IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) ~~REVISED~~

DATE 19 APRIL 2021 SIGNATURE

Case no: 42987/2019

In the matter between: -

ORTHOTOUCH (PTY) LTD Applicant/Plaintiff

And

DELTA PROPERTY FUND LIMITED Respondent/Defendant

JUDGMENT

N.E NKOSI (AJ):

INTRODUCTION

[1] This is an interlocutory application in which the applicant seeks an order uplifting the notice of bar and condoning its late delivery of a notice to amend its particulars of claim.

[2] The application is opposed and the respondent has filed a counter application for the dismissal of the applicant's claim in the main action.

BACKGROUND

[3] The applicant, through the Sheriff, served its combined summons on the respondent on 6 December 2019. The applicant claims payment of a commercial debt of R210, 300, 040, 49, interest on the said amount at the rate of 10.25% per annum from date of demand to date of final payment and costs.

[4] The respondent delivered its notice of intention to defend on 22 January 2020. Its plea to the applicant's claim was due on 19 February 2020. On 4 February 2020, the respondent delivered a notice in terms of Rule 30(1) of the Uniform Rules of Court, objecting to the applicant's particulars of claim on the basis that they constitute an irregular step and do not comply with the Uniform Rules of Court in many respects.

[5] The applicant attempted to amend its particulars of claim, however, its notice of intention to amend was met with further resistance from the respondent. This time, the respondent objected on the basis that the intended amendment rendered the particulars of claim vague and embarrassing. The applicant was therefore required to lodge an application for leave to amend its particulars of claim not later than 17 March 2020. It failed to do so.

[6] On 30 March 2020, the respondent delivered a notice in terms of Rule 23(1) formally notifying the applicant of its objection to its particulars of claim. The applicant was afforded 15 days as prescribed by the Rules, to remedy the cause of complaint.

[7] The applicant failed to comply with the request in terms of Rule 23(1) and on 14 May 2020, the respondent delivered its notice of exception. The exception application was not opposed and was enrolled for hearing on 29 June 2020.

[8] On 20 June 2020, the applicant's attorney approached the respondent's attorney to discuss the exception application. The applicant conceded being in default and agreed to the order upholding the exception application. Consequently, the Court made the following order on 30 June 2020:

"*having read the papers filed of record, having heard Counsel and having considered the matter, the following order is made, by agreement between the parties:*

1. *The exception is upheld.*
2. *The plaintiff is afforded fifteen days from the date of this order within which to amend its particulars of claim.*
3. *In the event of the plaintiff failing to amend its particulars of claim within the aforesaid time period, the particulars of claim are struck out.*
4. *The plaintiff shall pay the costs of the exception, inclusive of the costs of counsel.*"

[9] The terms of the Court order are unambiguous and to date, the order has not been challenged or set aside.

[10] On 16 July 2020, subsequent to the Court order, the applicant delivered amended particulars of claim, without first seeking leave of Court to amend. Clearly the procedure to seek and effect an amendment was incorrect. The very next day the respondent's attorney sent a letter to the applicant's attorney alerting them of the irregular step.

[11] On 20 July 2020 the applicant delivered a notice of intention to amend its particulars of claim. This intended amendment introduced an issue which by enlarge was the subject of the respondent's exception before Court and the Court had already upheld the exception. On 31 July 2020, the respondent

delivered its objection to the intended amendment. In effect, the applicant had until 17 August 2020 to apply for leave to amend its particulars of claim.

[12] On 17 August 2020, the applicant's attorney approached the respondent's attorney in writing requesting an extension of time to file its amended particulars of claim. The letter reads as follows:

"*Kindly be advised that our office has briefed Counsel herein to correctly affect the amendments as per the court order and your objections raised on 31 July 2020*

Kindly provide our client with an indulgence herein to amend its particulars of claim by no later than 26 August 2020.

