REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO.: 3234/2019

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

[redacted]

SIGNATURE **28 MARCH 2022** **DATE**

In the matter between:

KANHYM ESTATES (PTY) LTD Applicant

versus

STEVE TSHWETE LOCAL MUNICIPALITY Respondent

JUDGMENT

MPHAHLELE J:

[1] This is an application in terms of Rule 27(2) for the removal of the bar which was served upon the applicant on 11 February 2021 for the removal of the bar precluding the applicant from filing its plea and counterclaim.

[2] The summons was served on 12 August 2019 by affixing at the applicant's

place of business. The applicant subsequently delivered its notice of intention to defend the main action on or about 5 November 2020.

[3] On or about 14 January 2021 the applicant requested an extension to deliver the plea on or before 10 February 2021, the indulgence which was granted by the respondent.

[4] On or about 11 February 2021, the applicant's attorneys of record acknowledged that it had failed to deliver the plea and strangely advised that the respondent ought to deliver a notice of bar.

[5] On or about 11 February 2021, the respondent delivered a notice of bar providing the applicant with a further five days to deliver its plea. In terms of the notice of bar, the applicant had until 18 February 2021 to deliver its plea, failing which would be barred.

[6] On or about 23 February 2021, the applicant delivered a notice in terms of rule 30, after it had already been barred. Be that as it may this was not a proper response to the notice in terms of rule 26, as fully explained in paragraph [20] below.

[7] On 01 March 2021 the applicant's attorneys requested the respondent's attorneys consent for the upliftment of the bar, which request was rejected by the respondent on 09 March 2021.

[8] In the absence of an agreement between the parties, the court has the power in terms of Rule 27(2) of the Uniform Rules of Court to uplift the bar on application by the party seeking an indulgence. In the exercise of these powers the court is given a wide discretion, which must be exercised judicially on consideration of the facts of each case. The court will have regard not only to the prejudice to an individual party but also to the convenient determination of the issues.

[9] The respondent's claim, as the plaintiff in the main action, relates to a

services claim to a property previously owned by the applicant (the defendant in the main action).

[10] The parties could not agree on the amount owing for services on the property and as a result of the dispute, the respondent could not secure clearance certificates in order to attend to the transfer of the property to a new buyer. This prompted the respondent to approach the court on an urgent basis and on 02 April 2019, the court granted an order, amongst others, in the following terms:

> "*2. That the respondent be directed to issue clearance certificates in respect of units 5 and 6 in the section title scheme Greenacres (Scheme SS82/1998) situated on Erf 5228, Middelburg, within 48 hours after payment by the applicant to the respondent an amount of R158 449-50.*
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> *3. That the issuing of the aforesaid clearance certificates and the acceptance of the aforesaid amount is not to be construed as a concession by the respondent that there are no other amounts due and payable to it in respect of the aforesaid Sectional Title Units and that the respondent be directed to, if so inclined, issue a summons against the applicant for any amount allegedly owing in respect of the said units within a period of 90 days.*
>
> *4. If the respondent, however, fails to institute the aforesaid action within the period specified, that it then be accepted and so declared that no further amount is owing in respect of the aforesaid Sectional Title Units by the applicant to the respondent.*"

[11] The applicant contends that at the time of the selling of the property the only amount that was due, owing and payable to the respondent was the amount of R158 449-50 which was paid in full in order to obtain clearance certificate for the transfer of the property.

[12] It is the applicant's case that unaware of any pending proceedings, on 30

June 2020 the applicant's attorneys wrote a letter to the respondent's attorneys seeking clarity on the invoice issued by the respondent calling upon the applicant to make a payment of R900 679-72 by 07 July 2020. It was only when the respondent's attorneys replied to this correspondence by a letter dated 09 November 2020 that the applicant apparently became aware of the proceedings. The respondent's letter specifically mentioned that "*further to your letter dated 30 June 2020, (copy enclosed for your easy reference), we enclose herewith summons duly issued as well as the sheriff's return of service, which reflects that our client did comply with the High Court order dated 2 April 2019.*"

[13] The applicant stated that the action was not served at its place of business but was served on 12 August 2019 by affixing to the principal door, at the exact place of dispute between the parties, the person in charge at the premises having refused to accept service on behalf of the applicant.

[14] The applicant submitted that the respondent failed to properly institute its claim within the 90 days of the court order and the respondent also failed to properly serve that action which would constitute instituting of proceedings.

[15] The applicant further submitted that, even if the respondent could successfully prove that it instituted its claim in accordance with the urgent court order, the respondent would still have to provide a full explanation and calculation of the arrears which is disputed and in all probability will result in the dispute being resolved between the various experts.

