

REPUBLIC OF SOUTH AFRICA



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

Case Number: 5796/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:
NO
(3) REVISED: NO

DATE: 05 March 2025

SIGNATURE: _____

In the matter between:

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Applicant

and

TSHOLOFELO MANYETSA

Defendant

Summary: Condonation – Rule 27(3) of the Uniform Rules of the Court. Good cause to be shown for the degree of lateness. Applicant delayed to file the Plea and acted to the summons after being served with notice to be barred. Despite the notice, Applicant still missed and failed to file the Plea and adhere to the prescribed Court Days. Content of the application to ensure sufficient reasons for the degree of the delay and its relationship

with the interests of justice. Factors to be holistically considered and not independently of each other. Applicant attributed the basis of the failure to an 'administrative error' and extended negligence to Defendant that did not constitute a *bona fide*. Application dismissed due to lack of urgency and apportionment of the negligence. The costs to be costs in the main cause.

JUDGMENT

NTLAMA-MAKHANYA AJ

Introduction

Background facts

[1] The Applicant in this matter applied for condonation in terms of Rule 27(3) of the Uniform Rules of the Court in which it sought indulgence of this Court for the late filing of the Plea in the main action. This application arose from the delictual action filed by the Defendant against the Applicant. Both parties were legally represented and the matter was heard before me on 12 February 2025. I dismissed it in court and herein I provide reasons for such dismissal.

[2] The Applicant, after having been served with the notice of bar from filing its Plea on 27 May 2022, failed to file its Plea within the prescribed time frames even after the said notice. This meant that the application was out of time and leave was sought before this Court to grant condonation of the late filing of the Plea. The Defendant opposed this application.

[3] It was the Applicant's concession that following the notice of bar on 27 May 2022, it was supposed to have filed its Plea on 03 June 2022 and instead filed it on 13 June

2022 which meant six (6) days outside of the prescribed time frames. The Applicant further submitted that the delay in submitting the Plea is inordinate because as soon as it realized the failure, it sought consensus from the Defendant to remedy the situation which was refused by the latter. The Applicant further acknowledged that although he is constrained by limited resources, this matter is of importance in that it deals with issues pertaining to service delivery to the residents in his area of jurisdiction.

[4] However, the Defendant vehemently opposed the application and argued that:

- [5.1] the Applicant failed to provide a reasonable explanation for the delay;
- [5.2] the application is not *bona fide* and was made with the object of delaying the Defendant's claim;
- [5.3] there has been a reckless or intentional disregard of the Rules of Court; and
- [5.4] Applicant failed to show any prejudice caused to the Defendant could be compensated for by an appropriate costs order.

[5] This brief is meant as a foundation for the justification and reasonableness of the delay without any malice on either of the parties in the dispute.

Applicable legal principles

[6] I do not intend to make an exhaustive framework of the principles regulating the foundations of the principle of condonation. To date, voluminous jurisprudence has also been developed by the courts in giving meaning and substance to this principle. Its framework is prescribed in Rule 27(3) of the Uniform Rules of the Court which reads as follows:

"The court may, on good cause shown, condone any non-compliance with these Rules."

[7] For this Court, the principle of 'good cause shown' entails a responsibility on the part of the Applicant to place any justifiable cause to the delay that served as a bar to the timeous filing of the Plea. The Applicant had to satisfy justifiable factors relating to:

- (i) the cause of the delay;
- (ii) the degree of delay;
- (iii) what could have contributed to it;
- (iv) prospects of success on the merits; and
- (v) prejudice to the defendant, (Myburgh JP in *National Union of Mine Workers v Council for Mineral Technology* [1998] ZALAC 22 at para 10).

