IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
9/10/2024	**……**
DATE	SIGNATURE

CASE NO: 2020/17987

In the matter between:

EVANGELOS GIANNAKIS Applicant

and

ZANDILE PERTUNIA SITHOLE N.O. Respondent

JUDGMENT

E EKSTEEN, AJ:

Order

[1] In this matter I make the following order:

1. The application to strike out the respondent's claim is dismissed;

2. The delay in filing the respondent's declaration is condoned;

3. The notice of bar against the respondent is removed;

4. The timeframes for the respondent to file her declaration is extended;

5. The respondent is directed to file her declaration within 5 days of this order; and

6. Costs in the cause.

[2] The reasons for the order follow below.

Introduction

[3] This is a judgment in the Special Interlocutory Court. Before me was an application to strike out a claim in an opposed application that was referred to trial under the above case number ("*the main application*"), as well as an opposed application for the upliftment of a bar and condonation for the late filing of a declaration in the case referred to trial ("*the counter-application*").

[4] Mr Giannakis is the applicant in the main application and the respondent in the counter-application. Unless otherwise indicated by the context, he is referred to in this judgment as "*the applicant*".

[5] Ms Sithole, in her official capacity as executrix of the deceased estate of the late Mpumelelo Buku ("*the deceased*"), is the respondent in the main application and the applicant in the counter-application. Unless otherwise indicated by the context, she is referred to in this judgment as "*the respondent*".

Background to the main application and counter-application

[6] Ms Sithole and Dumisani Buku ("*Mr Buku*"), the parents of the deceased, launched an application against Mr Giannakis under the above case number on 22 July 2020 ("*the July 2020 application*"). The relief sought in the July 2020 application included, *inter alia*, an order that a purported sale agreement, concluded between the deceased and Mr Giannakis and pertaining to Unit […], V[…] D[…], M[…]e, Johannesburg ("*the immovable property*"), be declared invalid and set aside. Also, directing that the immovable property be transferred to the estate of the deceased, together with ancillary relief. Orders were further sought directing Mr Giannakis to pay R252,000 and R909,000 respectively, to the deceased's estate.

[7] On 30 March 2021, Dippenaar J granted an order ("*the March 2021 order*") that the July 2020 application is referred to trial; the notice of motion shall stand as the simple summons; the answering affidavit shall stand as a notice of intention to defend; and Ms Sithole and Mr Buku are directed to deliver their declaration(s) within 20 days of the order.

[8] At the time of the March 2021 order, Ms Sithole and Mr Buku were represented by Shepstone and Wylie attorneys. On 22 April 2021 these attorneys served a notice of withdrawal as attorneys of record. The declaration was also not filed within 20 days of the March 2021 order.

[9] On 10 May 2022, more than a year after the March 2021 order, Mr Giannakis' attorneys caused a notice of bar to be served at Ms Sithole and Mr Buku's address identified in the July 2020 application. On 17 May 2022 Mr Buku filed his declaration while Ms Sithole's declaration remained outstanding.

[10] On 12 October 2022, Mr Giannakis's plea and conditional counter-claim to Mr Buku's declaration was filed. Mr Buku did not plea to Mr Giannakis's conditional counter-claim. Consequently, a second notice of bar was filed and thereafter an application for default judgment. Mr Buku subsequently filed a plea to the conditional counter-claim. At the time, he was represented by Paul Friedman and Associates Inc Attorneys ("*PFA*") but they withdrew as attorneys of record on 10 November 2022.

[11] In March 2023, PFA served a notice of appointment as Ms Sithole's attorneys.

[12] Ms Sithole is under bar to file her declaration. In May 2023 Mr Giannakis launched the main application before me, which application is opposed. In her counter-application to the main application, Ms Sithole seeks the upliftment of the bar and condonation to file her declaration. The counter-application is similarly opposed.

The main application: application to strike

[13] In the main application, the applicant seeks and order to strike out the respondent's claim with cost. During argument, however, counsel for the applicant sought a finding that the respondent was in contempt of court because she "*wilfully and in bad faith disobeyed*"[1] the March 2021 order.

[14] In an application for a finding of contempt of court, an applicant bears the onus to prove the facts to substantiate such a finding, and once it has done so an evidentiary onus (an onus of rebuttal) is cast on a respondent. A declarator and other civil remedies are available on proof on a balance of probabilities,[2] but the criminal standard of proof applies in respect of a finding of contempt. This is not the case the respondent is called to answer. She is called to answer an application to strike out her claim for her failure to comply with the March 2021 order. Therefore, I do not deem it necessary to consider a finding of contempt.