[16] The applicant maintain that it has also set out, *ex abudanti cautela* that it possesses a counterclaim in the amount of R643 372-34 in respect of rental obligations which far exceeds the amount claimed by the respondent.

[17] The respondent submitted that the applicant's defence that the summons was served out of time was clearly ill founded and further calls the applicant's *bona fides* into serious question.

[18] The respondent further submitted that the applicant has not provided facts in support of its other defences, and that these purported defences are set out in a manner which is bald and vague.

[19] In its letter mentioned above in paragraph [4], dated 11 February 2021, the applicant's attorneys of record acknowledged that it had failed to deliver the applicant's plea as it was "*struggling to obtain [its] plea and counterclaim from [its] counsel*". This is contrary to the version deposed to in the founding affidavit where the applicant alleges that it was still consulting with its legal representatives and that a notice in terms of Rule 30 was being prepared.

[20] It is trite law that on receipt of a rule 26 notice of bar a defendant is put to an election of either pleading, thereby defeating the bar, or applying for an extension of the time within which to plead. Consequently, delivery of the applicant's rule 30 was not a proper response to the notice of bar. So the correspondent attorney's failure to file the applicant's rule 30 notice within the period stipulated in the notice of bar is of no moment.

[21] Upon receipt of the respondent's rejection of its request for the uplifment of the bar, the applicant delivered this application seeking an indulgence for the uplifment of the bar. In this respect, the applicant acted within a reasonable time.

[22] I now to turn to the defences raised by the applicant against the respondent's claim in the main action.

[23] The applicant has failed to disclose the facts upon which the counterclaim in respect of unpaid rental obligations is based. I tend to agree with the respondent that the allegations in respect of which the respondent is said to be indebted to the applicant in the amount of R643 372-34 are bald and vague.

[24] The applicant maintains that *'an order exists that declared that the applicant is not indebted to the respondent at all'*, under the following

circumstances: That the applicant made full payment of the amount due to the respondent; that the respondent issued the clearance certificates; that the property was duly transferred to the new buyer on 10 September 2019; that the proceedings were not instituted in accordance with the urgent court order in that the summons was not served at the applicant's registered address within 90 days of the urgent court order.

[25] Suffice to mention that, the summons was served at the property in issue (the alleged applicant's place of business) on 12 August 2019 and the applicant was still the registered owner of the property, the property having been transferred on 10 September 2019 to the new buyer.

[26] The clear import of the urgent court order is that the respondent would issue clearance certificates without any prejudice to its rights to pursue its claims against the applicant. It is specifically stated that the issuing of the aforesaid clearance certificates and the acceptance of the aforesaid amounts is not to be construed as a concession by the respondent that there are no other amounts due and payable to it.

[27] Under the circumstances, the contention by the applicant, that *'an order exists that declared that the applicant is not indebted to the respondent at all'*, is ill-founded.

[28] The applicant stated that it had no idea whatsoever how the respondent calculated the amount claimed for in the main action. The applicant further stated that, at the time of the transfer of the property the applicant calculated the amount due to the respondent to be R158 449-50. The applicant allegedly presented this calculation to the respondent on or about March 2019 and proposed payment of the aforementioned amount, which proposal was rejected by the respondent. This issue served before the urgent court and the respondent was directed to issue the clearance certificates in respect of the properties after payment by the applicant to the respondent of an amount of R158 449-50 without prejudice to the respondent's rights to pursue its claims, if any against the applicant, the full details of this order appear in paragraph [10] above.

[29] The applicant is still resisting, as it did in the urgent application, that it owes the respondent the alleged amounts. It would appear that the main issue is the computation of the respondent's claim.

[30] Under the circumstances, the applicant has shown in these proceedings, as well as in the urgent court proceedings, that it was anxious to contest the amount claimed to be owing to the applicant, and further that it believed that it had a good defence to the respondent's claim.

[31] It is my considered view that the applicant has shown sufficient cause for the indulgence sought.

[32] In the result, I make an order in the following terms:

1. That the bar is hereby uplifted,

2. That the applicant is hereby ordered to file its plea within 5 days from the date of this order,

3. The applicant is ordered to pay the costs of this application.

S S MPHAHLELE
JUDGE OF THE HIGH COURT,
MIDDELBURG

FOR THE APPPLICANT: Adv SM Van Vuuren
INSTRUCTED BY: Weavind & Weavind Inc
FOR THE RESPONDENT: Adv m Cajee
INSTRUCTED BY: Maphanga & Associates Inc

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of the hand-down is deemed to be on 28 March 2022.