[8] These factors are not to be viewed independently of each other but holistically because condonation is not a mere principle of the adjudicative process. It entails a satisfactory explanation of 'the conspectus of all the facts as to the cause of the delay' without prejudice to either of the parties in the dispute, (Dlodlo AJA in *Department of Home Affairs v Ndlovu* [2014] 9 BLLR 851 LAC at para 7). Condonation has been made unique today by its infusion within the broader framework of the interests of justice that is encapsulated in the rule of law as a foundational value of the new dispensation. Bosielo AJ in *Grootboom v National Prosecuting Authority* 2014 (1) BCLR 65 (CC) at para 36 reaffirmed that the standard for the granting of condonation must be the interests of justice. The Judge went on to state that the 'principle of the interests of justice is broad enough to be reflective and have due regard to all the relevant factors' and not necessarily limited to those mentioned by Myburgh JP above. The approach in *Grootboom* was earlier expressed by the Constitutional Court in *Van Wyk v Unitas Hospital* 2008 (4) BCLR 442 (CC) at paras 20-22 wherein the Court held:

"the standard for considering an application for condonation is in the interest of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry but are not limited to the nature of the relief sought, the extent and the cause of the delay, the effect of the delay on the administration of justice and other litigants, the

reasonableness of the explanation of the delay the importance of the issue to be raised in the intended appeal and the prospects of success ... An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And what is more the explanation must be reasonable."

It is also my affirmation that the interests of justice as reiterated in *Grootboom* at para 50 and *Van Wyk* above are of fundamental importance in the new dispensation particularly in the context of eliminating any conduct that may bedevil the functioning and integrity of the courts. As similarly expressed by Davis AJ in *S[...] K[...] v M[...] N[...]* CASE NO: D3532/24 KZN citing with approval *James Brown and Hamer v Simmons* 1963(4) SA (A) at 660 E-G that:

"It is a well-established principle in our law that it is in the interests of the administration of justice to require adherence to well established rules and that those rules should in the ordinary course be observed."

[9] I am not going to further pre-occupy this Court with a further analysis of this principle but the failure to adhere to the procedural safeguards in the matter herein has the potential to put the credibility not only of this Court but the entire judiciary at risk. I need not state that this Court stands as a guard for the general overview of the constitutionalised right of access to courts as envisaged in section 34 of Constitution of the Republic of South Africa, 1996, (Constitution). In essence, the failure to adhere to the procedural safeguards undermines the very foundations of the right to access the courts and contributes to the well-known idiom of 'justice delayed is justice denied'. Accessing courts is the 'coal-face' of dispensing justice without fear or favour. It also serves as a pre-requisite for the enjoyment of other rights without which the limitation on the extensive analysis of the rights by the courts will minimize the flourishing jurisprudence that will contribute to the development of the law.

[10] Therefore, the gist of this application was to establish whether a proper case was made for the relief sought by the Applicant in terms of Rule 27(3) of the Uniform Rules of the Court.

Analysis

[11] Let me reiterate, the content of this application was to enable the Applicant to reinstate the defence against the pursuance of the claim by the Defendant in the main action. This Court also acknowledges the Applicant's concession of having filed the plea outside the prescribed time frames. It is further acknowledged herein that condonation may be granted without being persuaded by the Applicant's poor explanation of the delay. This means that each case is considered on its own merits despite the lessons to be drawn from other precedent-setting jurisprudence that has been developed in the granting of condonation applications.

[12] Thus, in the context of this case, that persuasion is overshadowed by what I refer to as the Applicant's 'dragging of the feet approach' in submitting the Plea since the filing of the matter. It is also my view that the Applicant adopted what I considered as a 'reactionary approach' in addressing this matter after having been served with the 'notice of bar'. It was common cause that the Defendant served the summons on the Applicant on 15 February 2022. Following the serving of the summons, the Applicant only reacted to them when it was further served with the notice to 'be barred' from filing the Plea. It is now this 'Plea' that is the subject of this application which was also filed outside the time frame of the Court Rules. The notice of the bar was served on 27 May 2022 with the Applicant, supposedly, expected to have filed the Plea on 03 June 2022 and instead filed it on 13 June 2022. Simply put, the Plea was filed six court days later. Literally, the six-day period may be justifiable if good cause shown as prescribed in Rule 27(3). Thus, the justification of the delay should consider the history of the matter which is traced to the year 2022 when the claim was filed against the Applicant.

