IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO: 219/20
Reportable: YES / NO
Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES / NO

In the matter between:

MOGWAIMANG OLEKILE WESLEY **Respondent/Plaintiff**

AND

MINISTER OF POLICE **Applicant/Defendant**

DATE OF HEARING : 18 November 2022

DATE OF JUDGMENT : 03 March 2023

ORDER

[1] The defendant's application for upliftment of the bar is dismissed with costs.

JUDGMENT

REDDY AJ

Introduction

[1] This is an opposed application in terms of Rule 27 of the Uniform Rules of Court. The defendant seeks an upliftment of a bar to allow the defendant to file a plea. For purposes of brevity, I propose to follow the designation of the parties as cited in the main action.

Common cause facts

[2] On 4 February 2020, the plaintiff issued summons claiming damages on two causes of action for assault, unlawful arrest and detention and theft. The summons was duly delivered. On 12 March 2020, the defendant delivered a notice of appearance to defend. No plea was delivered as prescribed by the Uniform Rules of Court. On 28 May 2020, the plaintiff served the Notice of Bar. The defendant did not respond and it follows axiomatically that the defendant was *ipso facto* barred. The next phase of the litigation process followed in that on 04 November 2020, an application for a "trial date" to proceed with the action on a default basis was delivered. This similarly did not trigger a response from the defendant. On 15 March 2021, the date of 28 July 2021 was allocated by the Registrar, for Judicial Case Management.

[3] On 26 March 2021, a set down was delivered in respect of the Judicial Case Management date, being the 28 July 2021. On 28 July 2021, the date of 07 February 2022 was allocated for the hearing of the action on a default basis. On 03 August 2021, a notice of set down was served on the defendant, informing the defendant of the default hearing of the action set down for 07 February 2022. For the first time since of the entering a notice of intention to defend the action, a response was triggered from the defendant. On 03 February 2022, the defendant served on the plaintiff an application indicating its intention to move an application for the upliftment of the bar. As a result of this step taken in the legal proceedings, the default judgment hearing of the action was removed from the roll.

Defendant's Affidavit

[4] The founding affidavit in this application has been deposed to by State Attorney, Siyasanga Msutu. The relevant crisp issues are the following: Mr. M J

Maphutha, the erstwhile, now deceased, State Attorney for the defendant, was seized with this action. Mr Maphutha passed away on 29 August 2021. The matter was re-allocated to Ms Msutu. On perusal of the records, it was discovered by the defendant that the plaintiff had served a notice of set down for trial on 07 February 2022. The notice contending that the action was ripe for trial was misleading according to the defendant, as the action appeared not to be ready for trial. I deal with this issue later.

[5] The fact the Mr. Maphutha had passed on, left no source of information as to the status of the action. What exacerbated the enigma that the defendant faced was that during the end of 2021, the whole Department of Justice and Constitutional Development was "*hacked"* which restricted access to electronic mail. It was only on 19 January 2022, that confirmation was received from the plaintiff that the plaintiff will be persisting with the default order sought, on 07 February 2022.

[6] In dealing with the good cause prerequisite it would best to recite the founding affidavit in this regard:

> "4 **<u>GOOD CAUSE</u>**
>
> 4.1 I respectfully submit that good cause exists for the upliftment of the bar in that the Defendant's defence is based upon facts, that if proved would constitute a *bona fide* defence.
> 4.2. I submit further that this application is made bona fide and not to delay proceedings.
> 4.3. It is further submitted that the granting of this order will not prejudice Plaintiff's in any way that cannot be compensated for by a suitable cost order.
> 4.4. No delay can further occur as the Defendant has already prepared a plea which will at the granting of the application be filed within 10 days.
> 4.5. The defendant's defence is premised on the fact that the Plaintiff's arrest was lawful as the arresting officer, at all material times, entertained a reasonable suspicion that the Plaintiff had committed an offence, alternatively, the presence of the arresting officer.

5. In the premise the Defendant has *bona fide* defences to the Plaintiff's claim that if proved on trial will constitute a defence. Furthermore, taking into consideration the balance of prejudice the parties could suffer. It is in the interests of justice that be allowed an opportunity to put its defences before Court."