[15] An application to strike is regulated by rule 30A of the Uniform Rules of Court, which rule provides -

> *"(1) Where a party fails to comply with … an order …, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order:*
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> *(a) that such … order … be complied with; or*
>
> *(b) that the claimant's defence be strike out.*

[1] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); For a contempt of court claim an applicant needs to show that a respondent wilfully and in bad faith disobeyed an order of court that had been brought to her notice.
[2] *Fakie* at paragraph 42.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit. "

[16] In *Grootboom v National Prosecuting Authority*[3] Bosielo AJ reminded practitioners and litigants that the rules and court's directions serve a necessary purpose. "…*Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner*….*The conduct of litigants in failing to observe rules of this court is unfortunate and should be brought to a halt*…" This warning by the Constitutional Court is expressed in very stern terms and in particular that the court's directions cannot be disregarded with impunity.

[17] Striking out a claim is a drastic remedy. The above subrule confers a discretion on the court which must be exercised judicially on a proper consideration of all the relevant circumstances.[4]

[18] The court has inherent power to dismiss an action on account of a delay. The circumstances under which the court may do so will depend on the period of the delay, the reasons therefor, and the prejudice suffered by the other party.[5]
Consequently, I considered *(a)* the reasons for non-compliance with the March 2021 order and whether the respondent has recklessly disregarded her obligations in terms of this order; *(b)* whether the respondent's case appears to be hopeless; *(c)* whether the respondent does not seriously intend to proceed; and *(d)* prejudice to either party.

[19] The respondent appointed new attorneys in March 2023, being two years after the March order. The reason for this delay was because the respondent and Mr Buku's relationship came to an end after the March 2021 order was granted, and

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[3] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at paragraphs [32] to [33]
[4] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at paragraph 31F
[5] *Molala v Minister of Law and Order* 1993 (1) SA 673 (W) at 667C - D; *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 558A–B

they no longer live together. She explained in her affidavit that she did not appreciate the significance of not appointing new attorneys, nor what would follow in the event that she did not file her declaration within the period specified in the March 2021 order. She also added that she had insufficient funds. Ostensibly she required funds to pursue the claim against the applicant.

[20] In answer to this, the applicant claims that the respondent was fully aware of her obligations in terms of the March 2021 order because she quoted the order at paragraph 18 in her affidavit. I am of the view, considering her affidavit in its totality, that the contents of paragraph 18 forms part of the respondent's narration and is not presented to convey her knowledge, or even her understanding of the March 2021 order, at the time that the order was granted. In addition, the respondent is a lay person and shortly after the March 2021 order her erstwhile attorneys withdrew from record. There is no evidence before me that the March 2021 order was explained to the respondent, or that she appreciated the consequences should she fail to deliver her declaration within 20 days of this order. Therefore, I cannot find that the respondent recklessly disregarded her obligations in terms of the March 2021 order.

[21] I note, the applicant accepted Mr Buku's declaration and plea to the applicant's counter-claim in the trial under the above case number, albeit out of time. The respondent attached her declaration as an annexure to her answering affidavit, and claims that her declaration is on par with that of Mr Buku. This aspect was not denied by the applicant. I am of the view that the declaration attached to the respondent's answering affidavit does not evidence the conduct of a party that does not seriously intend to proceed with her claim.

[22] Relevant to whether the respondent's case appears to be hopeless, counsel for the respondent argued that because Dippenaar J referred the application before her to trial it was an indication that the learned Judge was of the view that the respondent and Mr Buku's claim was not frivolous. Neither parties before me have analysed the respondent and Mr Buku's claim, but I note it is not the applicant's case that Mr Buku and the respondent's claim is hopeless and does not have reasonable prospects of success on the merits.

[23] Prejudice to a party and the court, due to delays in prosecuting a case, is normally considered in the context of considerations regarding evidence that may be lost or tarnished, and the court's task to discover and recognise the true facts.[6] I am, however, of the view that the application before me can be distinguished from this general approach. The applicant's potential prejudice in this regard is negated by the fact that Mr Buku's declaration, (which declaration is apparently on par with that of the respondent), was filed. Thus, the trial can proceed and there is no prejudice to the applicant, or the court on this score. In contrast, the respondent is the executrix of the deceased's estate and closing the doors of the court to her may prejudice the heirs of the deceased's estate.

[24] Consequently, I am of the view that all the issues should be properly ventilated and aired in a trial.

The counter-application: condonation and the upliftment of the bar

[25] In terms of the March 2021 order the respondent and Mr Buku were directed to deliver their declaration within 20 days of the order. This they both failed to do. Mr Buku's declaration was subsequently accepted by the applicant. The same indulgence was not afforded to the respondent, and she now seeks condonation for her failure to comply with the March 2021 order, and the upliftment of the bar.