[13] The Applicant's Counsel submitted that the question of condonation should be similarly approached or this Court draw lessons from the already developed jurisprudence which laid the framework for affirmative principles wherein amongst others Holmes J in the case of *Melane v Santam Insurance Co. Limited* 1962 (4) SA 531 (A); at 532 C – D held:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay."

I am of the view that the Applicant's conduct eroded the merits of this application. The reactionary conduct only after the notice of the bar and the further failure to adhere to the procedural safeguards towards the filing of the Plea struck at the core of the substance of this application.

[14] In *casu*, during argument and on papers, the Applicant's Counsel traced and attributed the delay to the 'administrative error' on his part. I find this disturbing that the obligation of a sphere with a constitutional responsibility could be relegated to an 'administrative error'. This Court acknowledges that humans are 'fallible' but will not substitute the substance of the legal principle in adhering to the requisites of adjudicative processes over human fallibility. In this case, the Defendant fell into a potholed road and the Applicant extended contributory negligence to the Defendant who, according to the

Applicant, 'failed to keep a proper look out and exhibit the degree of care' to avoid falling in the circumstances. The extension of negligence on the Defendant is not a justified defence for the injuries suffered. Such apportionment of negligence is also disturbing because the primary responsibility rest with the Applicant to ensure the proper maintenance of the roads. The Applicant did not provide any credible evidence in this Court how such awareness or familiarity could have been obtained by the Defendant except the 'blanket contention without substantiation. The extension of negligence touch on the Applicant's *bona fides* on this application as it appeared to be indicative of a yardstick against which to evade responsibility of his own 'human fallibility'.

[15] The Applicant further emphasised the importance of this case as it relates to service delivery that has to be provided to his residents. Whilst the Applicant acknowledged the limited resources to deliver services, it also uses the scant resources to fight legal battles against ordinary citizens. The Applicant therefore, amassed the limited legal resources to be used at the prejudice of the Defendant. I am not going to justify the way in which the Applicant spends its allocated resources, thus of importance in this matter is the 'thorn' in the content of principle of condonation relating to the proper justification of the delay to the application.

[16] In this case, the Applicant has a constitutionalised status as a sphere of governance at local level and did not view the urgency of this matter on its inception, which is February of the year 2022. It has been emphasised that condonation is not a 'mere asking' but entails a satisfactory cause of the delay. Similarly, as expressed by Waglay DJP in *South African Post Office Ltd vs Commission for Conciliation, Mediation and Arbitration* [2012] 1 BLLR 30 LAC at para 16 held that that 'it is also generally accepted that if an applicant does not provide an acceptable explanation for its delay, the court need not consider the other factors and refuse condonation'.

[17] Although the application of this rule is not rigid and may be relaxed, I am persuaded by Waglay DJP above because of the complementarity between the degree of the delay and the reasons proffered by the Applicant for such a delay. Counsel for the Applicant

made an intensive argument about the degree of the delay day not to be viewed by this Court as 'inordinate' but to be considered holistically with other factors. The core content of the reasons for the delay which could be found acceptable by this Court as Waglay DJP at para 18 held 'cannot be reduced to an 'arithmetic calculation'. I am encouraged by Waglay DJP above, that the emphasis on the number of days should not be a key focus to the exclusion of other factors that are equally a determinant of this application. The 'administrative error' should not serve as the basis and a justified reason for the acceptable days whilst the subject of the dispute is of highest magnitude for the adjudicative process. It is therefore, evident that the intensive argument about the limited days made by the Applicant needed to be concretised with justifiable reasons that are foundational to the ultimate justification of the delay and without such, it is not excusable.