[7] The replying affidavit deposed to by attorney Mr. Mlungisi Nkabini who is the third State Attorney seized with the action, did not take the application further. According to Mr. Nkabini, the country was under National Lockdown with Alert Level 5 in effect from 26 March 2020 to 30 April 2020. Alert Level 4 came into effect from 01 to 31 May 2020, with Alert Level 3 coming into effect from 01 June 2020 to 17 August 2020. These truncated alert levels had some random effect or implications, which remained unexplained.

Plaintiff's Answering Affidavit

[8] As alluded to, the chronology of the litigation is not in issue. Building on the undisputed litigation history, the plaintiff contends that as at the delivery of the notice of intention to defend (12 March 2020) until the delivery of the present application, the defendant was legally sterile. In an estimated period of twenty-three (23) months the defendant was *in limbo* and did not assert any procedural devices as envisaged in the Uniform Rules of Court, to address the failure to deliver a plea.

[9] The plaintiff submitted that an explanation had to be provided for two periods, first before the defendant was *ipso facto* barred and second, the period thereafter. The plaintiff submits that on an examination of the founding affidavit, it does not meet the threshold of good cause and neither does the defendant exhibit a *bona fide* defence.

The law

[10] Rule 27 of the Uniform Rules of Court provides as follows:

"27 Extension of time and removal of bar and condonation

(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of the court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.
(2) Any such extension may be ordered although the application therefor is not made until after the expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as it seem, meet as to the recalling, varying or cancelling of the results of expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.
(3) The court may, on good cause shown, condone any non-compliance with these rules.

[11] The legal framework that underscores an application for condonation is succinctly set out in *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (OPA). In *Du Plooy*, the Court emphasized that "*good cause*" as set out in Rule 27(1) had to be shown and that the court was vested with a wide discretion which should be exercised upon consideration of all the merits of the case. (See also *Gumede v Road Accident Fund* 2007 (6) SA 304 (CPD) at 307 D).

[12] As can be gleaned from Rule 27(3), the Court, may on good cause shown, condone any non-compliance with the Rules of Court. It therefore was peremptory for the defendant to establish the existence of good cause why its application for condonation should be granted, to pave the way for it to deliver its plea. Good cause in broad entails the consideration of the following:

(i) a reasonable and acceptable explanation for the default;
(ii) a demonstration that a party is acting bona fide;
(iii) that such party has a bona fide defence which *prima facie* has some prospects of success;

(iv) a full explanation of the default so that a court may assess the explanation. (See *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* 2003 (2) All SA 113 (SCA*), Chetty v Law Society Transvaal 1985(2)* SA 756(A) at 764J -765E, *Siber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 353 at 354 A (A))

(v) The aspect of good cause was reiterated in Dalhouzie v Bruwer 1970 (4) SA 566 (C) by adding two requirements. Firstly, the applicant should file an affidavit satisfactorily explaining the delay. Secondly, the applicant should satisfy the court on oath that he has a bona fide defence. A third requirement has been added by authorities namely, the granting of the indulgence sought must not prejudice the plaintiff.

(vi) In Smith NO v Brummer NO 1954 (3) SA 352 (O) at p358, five factors were highlighted where the courts have a tendency to grant a removal of bar.

(vii) In Ferris v FirstRand Bank Ltd 2014(3) SA 39 CC the Constitutional Court held that lateness is not the only considering factor. The test for condonation is whether it is in the interest of justice to grant it, which includes factors such as applicant's prospects of success and the importance of the issue to be determined.

Discussion

[13] I now turn to consider each of the various considerations which embody good cause.

A reasonable explanation for the default/a full explanation of the default so that a court can assess the explanation

[14] An examination of the evidence indicates that there is no reasonably acceptable explanation for the default. The time lines as set out categorically indicates that there is no reasonably acceptable explanation for the failure to comply with the Rules of Court. An irrefutable fact is that the defendant delivered an appearance to defend on 12 March 2020. The defendant is enjoined to within twenty court (20) days after the filing and serving of the intention to defend to file and serve a plea, exception, notice to strike out, with or without a counterclaim. There is no

explanation aerated in respect of the failure to comply with this time line. Ms Msutu, who deposed to the founding affidavit, kicks for touch in averments that are made, with no specific date provided when this action was handed over to her.

