NOTING PAGE.

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Reportable

Case no: D9608/2021

In the matter between:

NU-SHOP HOLDINGS (PTY) LTD **APPLICANT / DEFENDANT**

(Registration Number: 1992/007581/07)

and

KASLE PROPERTIES (PTY) LTD **RESPONDENT / PLAINTIFF**

(Registration Number: 1986/009988/07)

Coram: M E Nkosi J

Heard: 07 August 2024

Delivered: 14 August 2024

ORDER

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1. The bar placed on the defendant by the plaintiff's notice of bar delivered on 13 December 2022 is hereby removed, and the late delivery of the defendant's plea is hereby condoned.
2. The defendant is ordered to pay the plaintiff's costs of the application.

JUDGMENT

M E Nkosi J

Introduction

[1] For ease of reference, I will refer to the parties in the same way they are cited in the main action which preceded this application. This is an application in which the defendant seeks an order to uplift the bar that was placed on it by the plaintiff's notice of bar delivered on 13 December 2022, together with ancillary relief condoning the late delivery of its plea. The application is opposed by the plaintiff.

Factual background

[2] The factual background to the matter, briefly stated, is that on 19 October 2021 the plaintiff instituted an action against the defendant for payment of arrear rental in respect of the plaintiff's premises leased to the defendant, the cancellation of the relevant lease agreement, as well as the ejectment of the defendant from the leased premises. On 26 November 2021 the defendant delivered a notice in terms of rule 30(2)*(b)* of the Uniform Rules of Court ('the Rules') objecting to the plaintiff's particulars of claim as defective in a number of respects.

[3] On 14 February 2022 the plaintiff delivered a notice to effect certain amendments to its particulars of claim with a view to addressing the complaints raised by the defendant in relation thereto. Not satisfied with such amendments, the defendant proceeded to make an application to court to set aside the plaintiff's particulars of claim, and the said application was initially set down for hearing on 5 April 2022 on the unopposed motion roll as the plaintiff had not delivered its notice of opposition thereof. On 5 April 2022, which was the date of the hearing of the application, the plaintiff delivered its answering affidavit in the matter. This resulted in the matter being adjourned to the opposed motion roll until it was eventually argued before Sipunzi AJ on 8 September 2022.

[4] On 5 October 2022 judgment in respect of the rule 30 application was handed down, in terms of which the said application was dismissed. However, the plaintiff was ordered to pay the wasted costs occasioned by the irregular step it took in delivering the defective particulars of claim prior to it effecting the aforesaid amendments thereto. Thereafter, the next step in the proceedings was the delivery of a notice of bar by the plaintiff on 13 December 2022.

[5] Not counting the days between 16 December 2022 and 15 January 2023 (the *'dies non'*) as envisaged in rule 26 of the Rules, the final date for the delivery of the defendant's plea before the bar came into effect was 18 January 2023. However, it is common cause that it was not until 1 February 2023 when a copy of the defendant's plea was transmitted by email to the plaintiff's attorneys because, according to the defendant's attorneys, they were unable to effect service in any other way.

[6] Upon receipt of an email from the defendant's attorneys attaching a copy of their client's plea, the plaintiff's attorneys responded by email advising that the defendant was already barred from delivering its plea, and that the plaintiff would be applying for default judgment against the defendant. In response, the defendant's attorneys wrote to the plaintiff's attorneys on 2 February 2023 advising them about the reasons for the delay in delivering the defendant's plea and requesting that the bar be uplifted by consent. The plaintiff's attorneys responded on 3 February 2023 recording their refusal to consent to the upliftment of the bar, which resulted in the defendant lodging this application.

The law

[7] Needless to say, the Rules are there for a reason, and legal practitioners are enjoined to ensure compliance therewith at all times, that is, unless they are allowed by the court or by agreement between the parties to deviate from compliance. This includes due compliance with the prescribed time limits for the delivery of pleadings. In the absence of an agreement between the parties to extend the time limits, a litigant who seeks an extension must make an application to court, on good cause shown, to be granted an extension.[1] In instances of non-compliance with the Rules other than those prescribing the time limits, the court is empowered in terms of rule 27(3) to condone non-compliance with any such rule on good cause shown.

[8] It is, of course, trite that when it comes to an application for the upliftment of bar the court has a wide discretion which must be exercised by it in accordance with the circumstances of each case. To this end, it was held by the court in *Smith, NO v Brumme, NO and Another; Smith, No v Brummer*[2] that:

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[1] Uniform rule 27(1).
[2] 1954 (3) SA 352 (O) at 358A-B.

'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;[3] *(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.'

[9] It was further stated by the court in *Smith*[4] that:

'Where the delay in filing the pleading is due to the negligence of the applicant's attorney, the Court will not on that ground refuse the application. It will refuse it where the negligence or inattentiveness is, in the opinion of the Court, of so gross a nature that, having regard to the other circumstances, the applicant is not entitled to the indulgence prayed for.'