[26] Rule 26 of the Uniform Rules of Court does not deal explicitly with a case where a plaintiff is in default of delivering a declaration. The rule that applies in such a case is rule 27. Thus, the plaintiff will be barred only if the defendant serves a notice requiring delivery of the declaration within the time prescribed and the plaintiff fails to comply with this notice.[7] Consequently, failure to deliver the declaration within the time stated in the March 2021 order did not entail an automatic bar. Notice of bar had to be given. Such a notice was apparently served at the respondent and Mr Buku's erstwhile residential address, in May 2022.

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[6] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC)

[7] *Ford v South African Mine Workers' Union* 1925 TPD 405; *Irvin v Nefdt* 1950 (1) SA 431 (T); The fact that a plaintiff is barred from delivering a pleading does not debar her from proceeding with the action. The pleadings are merely deemed to be closed and the action may be set down for trial; *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D)

[27] The court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by an order of court and also condone any non-compliance. This gives the court a wide discretion[8] which must, in principle, be exercised with regard also to the merits of the case seen as a whole.[9]

[28] I have considered the application for condonation before me with due regard to the following observation by the Constitutional Court in *Grootboom v National Prosecuting Authority,*[10] with reference to *eThekwini Municipality v Ingonyama Trust,*[11] and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae*)[12]

> "…*It is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.*
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> …
>
> *It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it 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.*
>
> …
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> *It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case.*
>
> *...*"

[29] Over the years the courts have considered the requirements for condonation and the upliftment of a bar. In general,

> [29.1] if there has been a long delay, the party in default should satisfy the court that the relief sought should be granted, especially in a case where the

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[8] *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H–217A
[9] *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C–308A
[10] 2014 (2) SA 68 (CC) at 75F–H, 76C–D and 78B–79C
[11] 2013 (5) BCLR 497 (CC)
[12] 2008 (2) SA 472 (CC)

applicant is dominus litis.[13] This is not dissimilar to the application that is before me;

[29.2] it is not sufficient for an applicant to show that condonation will not result in prejudice to the other party. An application for relief under rule 27 must show good cause.[14] Consequently, an application should not be a reckless or an intentional disregard of the rules of court, and must be bona fide and not made with the intention of delaying the opposite party's claim;

[29.3] an applicant should satisfy the court on oath that she has a bona fide defence or that her action is not ill-founded, as the case may be. Regarding this requirement it has been held that the minimum that an applicant must show is that her claim or defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a claim;[15] and

[29.4] the grant of the indulgence sought must not prejudice a plaintiff (or defendant) in any way that cannot be compensated for by a suitable order as to postponement and costs.

[30] In *Brummer v Gorfil Brothers Investments*[16] Yacoob J stated that:

"…*an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect*…"

[31] In summary, the overarching test for determining whether condonation should be granted, or refused, is the interests of justice. If it is in the interests of

[13] *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000 (3) SA 87 (W) at 93G
[14] *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000 (3) SA 87 (W) at 95E–F
[15] *Ingosstrakh v Global Aviation Investments (Pty) Ltd* 2021 (6) SA 352 (SCA) at paragraph [21]
[16] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) (2000 (5) BCLR 465; [2000] ZACC 3) in paragraph 3

justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are considered for such an inquiry include:[17](a) the length of the delay; (b) the explanation for, or cause for, the delay; (c) the prospects of success for the party seeking condonation; (d) the importance of the issue(s) that the matter raises; (e) the prejudice to the other party or parties; and (f) the effect of the delay on the administration of justice.

[32] Thus, the introduction of considerations of the interests of justice broadens the court's discretionary powers to prevent unnecessary delays and the concomitant and unnecessary incurrence of legal costs, at the one end of the scale, or the deprivation of a legal remedy, at the other end of the scale.

[33] With the above legal position in mind, I now turn to the facts before me.

[34] According to the respondent, on 24 January 2023 she phoned the applicant's attorneys to inquire whether she could collect the deceased's belongings at the deceased's immovable property. During this conversation, she was not made aware of the ongoing litigation although she was requested to provide an email address. She did not have a functional email address at the time, and she provided her cousin's email address.

[35] The notice of bar was apparently emailed to the respondent's cousin's email address. According to the respondent, her cousin did not receive an email from the applicant's attorneys, which denial is confirmed in the respondent's cousin confirmatory affidavit. The applicant challenged this denial and relies on an email confirmation notice as proof that the email was received by the respondent's cousin. Considering the evidence as a whole, I am not satisfied that the email confirmation note is sufficient evidence that the respondent received the notice of bar when it was emailed to her cousin's email.