[15] The two time periods alluded *supra,* relevant to considering the default of the defendant, was pertinently addressed in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* [2021] ZASCA 69, where Makgoka JA stated as follows:

"[22] With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence of Ingosstrakh's failure to plea. With regard to the former, Ingosstrakh served its notice of intention to defend the action on 30 September 2015. It therefore had up to 28 October 2015. There is simply no explanation whatsoever why a plea was not filed during that period."

[16] The conduct of the defendant up to the period of the service of the bar is analogous to what transpired in *Ingrosstrakh*, where no explanation was put forward by the defendant, explaining what transpired between the hiatus of the delivery of the notice of intention and the service of the bar. The death of Mr. Maphutha provides no immunity to the tendering of an explanation for that period.

[17] In the replying affidavit, the following is recorded:

> "[14.1] The hack played a cardinal role in the delay herein. All facets of the proper functioning of the office of the state attorney is computerized. Without such computerized systems the case could not be properly managed.
> "[14.2] Furthermore, and as mentioned numerously, such explanation of what transpired since the filing of the notice of intention to defend can only be explained by the late Mr. Maphutha."

[18] Shifting blame, is in essence non-compliance with the Rules of Court. The late Mr. Maphutha was not an independent entity who functioned under an auspices of

his own. He was the duly appointed representative of the defendant. Neither the deponent in the founding affidavit nor the deponent in the replying affidavit, suggest that a vigilant examination of the physical case file in conjunction with any notes or the much relied upon computerized system have been investigated in the determination of obtaining a sense of what contributed to the legal inaction of Mr. Maphutha. To therefore suggest that the late Mr. Maphutha is the only source of an explanation is simply mendacious. What is glaringly obvious is that the court file was not perused to extract a sense of the litigation history. The absence of proper oversight is telling.

[19] In short, there is no acceptable explanation for two time lines, the period before the defendant was *ipso facto* barred and the period thereafter until 3 February 2022 when the current application was delivered. The defendant suggests that the arrival of the Covid-19 pandemic on our shores and the implementation of the various National Lockdown measures should be factored in, whilst in the same breath conceding that no substantive steps were taken to defend this action. It does not augur well for the defendant to abrogate and probate. As per the defendant's own time frames in respect of the various lockdown levels (assuming that these are correct) alert level 3 was in effect from 01 June 2020 to 17 August 2020. Mr. Maphutha passed on more than a year later on 29 August 2021.

A demonstration that applicant is acting bona fide

[20] *Bona fides* is synonymous with "*good faith*." Motion proceedings are regulated by strict legal principles. In *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA (SCA) at 200D, the SCA, restated the principle, that in motion proceedings affidavits constitute both pleadings and the evidence. It is these two legal instruments that I principally consider in evaluating the *bona fides* of the defendant. With great tedium, I repeat that Mr, Maphutha passed on 29 August 2021.

[21] It is expected of a litigant to take the Court fully into its confidence. I am alive to the fact that the defendant would only be disentitled to the relief sought if it is found that the conduct of defendant has been fraudulent or dishonest. (*Mgoqi v City*

of Cape Town and Another; City of Cape Town v Mgoqi and Another 2006 (4) SA 355 (C) at page 395 paragraph [140]). The defendant fell short of the standard of *bona fides*. I enunciate on this finding for three principle reasons. Firstly, there is no date indicated when the second State Attorney was allocated the matter. This is legally relevant in discharging good cause. Secondly, the defendant contends that it was served with a notice of trial for 07 February 2022 and that the matter was not trial ready. This averment is disingenuous. The defendant had been *ipso facto* barred, which in essence negates the trial of an action. The notice served on 03 August 2021 was for the default hearing set down for 07 February 2022. This certainly excluded the trial of the action. A cursory reading of this set down would have suggested the nature of the hearing. To therefore aver that the action was not ripe for trial is plainly duplicitous. Thirdly, the defendant contends that no further delays are envisaged as a plea has already been prepared and will be filed within ten (10) days of the granting of this order. Ironically, the already prepared plea was not annexed to the founding papers.

