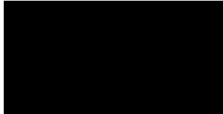


REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
<u>8/5/2023</u>	
DATE	 SIGNATURE

CASE NO: 2021/20060

In the matter between:

VICO MINING (PTY) LTD
(Registration Number: 2015/414260/07)

Applicant

And

ADVANCE INDUSTRIAL SOLUTIONS (PTY) LTD
(Registration Number: 2005/013558/07)

Respondent

In Re:

ADVANCE INDUSTRIAL SOLUTIONS (PTY) LTD
(Registration Number: 2005/013558/07)

Plaintiff

And

VICO MINING (PTY LTD
(Registration Number: 2015/414260/07)

Defendant

Neutral citation: *ADVANCE INDUSTRIAL SOLUTIONS (PTY) LTD v VICO MINING (PTY) LTD* (Case No: 2021/20060) [2023] ZAPGPJHC 433 (8 May 2023)

JUDGMENT

DREYER AJ:

1. The Applicant seeks an order *inter alia*:
 - 1.1 That condonation be granted to it for the late filing of its Plea under the abovementioned case number.
 - 1.2 That the Notice of Bar served on its attorneys of record on 7 June 2021 be uplifted and removed.

2. A brief chronological background leading up to the present application is as follows:
 - 2.1 On 21 April 2021 the Respondent instituted action against the Applicant seeking payment *inter alia* in the amounts of R9 569 476.88 and R640 894.08.
 - 2.2 The Respondent on 21 April 2021 also filed a Notice in terms of Rule 41A(2)(a) of the Uniform Rules of Court opposing the referral of the matter to mediation.
 - 2.3 On 6 May 2021 the Applicant served a Notice of Intention to Defend as well as a Notice of Irregular Step in terms of Rule 30 ("the Applicant's Rule 30 notice"). The Applicant's Rule 30 notice states that the Respondent failed to serve and file a Notice in terms of Rule 41A(2)(a) with its Summons on the Applicant, and further called upon the Respondent to remove the irregular step within ten (10) days.
 - 2.4 In response to the Applicant's Rule 30 notice, the Respondent also served a Notice of Irregular Step in terms of Rule 30 on 19 May 2021 ("the Respondent's Rule 30 notice"). The Respondent's Rule 30 notice states that the Applicant's Rule 30 notice constitutes an irregular step in that the Sheriff served the Respondent's Rule 41A(2)(a) notice on the Applicant at its registered address on 24 April 2021, with its Combined Summons. The Respondent's Rule 30 notice further afforded the Applicant to remove the cause of complaint within ten (10) days of delivery of the said notice by withdrawing its Rule 30 notice.

- 2.5 On 21 May 2021 the Applicant's attorney of record addressed a letter to the Respondent's attorney of record advising that their office did not have access to CaseLines, that the Applicant only received the Summons and further requesting that the Respondent withdraw its Rule 30 notice and respond to the Applicant's Rule 30 notice.
 - 2.6 On 26 May 2021 the Respondent's attorney of record in response to the aforesaid letter addressed an email to the Applicant's attorney of record advising that they have been added to CaseLines and should now have access to the Rule 41A(2)(a) notice *"which was, in any event, served on your client (together with the summons) on 24 April 2021, in accordance with the sheriff's return of service."*
 - 2.7 On 7 June 2021 the Respondent's attorney of record served a Notice of Bar on the Applicant's attorneys of record, without serving a formal response to the Applicant's Rule 30 notice.
 - 2.8 The Respondent's attorney of record proceeded on 15 June 2021 to serve a Notice of Intention to apply for Default Judgment in terms of Rule 31(5) ("the Default Judgment application").
 - 2.9 On 18 June 2021 the Applicant's attorney of record served a Plea.
 - 2.10 The present application was then served on the Respondent's attorney of record on 22 June 2021.
3. The Notice of Bar called upon the Applicant to deliver its Plea within five (5) of the Notice being delivered. The Applicant therefore had to deliver its Plea on or before 14 June 2021. The Applicant however delivered its Plea three (3) days late, as 16 June 2021 was a public holiday.

