defence to the plaintiff's claim or to prove his *bona fides*. See in this regard: **Juntgen a/a Paul Juntgen Real Estate v Nottbusch** 1989 (4) SA 490 (W). The facts in these cases are not similar to the facts in the present matter.

- [41] No explanation has been forthcoming as to why the matters contained in the supplementary affidavit were not dealt with in the initial affidavit. The Defendant contents with the following in subparagraph 2.5 of the supplementary affidavit:

“The Honourable Court is also requested to condone the filing of this supplementary affidavit . . .”

- [42] No grounds are set out as to why the supplementary affidavit should be allowed. The Defendant should at least have touched upon the question as to why the defences were not timeously included in an affidavit and what special circumstances exist for the court to grant an indulgence. See: **Empire Fresh Meat Supply (Pty) Ltd v Ilic** 1980 (4) SA 23 (W); **Juntgen t/a Paul Juntgen Real Estate v Nottbusch** 1989 (4) SA 490 (W).

- [43] The Defendant did not even attempt to make out a case for condonation for the late filing of the supplementary affidavit. Ms Jacobs was therefore constrained to again use the argument of prejudice in an attempt to convince me to allow the supplementary affidavit. I already

dealt with the issue of prejudice, but I may add that the defences mentioned in the supplementary affidavit are such that, if the Defendant seriously intended relying on them, they should, and easily could have, been dealt with in the initial opposing affidavit.

[44] In the light of all the defects in the Defendant's request for condonation I find that the Defendant has failed to make out a proper case for condonation for the late filing of its opposition to the summary judgment application. As such the Plaintiff's application for summary judgment stands to be dealt with on an unopposed basis.

[45] The Defendant is to be held responsible for any and all costs connected to the application for condonation.

PLAINTIFF'S CLAIM

[46] The Plaintiff claims the costs of services rendered to the Defendant since "*2011 until the present*". Summons was served on the Defendant on 27 October 2014. Without the averments contained in the supplementary affidavit, there is no mention of prescription as a possible defence (at least for part of the time period claimed for). In terms of section 17(1) of the **Prescription Act**, Act 68 of 1969, a court may not of its own motion take notice of prescription.

[47] I am satisfied that the Plaintiff duly complied with the requirements of Rule 32. The Plaintiff's claim appears to be for a liquidated amount of money, namely an amount that can be easily calculated or ascertained.

[48] As such, the Plaintiff is entitled to summary judgment.

COSTS

[49] Mr Cilliers urged me to consider a punitive cost order when granting summary judgment. This argument was made in the light of the manner in which the Defendant dealt with the matter. I am satisfied that ordering the Defendant to be responsible for the costs of suit will suffice in the circumstances.

[50] It is necessary to deal with the costs of the postponement on 29 January 2015 as it stood over for later adjudication. Counsel were *ad idem* that the Defendant should pay the wasted costs occasioned by the postponement. The postponement was the direct result of the late filing of the Opposing Affidavit. In his Heads of Argument Mr Cilliers conceded that such costs should be on an unopposed scale.

ORDER

1. The Defendant's applications for condonation of the late filing of the Opposing Affidavit and Supplementary Opposing Affidavit are dismissed with costs;
2. The Defendant is to pay the wasted costs occasioned by the postponement of the matter on 29 January 2015, such costs to be on an unopposed scale;
3. Summary judgement is granted in the following terms:
 - 3.1 Payment of the amount of **R 428 785 – 32**;
 - 3.2 Interest *a tempore morae* on the amount of **R 428 785 – 32** at the rate of 9% *per annum*, from date of summons to date of payment;
 - 3.3 Cost of suit.

G.J.M. WRIGHT, AJ

On behalf of applicant: Adv H.J. Cilliers
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv M Jacobs
Instructed by:
Moroka Attorneys
BLOEMFONTEIN