That such party has a bona fide defence which prima facie has some prospects of success

[22] The founding and replying affidavits collectively do not provide a full explanation as is required. In determining whether the defendant has a *bona fide* defence which *prima facie* has some prospects of success logically, an examination of the cause of action as set out in the *facta probanda* must be evaluated. The relevance of *facta probanda* can best be surmised as stated in *Inzinger v Hofmeyr* [2010] ZAGPJHC at [15]-[16]:

> *"The need to distinguish between facta propanda and facta probantia is a further aspect of the requirement that material facts only be pleaded. [See Makgae v Sentraboer[Koopertief] Bpk supra at 244C-H].Facta probanda should be distinguished from "pieces of evidence" required to prove the true facta probanda.[Kings Transport v Viljoen 1954 (1) SA 133(K) at 138-139]. As was remarked in Dusheiko v Millburn 1964 (4) SA 648 (A) at 658A:*

"I venture to think that most difficulties will in practice be resolved if, in applying the definition stated in McKenzie v Farmers' Co-operative Meat Industries Ltd (supra) to any given case, it is borne in mind that the definition relates only to 'material facts', and if at the same time due regard be paid to the distinction between the facta probanda and the facta probantia.

Facta probantia has no place in a pleading and the contents of any pleading should be restricted to those facts only which serve to establish the cause of action, excluding any evidence required to prove them."

[23] It is apposite to consider the plaintiff's *facta probanda*. The plaintiff alleges that on 28 July 2017, at or about 08h00 at Wolmaransstad at his residence and in the presence of his family and neighbours, servants of the defendant assaulted him. The plaintiff avows that he was hit with clenched hands, open hands and kicked on his genitals. Resultantly, the plaintiff sustained injuries including but not limited to a left ear injury.

[24] The plaintiff was subsequently subjected to a warrantless arrest. He was consequently detained at the Wolmaransstad Police Station holding cells until 31 July 2017, when he was transported to Court and made his first appearance in the Wolmaransstad Magistrate's Court. The plaintiff pleads that a second assault was perpertrated on him at the Makwassie Police Station, where he was assaulted by one Inspector Kubu and other members of the SAPS, who were unknown to him. He was kicked, hit with clenched fists, threatened with a firearm and a plastic bag was placed over his head. The plaintiff avers that he suffered injuries to his body as a result of these unlawful actions, suffered *contumelia,* shock and humiliation. In the fourth claim, the plaintiff alleges that servants of the defendant, confiscated a Samsung A7 cell phone valued at R9000.00, from him. Notwithstanding the criminal charges having been withdrawn against the plaintiff, he alleges that servants of the defendant have failed and/or neglected to return the said cell phone to him.

[25] The defendant's defence is premised on the fact that the plaintiff's arrest was lawful as the arresting officer, at all material times entertained a reasonable

suspicion that the plaintiff committed an offence, alternatively the plaintiff committed *"the presence of the arresting officer*". (as per the founding affidavit)

[26] A perfunctory examination of the *facta probanda* as extracted from the pleadings indicates that the plaintiff has proffered four claims against the defendant:

(i) Claim A : assault
(ii) Claim B: unlawful arrest and detention
(iii) Claim C: assault
(iv) Claim D: theft

[27] The defendant adopts a nonchalant approach to the drafting of the application for relief within the purview of Rule 27. The serving and filing of an application is not a gateway to the proposed relief. The relief sought must conform in substance to the Rules of Court. The lacksidisical approach of the defendant is best illustrated by averments made as regards the defendant's *bona fide* defence. I reiterate the defence:

> *"The defendant's defence is premised on the fact that the Plaintiff's arrest was lawful as the arresting officer entertained a reasonable suspicion that the plaintiff had committed an offence, alternatively, the presence of the arresting officer."*
>
> (my underlining)

[28] I propose to deal with the legal ambiguity of the first portion of the defendant's defence and illustrate that this defence in the current the form is legally untenable. The general law of application as regards a warrantless arrest is captured in section 40 of the Criminal Procedure Act 51 of 1997. It provides as follows:

> "Arrest by peace officer without warrant.-
>
> (1) A peace officer may without warrant arrest any person-
>
> (*a*) who commits or attempts to commit any offence in his presence;

(*b*) *whom he reasonably suspects* of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(*c*) who has escaped or who attempts to escape from lawful custody;

(*d*) who has in his possession any implement of house-breaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

(*e*) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

(*f*) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;

(*g*) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;

(*h*) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;

(*i*) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;

(*j*) who willfully obstructs him in the execution of his duty;

(*k*) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

(*l*) who is *reasonably suspected* of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;

(*m*) who is reasonably suspected of being a deserter from the South African National Defence Force;

(*n*) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

(*o*) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;

(*p*) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;

(*q*) who is reasonably suspected of having committed an act of domestic violence as contemplated in section (1) of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

[29] Section 40(1) and (2) of the CPA enjoins a peace officer to arrest without a warrant. The executing of an arrest by a peace officer in terms of section 40(1) (a) – (q) of the CPA necessitates that the jurisdictional requirements of each of the sub-

sections are complied. The use of the phrase "*entertained a reasonable suspicion that the plaintiff had committed an offence*" in terms of the first part of a purported defence is no defence. The phrase "*reasonably suspected"* is embodied in section 40(1) (b), 40(1) (e), 40(1) (g), 40(1) (h), 40(1) (l), 40(1) (m), 40(1) (n), 40(1) (o) and 40(1) (q) of the CPA. It is open to speculation, conjecture and guesswork as to defence of the defendant's. A broad, multifaceted defence is not a *bona fide* defence.

[30] I turn to consider the second part of the defence "*alternatively the presence of the arresting officer*." An ordinary reading of this part of the *bona fide* defence is devoid of legal sense. It is not for this Court to embark on an interpretation which may be favorable to the defendant. At best, this part of the defence is nonsensical. A plain reading of the entire defence holistically does not pass muster of constituting a *bona fide* defence.

[31] The proverbial straw that breaks the back of the existence of a *bona fide* defence is the following: the *facta probanda* which forms the bedrock of the plaintiff's case has been set out. This cause of action is founded on four claims. Claim A, assault; Claim B, unlawful arrest and detention; Claim C, assault; Claim D, theft. There is no defence to the assault and theft allegations. The defence of the defendant does not pass the watermark of a *bona fide* defence. Resultantly, the defendant has not exhibited a *bona fide* defence. No *bona fide* defence axiomatically excludes the prospects of success.

The question of prejudice

[32] In line with the general approach of the defendant, it adopts a supine stance approach to the issue of prejudice. The sparse averments regarding the issue of prejudice does not assist the defendant nor the Court. In the views of the defendant, the prejudice that the plaintiff will suffer can be cured by the awarding of a cost order. The prejudice of the defendant is expressed in three lines where the following is contended, "*if an extension is not granted the prejudice the Defendant would suffer greatly outweighs the prejudice that Plaintiff could suffer.*" Absent are material facts.

[33] The plaintiff speaks to the issue of prejudice as follows:

> "[8] The allegations therein contained are denied. The prejudice I am suffering due to the delay of almost 2 years, is glaring. It is so that the action has its geneses from an unlawful infringement of my Constitutional Rights. As at date of this affidavit, it has been 24 months since the notice of intention to defend had been delivered, and the applicant hasn't even disclosed a draft plea, nor any other evidence it intends to use to show a bona fide defence. For 24 months nothing has been done by the Applicant in this matter. For 24 months the adjudication on the unlawful infringement of my Constitutional Rights had been delayed unduly so."

Conclusion

[34] An evaluation of the entire conspectus of the defendant's application fails to establish good cause of which prejudice is a consideration. A careful evaluation of the entire application does not lead to finding that it would be in the interest of justice to order the upliftment of the bar. Consequently, the application for the upliftment of the bar falls to be dismissed. There is no basis to deviate from the usual order in respect of costs.

Order

[35] Consequently, the following order is made:

> The defendant's application for upliftment of the bar is dismissed with costs.

A REDDY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

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