4. Rule 27 provides for the extension or abridging of time or removal of bar, and for condonation of non-compliance with the Rules.
5. Good cause is a requirement for any application in terms of Rule 27.
6. The Applicant's application is supported by an affidavit deposed to by its director. The reasons for the late filing of the Plea appears from paragraphs 6.2 to 6.5 of the Founding Affidavit as follows:
 - 6.1 The Applicant's attorney of record briefed Counsel to attend to the drafting of the Plea on 8 June 2023.
 - 6.2 In order to follow up the instruction, the Applicant's attorney of record diarised the matter in an automatic and computerised legal system, Practice Panther. The system brings up a reminder on the screen and also sends an email to ensure that the reminder comes to one's attention.
 - 6.3 It was only after a conversation with Counsel on 15 June 2023 that the Applicant's attorney of record realised that she had typed the date incorrectly as "06/07/2021", being 6 July 2022, instead of "07/06/2021". The legal system accordingly automatically calculated that a reminder of the drafting of the Plea would only be sent on 8 July 2021. I point out that the Founding Affidavit incorrectly refers to the date of the conversation as being on 9 June 2021. This was however rectified and explained in a Confirmatory Affidavit deposed to by the Applicant's attorney of record, attached to the Replying Affidavit.

- 6.4 On realising the oversight, the Applicant's attorney of record immediately tried to contact the Respondent's attorney of record but was unable to speak to the attorney as she was informed by the Receptionist that all of the attorneys were in a meeting. The Applicant's attorney of record requested that her call be returned as matter of urgency.
- 6.5 Despite the request, the call of the Applicant's attorney of record was not returned. Instead, the Respondent proceeded to serve the Default Judgment application.
- 6.6 A Confirmatory Affidavit by the Applicant's attorney of record is attached to the Founding Affidavit.
7. The Answering Affidavit is in response to the incorrect date of 9 June 2021 contained in the Founding Affidavit. The new evidence contained in the Replying Affidavit, being the correct date of 15 June 2021, is not dealt with by the Respondent. Counsel for the Respondent does however deal with it in the Respondent's Heads of Argument, seeking to argue that the Applicant's attorney seeks to do an about turn in reply and is a change of heart without any substantiation or proof. I am not in agreement with this.
8. In *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others* 2000 (3) SA 87 (W) it was held:

[12] It is a well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the Court's discretion. The Applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and the motives. Where there has been long delay, the Court

should require the party in default to satisfy the Court the relief sought should be granted.”

9. The Constitutional Court in *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) held that the standard for considering an application for condonation is the interests of justice. The concept ‘interests of justice’ is so elastic that it is not capable of precise definition. It includes the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospect of success. The particular circumstances of each case will determine which of these factors are relevant. It was further held:

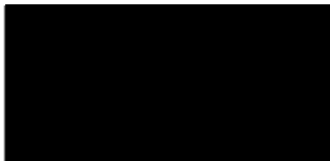
[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.”

10. In *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) the Constitutional Court held that in determining whether condonation could be granted, lateness was not the only consideration. The test for condonation was whether it was in the interests of justice to grant condonation.
11. A second requirement for the favourable exercise of the Court’s discretion is that an applicant should satisfy the Court on oath that he has a bona fide defence (See *Dalhousie v Bruwer* 1970 (4) SA 566 (C); *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* 2021 (6) SA 352 (SCA)).