[36] The respondent's relationship with Mr Buku came to an end after the March 2021 order was granted and they no longer lived together at their erstwhile

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[17] *Ferris and another v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) at paragraph 10;*Grootboom v National Prosecuting Authority* at paragraph [50]

residential address. Also, they have not spoken to each other for more than a year. On 29 May 2023, Mr Buku phoned the respondent on one of their other children's contact numbers. This was apparently the first time she spoke to him in more than a year. It was during this conversation that she learned for the first time of the ongoing litigation. She thereafter provided her contact details to Mr Buku's attorneys.

[37] Since 23 June 2023 the respondent and Mr Buku are both represented by the same attorneys.

[38] According to the respondent, it was never her intention to abandon the litigation and any delay in the case until 2023 was not deliberate or *mala fide*. She intended to persist with it once she was in a better financial position to do so. She did not anticipate the lengthy delay, and she was not aware of the "…*litigation which had continued*…" in her absence.

[39] I am of the view, as a general proposition it is reasonable to assume that a party that is legally represented and dominus litis in an action would make sure what the status is of her case and take the necessary steps to prosecute it. I am, however, cautious of the fact that shortly after the March 2021 order the respondent's attorneys withdrew from record and she was from thereon unrepresented until June 2023; she is a lay person; and at some stage she did not have sufficient funds to pursue her claim. Consequently, I'll allow the respondent the benefit that she has sufficiently addressed the length of delay, as well as the cause of the delay, albeit open to criticism.

[40] I have dealt above with my finding that I have not seen evidence that the respondent does not intend to pursue her claim as set out in the declaration attached as an annexure to her affidavit, or that her claim does not have reasonable prospect of success on the merits . Similarly, I have dealt above with the fact that the applicant has accepted Mr Buku's declaration, which declaration is apparently on par with the respondent's declaration. Considering the above, I am of the view that the prejudice the respondent will suffer if I do not grant her condonation far outweighs any prejudice that the applicant may suffer.

[41] In support of her case that it is in the interest of justice that she be afforded condonation, the respondent claims that Mr Buku cannot pursue the claim relevant to the deceased's immovable property because she is the executrix of the deceased's estate.[18] Consequently, the respondent claims that as the appointed executrix of the deceased's estate she has the requisite locus standi to pursue the claim referred to trial, and not Mr Buku.

[42] I am not requested to consider the parties locus standi in the trial, however, Corbett CJ in *Gross and Others v Pentz*[19] remarked that "… *it should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have locus standi to do so*."[20] Therefore, I am of the view that it will not be in the interest of justice to close the doors of court to an executrix that is pursuing litigation pertaining to the estate of a deceased, to safeguard the interests of the estate.

[43] Considering the above, I am of the view that there can be no doubt that it is desirable that the respondent participate in the trial under the above case number as she is the appointed executrix in the deceased's estate.

[44] Consequently, I am of the view that it will be in the interest of justice to grant the respondent the opportunity to pursue her claim so that all the relevant issues may be ventilated.

Costs

[45] The issue of costs falls within the purview of a court's discretion, which discretion needs to be exercised judicially. I am mindful of the general principle that costs follow the order, and that in appropriate circumstances where a party suffers

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[18] In *Segal and Another v Segal and Others* 1976 (2) SA 531 (C) at [3] it was held that "… *the executor is the person in whom, for administrative purposes, the deceased's estate vests. It is his function to take all such steps as maybe necessary to ensure that the heirs in the estate to which he is appointed receive what in law is due to them. ..."*

[19] 1996 (4) SA 617 (A)

[20] In *Asmal v Asmal and Others* 1991 (4) SA 262 (N) the court held that an heir in an estate did not have *locus standi* to sue for a declaration that a sale of property entered into during his lifetime by the deceased to a third party was null and void, and for an order cancelling the deed of transfer concerned.

prejudice because of the conduct of another, an appropriate cost order will serve to compensate for the prejudice.

[46] The applicant, however, persisted with his application to strike the respondent's claim in circumstances where he accepted Mr Buku's declaration, which declaration is on par with the respondent's declaration.

[47] In turn, the respondent seeks an indulgence from the court as a result of her failure to comply with the March 2021 order.

[48] In the circumstances, I am of the view that the costs occasioned by the main application and the counter-application should be costs in the cause.

Conclusion

[49] For the reasons as set out above, I make the order in paragraph 1.

E EKSTEEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CaseLines. The deemed date of publication will be the date of the judgment.

Date of hearing: **10 September 2024**
Date of judgment: **9 October 2024**

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