[18] The consideration of this application was also focused on the interrelationship that exists between the prospects of success and the prejudice to be suffered by either of the parties. Thus, I am not going to make a *prima facie* view regarding the prospects of success because it will be a subjective opinion given the nature of the dispute and what may also be viewed as pre-empting the outcome of this matter in the main application. On the other hand, the emphasis is more on this Court having observed the glaring prejudice against the Defendant which is evidenced by the lack of urgency to this matter before the Applicant woke up from 'slumber'. The Applicant's Counsel submitted that the Defendant was unlikely to suffer prejudice if condonation is granted because the costs have been granted for the delay in the main action. I am not satisfied that the costs granted in another application will be used to cushion the prejudice to be suffered in another one. The prejudice is considered in the context of this application only and not on the importation of the 'curing costs' in an application that considered a different point of law. As evidenced in this case, the prejudice is of substantial interests in that there are clear 'unequal legal powers' between the parties. The Applicant has shown his 'legal muscles' and amassed human and financial resources to litigate this matter against the Defendant. Hence his approach for the indirect intrusion of costs in a matter that dealt with a different subject of the law.

[19] It is also my view that the Applicant was not genuine in this application because his prayers sought an order of costs against the person who opposes this matter, which is the Defendant. At the risk of repletion, the Applicant had shown the flexing of his legal muscles in furthering the perpetuation of the delay in bringing the matter into finality. The 'prayer' for costs appeared to have the potential to 'silence' the Defendant to accept the status *quo* of having limited abilities in opposing this application. The Defendant should not be made to pay the costs for no simple reason other than opposing the condonation application. The prayer for costs questions the Applicant's *bona fides* in the resolve of this matter. In considering the interests of justice as they dictate otherwise because they equally put the Defendant at the 'pedestal' to oppose any claim or application that may hinder the quality of the protection against her. The Defendant opposed what she believed was deserving of her argument against an application that is likely to delay the finality of her matter. The opposition was also meant to contribute to the upholding of the integrity of the procedural regulations of the adjudicative processes. It is my further view that the prayer for costs was designed as a measure that pulled the legal muscle underneath the 'radar' with a potential to scare the Defendant not to oppose this matter to avoid said costs.

[20] It has been emphasised that condonation is not a 'mere formality' but carries the gist of the interests of justice which are of direct link not only to the protection of rights but their fulfilment as envisaged in section 7(2) of the Constitution. This Court acknowledges that the Applicant has equal responsibility to defend what may be, allegedly unjustifiable claims against him. Thus, in the context of this case, such responsibility could not be used to propel the disregard of the procedural safeguards relating to the adjudicative role of this Court.

[21] Having considered the reasons proffered by the Applicant, the 'administrative error' which was the basis of this application due to an oversight on his part, was a poor and unconvincing justification that relegated the content of his obligation to a 'mere administrative oversight'. Further, reducing the foundations of Rule 27(3) of the Uniform Rules of the Court to a 'poor brother' was not judicially persuasive in the exercise of the


discretion to grant the condonation. The degree of lateness might not be excessive but the foundation of such a delay should have been based on sound and justifiable reasons before this Court. The Applicant ought to have appreciated that the degree of lateness is linked to sound and justifiable reasons and not to insist on an application by amongst others apportioning the blame on the Defendant which misplaced the substance of a *bona fide* defence before this Court.

[22] It is my view that the Applicant minimised the substance of the dispute to an 'administrative error' and the apportionment of negligence to the Defendant. Considering the argument presented in totality, it is my considered opinion that the Applicant failed to satisfy the requirements of condonation by the lack of urgency and response to the quest to file the Plea timeously. The cause of the delay was 'self-inflicted' and could not serve as a justification to condone the application. It is my conviction and remain unconvinced that the Applicant has sufficiently explained the cause of the delay except for cushioning it under an 'administrative error' which allegedly delayed the filing of the Plea.

[23] In the circumstances, the following order is made:

[23.1] The application for condonation is refused.

[23.2] The costs of this application are the costs in the main application.


N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivery: This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines, and its date of delivery is deemed 05 March 2025.

Date of Hearing: 12 February 2025

Date Delivered: 05 March 2025

Appearances:

Counsel for Applicant Advocate S Dlali

Instructing Attorneys: K Matji and Partners

Defendant: Advocate HW Theron

Instructing Attorneys: HW Theron INC.