12. In this regard it has been held that the minimum that the applicant must show is that his defence is not patently unfounded and that it is based upon facts which must be set out in outline, and which, if proved, constitutes a defence (See *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O)).
13. The Applicant set out its defence in paragraphs 7.2 to 7.11 of the Founding Affidavit. The Applicant avers that the amounts claimed by the Respondent is not yet due and payable. The Applicant further states that coal was uplifted which the Respondent does not reflect in its reconciliation attached to the Summons and that the quantities uplifted by the Respondent are the subject matter of an arbitration. The Applicant also states that the amounts claimed to be uplifted are less than the actual quantities that were uplifted.
14. It is not for this Court to determine the validity of the defence raised by the Applicant. This will be dealt with by the Court adjudicating upon the action.
15. I am satisfied that the Applicant's explanation is reasonable enough to excuse its default and therefore that it has shown good cause. It was due to a bona fide oversight on the part of the Applicant's attorney. Immediately upon realising the oversight on 15 June 2021, the Applicant's attorney of record contacted the Respondent's attorney of record and having been informed that all of the attorneys were busy in a meeting, requested that her call be returned as a matter of urgency. The Respondent's attorney of record however did not return the call of the Applicant's attorney. This is not responded to in the Answering Affidavit and therefore remains undisputed.
16. There was also not a long delay. The Applicant's Plea was due on 14 June 2021 and was served on 18 June 2021, three (3) days late. The present application was served on 22 June 2021, two (2) days after the Applicant served its Plea.

17. I am also satisfied that the Applicant has a bona fide defence which is not patently unfounded.
18. Having found that the Applicant has shown good cause, I now turn to the question of prejudice. The Applicant in its Founding Affidavit avers that no prejudice will be suffered by the Respondent should the relief sought be granted. Should the relief sought however be denied, the issues between the parties will not be canvassed. The Respondent in its Answering Affidavit does not respond to this averment of the Applicant and therefor does not dispute same, and further does not set out what prejudice it will suffer should the relief sought be granted. It does bear mention that a period of approximately two (2) years has lapsed since the action was instituted on 21 April 2021 and the hearing of the present application on 24 April 2023. This delay could have been avoided, specifically by the Respondent. The uncooperative way in which the Respondent is conducting the litigation, as well as the uncollegial behaviour of the Respondent's attorney of record have contributed to this delay.
19. In *Smith, NO v Brummer, NO and Another* 1954 (3) SA 352 (O) the Court held in an application for the removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the Court is to grant such an application where:
 - (a) The applicant has given a reasonable explanation of his delay;
 - (b) The application is bona fide and not made with the object of delaying the opposite party's claim;
 - (c) There has not been a reckless or intentional disregard of the Rules of Court;
 - (d) The applicant's action is clearly not ill-founded and
 - (e) Any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs.

20. Having regard to the circumstances of the present matter, in consideration of the circumstances set out in *Smith, NO v Brummer, NO*, I am of the view that the removal of the bar should be granted.
21. I am also of the view that it would be in the interests of justice to grant the application.
22. With regards to costs, the Applicant seeks an order that the costs of the application be paid by it, save in the event of opposition in which case the costs be paid by the Respondent. During the hearing of the matter Counsel for the Applicant, Mr Van Rensburg, submitted that he would not be in disagreement if the Applicant is ordered to pay costs of the application.
23. The costs order sought by the Applicant is in accordance with the general rule that the applicant should pay all the wasted costs due to the application, as the applicant seeks an indulgence. This indulgence includes any costs of reasonable (not vexatious or frivolous) opposition.
24. I therefore make the following order:
- 24.1 The bar is uplifted.
- 24.2 Condonation is granted to the Applicant for the late filing of its Plea.
- 24.3 The costs of the application are to be paid by the Applicant.



E DREYER

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 8 May 2023.

Appearances:

Appearance for Applicant:	Adv. SJ Van Rensburg SC
Instructed by:	JC Scheepers Attorneys C/O Hannelie Swart Attorneys

Appearance for Respondent:	Adv. M Cooke
Instructed by	Prinsloo Inc.

Date of hearing:	24 April 2023
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Date of Judgment:	8 May 2023
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