We await your response, soonest"

[13] The respondent agreed to the request and granted the requested indulgence again. The applicant failed to deliver its amendment particulars within the deadline it set for itself. The applicant once again approached the respondent requesting a further indulgence, this time citing COVID 19 related reasons for failing to meet the deadline of 26 August 2020. This time the request was refused.

[14] The respondent delivered a notice of bar affording the applicant five days to deliver its notice to amend the particulars of claim. The notice of bar was due to expire on 3 September 2020. The applicant missed the deadline and delivered its notice on 4 September 2020.

[15] This concludes the summary of events which took place between the parties preceding this application.

DISCUSSION

[16] The issue to be determined by this Court is whether, the applicant has made out a case for the upliftment of the notice of bar and condoning the non-compliance with the Rules of Court.

[17] The submissions made by each party in support of their respective case, predominantly rests on the application of the test enunciated in *Smith NO v Brummer NO*[1]. In line with that test, the factors to be considered are the following:

(a) has the applicant given reasonable explanation for its failure to file its amended particulars of claim timeously;

(b) is the application to lift the notice of bar *bona fide* and not made purely to delay the action;

(c) was the applicant reckless or intentional in disregarding the Rules of court;

(d) is the applicant's claim ill-founded; and

(e) will the respondent suffer prejudice by the upliftment of the notice of bar.

[18] The applicant submitted that the period of delay relates only to the notice of bar and not any other non-compliance with the Rules of Court. The background to the events preceding the notice of bar indicates that the applicant was placed in terms, to comply with certain procedural steps within the time limits prescribed by the Rules of Court, its own concession which was made an order of Court and its request for an indulgence to comply before 26 August 2020. In each instance, the applicant failed to meet the deadline.

[19] In my view the period of delay should be understood against the background of the matter and should not be confined to the period of the notice of bar, otherwise to do so will reduce all the events preceding the notice of bar to a nullity which is untenable and undesirable. There should be full disclosure. The notice of bar came into the picture because of the history of non-compliance with the Rules of Court. The explanation for non-compliance should also cover the events leading to the delivery of the notice of bar. In *Van Wyk v Unitas Hospital*[2], the Constitutional Court had this to say:

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[1] 1954 (3) SA 352 (O) at 258 A.

[2] (CCT 12/07) [2007] ZACC 24, 2008 (2) SA 472 (cc) at para 22.

"an applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."

[20] A litigant approaching a Court for condonation should disclose all the material facts relating to the delay. There is no explanation proffered by the applicant why it failed to comply with the terms of the Court order. I cannot disregard the court order, unless it is set aside. The onus remains with the applicant to give a full explanation for its non-compliance with the court order and it has failed to discharge this duty.

[21] The reason given for failing to honour the time frames prescribed by the notice of bar was load-shedding. The applicant submitted that there was no electricity on 3 September 2020 at its offices due to load shedding and consequently was unable to serve its amended papers on that day being the expiry date of the notice of bar.

[22] When asked by Court, Counsel for the applicant conceded that there was a load-shedding schedule available to warn consumers in their area of power outage on scheduled dates. There is no explanation on the applicant's papers why it failed to take precautions in light of load-shedding schedule, to deliver its papers in time. Load shedding is the only reason proffered for failing to comply with the notice of bar and full details thereof were not disclosed.

[23] In Cape Town City v Aurecon South Africa (Pty) ltd[3] the Constitutional Court reiterated the test for condonation as stated in *Van Wyk's*[4] and *Ekurhuleni*[5] cases and stated that the factors that are relevant to an inquiry for condonation include but not limited to *"the reasonableness of the explanation."*

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[3] 2017 (4) SA 223 (CC) at 46.