[10] Therefore, contrary to the argument advanced by Mr *Shamase*, who appeared for the plaintiff, the negligence of the defendant's attorney, in itself, does not necessarily strike a fatal blow to the defendant's application for the upliftment of bar as in the present case. It is only in the event of such negligence being gross in nature that the court may be justified in its decision to refuse the relief sought by an applicant, more so if the court is not satisfied that the applicant meets the other factors that are listed in *Smith* to be granted the relief it seeks.

The explanation of the delay

[11] Before I delve into the explanation provided by the defendant for the delay in delivering its plea herein, I wish to record that I was referred by Mr *Shamase* to the case of *Silber v Ozen Wholesalers (Pty) Ltd*,[5] where the court held that 'the defendant must at least furnish an explanation of his default sufficiently full to enable the Court

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[3] See also *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476.
[4] *Smith* above fn 2 at 358B-C.
[5] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A).

to understand how it really came about, and to assess his conduct and motives.'[6] In the present case, the explanation of the delay in the delivery of the defendant's plea was furnished by Ms Parak of the defendant's attorneys.

[12] In her explanation, Ms Parak admitted that in terms of the Rules, the defendant's plea was supposed to have been delivered within 20 court days after 5 October 2022, which was the date of delivery of judgment in the rule 30 application. She said she consulted with her counsel on 14 October 2022 to prepare the defendant's plea in respect of this matter, but the said consultation ended up being used for another matter which took precedence as it had arisen as a matter of urgency.

[13] Alive to the fact that service of a notice of bar was inevitable, so she explained, she drafted the defendant's preliminary plea herself but wished to utilize the services of counsel who dealt with the rule 30 application to finalise the plea because of his familiarity with the matter. It was at that point, whilst she was waiting to secure the availability of counsel to finalise the plea, that the plaintiff delivered a notice of bar on 13 December 2022. Due to the unavailability of counsel over the festive period, she proceeded to finalise the defendant's plea herself and signed it on 16 January 2023. On the same date, she requested her associate to attend to the delivery of the plea.

[14] Assuming that her associate had attended to the delivery of the plea as instructed, Ms Parak had travelled to Ladysmith on 16 January 2023 for an opposed motion that was concluded on 17 January 2023. Before she could return to Durban

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[6] Ibid at 353A.

on 17 January 2023, she was notified that her 82 year-old father was seriously injured in an armed robbery at one of his business premises in Colenso. She then went to attend to her father and only returned to Durban and to her office on 19 January 2023. Upon her return to her office, she became preoccupied with the preparations for a trial that was set down for hearing from 24 to 26 January 2023 in Vereeniging.

[15] On 21 January 2023 she travelled from Durban to Vereeniging and did her final preparations with her correspondent attorney and the witnesses on 23 January 2023. Despite the trial ending a day earlier, on 25 January 2023, she had to attend a taxation at the Johannesburg High Court on 26 January 2023. This was because the notice of set down for the taxation was emailed to her office on 21 December 2022 during the *dies non* period, and it only came to her notice as she was sifting through the emails received during that period.

[16] On 27 January 2023 she had to attend to another matter in Johannesburg and could only return to Durban during the weekend of 28 to 29 January 2023. On 30 January 2023 the taxing master in Durban requested her to attend at court for the entire day for an allocator to be drawn in respect of a bill of costs that was 77 pages long. On 31 January 2023 she had to deal with the end-of-month administrative procedures.

[17] It was only on 1 February 2023 when she requested the served and filed copy of the defendant's plea to update her file that she was informed that the plea had not yet been delivered. When she enquired about the reason, she was informed that her associate could not locate the address given in the plaintiff's notice of substitution of local correspondents, and no telephone number or email address had been provided for the local correspondents concerned. According to Ms Parak, those were

the third substituted local correspondents for the plaintiff, and her associate had informed her that the reason she did not email the plea directly to the plaintiff's attorneys in Johannesburg was because they did not normally respond to their emails.

[18] On the same day, upon her learning that the plea had not been delivered, Ms Parak had immediately instructed her associate to email the plea to the plaintiff's attorneys because her office 'could not secure service (in) any other way'. As stated elsewhere in this judgment, the plaintiff's attorneys responded by email advising that the defendant was barred from delivering its plea and that the plaintiff would be applying for default judgment.

Whether the explanation of the delay is reasonable

[19] In my view, the convoluted explanation provided by Ms Parak for her delay in delivering the defendant's plea is indicative of the prevalent practice amongst some attorneys, especially in sole practitioner practices, who tend to take on more work than they can possibly handle. While I fully empathise with any such attorney's need to generate income to sustain his or her practice, I think the court is justified to express its displeasure at the conduct of any legal practitioner who sacrifices the diligent discharge of his or her duties at the altar of profitability.

[20] Besides, the cavalier attitude towards strict compliance with the Rules invariably ends up affecting the smooth operation of the courts and ultimately causes disservice to paying clients. In the present case, it is clear from Ms Parak's explanation that the main reason for the defendant's plea not being delivered on time was her failure to ensure that her associate had carried out her instruction before she

left for Ladysmith on 16 January 2023. This is particularly so as she was aware that the barring of the delivery of the plea was looming in just two court days.