[4] Van Wyk supra (Footnote 2) at para 20

[5] Ekurhuleni Municipality v Ingonyama Trust [2013] ZACC 7; 2014(3) SA 240 (cc); 2013 (5) BCLR 497 (cc) at para 28

[24] In the circumstances of this case, I am not persuaded by the magnitude of the claim to find in the applicant's favour regarding the prospect of success. Instead, the effect of a poorly explained delay impacts negatively on the prospects of success of the action. In *Van Wyk's* case[6] the Court further said:

"*the applicant has submitted that her application for leave to appeal bears prospects of success. Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay.*"

The delay herein emanates way before the notice of bar and there is no reasonable explanation. At para 32, the Court in *Van Wyk's*[7] case went on to say:

"*This in itself is no reason to come to the assistance of a litigant who has been dilatory in the conduct of litigation.*"

Clearly there is an inordinate delay. The applicant's application does not meet the requirements of the *Smith NO v Brummer NO* test in relation to the issue of the delay and the prospects of success. In my view, the application should not succeed purely on these grounds alone.

[25] The issue of prejudice cannot be considered in isolation from the other factors of the test. In an attempt to refute the respondent's submissions on the issue of prejudice, the applicant sought the leave of this Court to file a supplementary affidavit to deal squarely with the issue of prejudice. The application was unopposed and I allowed the supplementary affidavit into the record of the proceedings. In a nutshell the respondent, in its answering affidavit, submitted that it is a listed company and its share price had been adversely affected by the litigation. As in December 2019, the share price dropped significantly. The applicant in its supplementary affidavit, argued

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[6] See footnote 2 *supra*, at para 33

[7] See footnote 4 *supra* at para 32. "this Court has previously refused to come to the assistance of litigants where there was a delay of some nine month regardless of the issue raised" Van Wyk at para 32, also see, Head of Department; Department of Education, Limpopo Province v Settlers Agricultural High School and Others 2003 (11) BCLR 1212 (CC) at para 11 and Brummer v Gortile Brothers Investments (Pty) ltd and Others [2000] ZACC 3; 2000 (2) SA837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

that a newspaper article published in December 2020, demonstrates that it was not the present litigation which caused the share price to drop but a whole host of factors including maladministration, corruption and other similar mismanagement. What I find unchallenged is the fact that the shareholders were notified of the present litigation by the respondent and the share price dropped in December 2019 and not in December 2020, as alleged by the applicant. Assuming that the share price dropped in 2020 for the reasons mentioned by the applicant, the possibility that the share price may have gone down in December 2019 as a result of the litigation and to the prejudice of the respondent can't be ruled out. I am therefore not prepared to take judicial notice of the allegation that the share price dropped solely because of the reasons mentioned in the newspaper. The veracity of the contents of the article was not proven.

[26] The applicant's claim is, to date, not amended to comply with the Court order granted on 30 June 2020. As the action stands, it is not well founded in the absence of an amendment to cure the deficiencies. The history of this matter clearly demonstrates that the applicant has been unable to cure the deficiencies. I am therefore, not persuaded that the upliftment of the bar will enable the applicant to deal diligently with the deficiencies and propel the matter to finality, more so that the applicant has not given a reasonable explanation why it failed to brief Counsel from the onset, given the magnitude of its claim and its inability to reply effectively to the respondent's objections. I am also unable to conclude that the application is *bona fide*. In my view, the applicant was reckless in failing to amendment within a reasonable time at least since from the date of the Court order on 30 June 2020.

[27] The 30 June 2020 court order stipulates *inter alia* that, in the event the plaintiff fails to amend its particulars of claim within 15 days from the date of the order, the particulars of claim are struck out. It is common cause that the particulars of claim have not been amended. I have indicated that the application for condonation should fail for reasons I already mentioned in this judgement. It is therefore unavoidable that the particulars of claim should be struck out.

[28] I therefore make the following order:

1 The application to uplift the notice of bar is dismissed.

2 The applicant's claim in the main action is dismissed.

3. The Applicant is to pay the costs of the application and action including the costs of two counsels.

19/04/2021

NE NKOSI, AJ
Acting judge of the
High Court

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