[20] By her own admission, Ms Parak became so engrossed in her other matters that she only became aware on 1 February 2023, after the bar had already come into effect, that the defendant's plea had not been delivered. This, in my view, is a clear sign of negligence on her part. A diligent attorney would have ensured that the defendant's plea was received by either the plaintiff's attorneys or their local correspondents before the bar came into effect. Ms Parak's explanation that the address given in the plaintiff's notice of substitution of local correspondents could not be located makes no sense, particularly, as the telephone number of the plaintiff's attorneys appears on the same notice.

[21] Furthermore, Ms Parak's explanation is silent as to whether any attempt was made by her associate to contact the plaintiff's attorneys directly to verify the address of their local correspondents. I am equally not persuaded by Ms Parak's explanation that her associate informed her that the reason she did not email the plea directly to the offices of the plaintiff's attorneys in Johannesburg is because they normally did not respond to any of their emails. If that was indeed the case, all that she could have done was to email the plea directly to the plaintiff's attorneys with a covering letter explaining that the address of their local correspondents could not be located. Needless to say, the proof of transmission would have sufficed to prevent the bar from coming into effect.

[22] Therefore, after due consideration of the explanation provided by Ms Parak for the delay in delivering the defendant's plea, I think the delay was caused by her negligence. However, using the test applied by the court in *Smith*, I think it would

be a gross exaggeration to suggest that Ms Parak's negligence was of so gross a nature that, having regard to the other circumstances of this case, the defendant is not entitled to the upliftment of the bar. As I indicated elsewhere in this judgment, it would seem that Ms Parak's negligence is attributable to her apparent practice of juggling too many matters at the same time.

The merits of the application

[23] Regarding the merits of the application, a number of arguments are raised by the defendant in its defence of the plaintiff's action against it. The first argument is that the plaintiff's claim is based on an incorrect version of the lease agreement between the parties. The plaintiff relies on a lease agreement that was allegedly concluded between the parties in 2010 ('the 2010 agreement'), and which was only signed by the defendant. The defendant, on the other hand, alleges that its continued lease of the premises is in terms of the tacit relocation of the original lease agreement that was concluded between the parties in 1996 ('the 1996 agreement'). The latter agreement is signed by both parties.

[24] The second argument raised by the defendant is that the 1996 agreement did not make provision for escalation, that is, unless agreed to by the parties. According to the defendant, this is evidenced by the fact that escalation was not charged for significant periods by the plaintiff, after which it attempted to charge the defendant's account with undue 'arrear' escalation without the defendant agreeing thereto.

[25] The third argument raised by the defendant is that the parties entered into a settlement agreement in 2016, in terms of which arrears up to that point were settled, and no escalation would be charged unless by agreement. It further argues that any

escalation charged by the plaintiff after that point was not in terms of the agreement between the parties, and that payment thereof is not due.

[26] The last argument raised by the defendant is that the period in respect of which it admits to not paying any rental for the leased premises was during the national lockdown as a result of Covid 19. It argues that the plaintiff was not entitled to any rental for that period because it was not able to provide use and occupation of the premises to the defendant for the duration of that period which, so it argues, entitles it to a remission.

The prospects of success

[27] Against the background of the arguments raised by the defendant in its defence of the plaintiff's action, one of the cases I was referred to by Mr *Gevers*, who appeared for the defendant, was *F v Minister of Safety and Security and Others*,[7] where the Constitutional Court held that 'it is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible'.[8] Likewise, in the present case, I think it will be in the interests of justice to have all the issues raised by the defendant being fully and properly ventilated before the court.

Costs

[28] On the issue of costs, it was stated by the court in *Smith* that 'any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs'.[9] Therefore, while I admit that the interests of justice demand that I allow the

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[7] *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC).
[8] Ibid para 34.
[9] *Smith* above fn 2 at 358A.

defendant an opportunity to have all the issues raised in its defence being fully and properly ventilated before the court, I think the interests of justice equally demand that the plaintiff, at least, be compensated by an appropriate order as to costs.

Order

[29] In the result, I make the following order:

1. The bar placed on the defendant by the plaintiff's notice of bar that was delivered on 13 December 2022 is hereby removed, and the late delivery of the defendant's plea is hereby condoned.
2. The defendant is ordered to pay the plaintiff's costs of the application.

[redacted]

ME NKOSI

JUDGE

Appearances

For the applicant:	Mr Gevers
Instructed by:	Thasneem Parak and Associates, Durban.
Email:	tasz@tpaattorneys.com
Ref:	P058(15HC)/NOB
For the respondents:	Mr Shamase
Instructed by:	Shamase Ramotswedi Attorneys
Email:	sihle@srattorneys.co.za
Ref:	MRS SHAMASE/ EXCEU0317
C/O:	Chiocchetti Naicker Govender Incorporated CNG Attorneys, Durban.
Date of Hearing:	07 August 2024
Date of Judgment:	14 August 2024