

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

Case No:45707/2021

(1) REPORTABLE: YES / **NO**

(2) OF INTEREST TO OTHER JUDGES: YES/ **NO**

(3) REVISED: **NO**

DATE: **25 August 2023**

SIGNATURE

In the matter between:

A[...] **M[...]**

Applicant/Defendant

and

S[...] **M[...]** **M[...]**

Respondent/Plaintiff

JUDGMENT

Coram NOKO J

Introduction

[1] This is an application for an order uplifting the bar in terms of Rule 27 of the Uniform Rules of Court.

Background and parties' contentions

[2] The respondent sued out summons for divorce which were served on the defendant on 26 November 2021. The defendant served notice of intention to defend on 10 December 2021. The defendant subsequently proceeded to serve notice in terms of rule 23(1) on 15 December 2021. Having realised that the

application for exception is not being taken forward the plaintiff notified the defendant by email on 18 January 2022 that the notice of exception has lapsed. Plaintiff thereafter served notice of bar on 7 February 2022.

[3] The defendant failed to respond to the notice of bar and the plaintiff accordingly enrolled the matter for divorce on the unopposed roll of 3 March 2022. The divorce could not proceed on the hearing date as the parties agreed to postpone the matter to allow the defendant to launch the application to uplift the bar.

[4] The defendant served application for the upliftment of bar on 8 April 2022 and the plaintiff served its answering affidavit on 3 May 2022. The *dies* for defendant to serve its replying affidavit lapsed and plaintiff served its heads of argument for the purposes of advancing the upliftment of the bar application to be brought to finality. The plaintiff further approached the court for an order that the defendant serve his heads of argument which must precede the enrolment of the application for the upliftment of the bar. The defendant thereafter served his heads of argument.

[5] The defendant contended that he could not serve and or upload the notice of exception on time as the CaseLines was not accessible. Further that the respondent did not take time to assist him in this regard. He then sent an email to court online officials for assistance but not avail. He further summoned the assistance of legal representative privately but could not get proper assistance.

[6] The defendant believed that there are merits in his exception as the summons were excipiable, first, the plaintiff prayed for the forfeiture of benefits from marriage in community of property against the defendant without properly placing factual foundation thereof. Secondly, that the plaintiff has requested the court to award maintenance in the sum of R7000.00 whilst the plaintiff was aware that the defendant is a man of low means and unemployed. Thirdly, plaintiff contended that the defendant financially abused her and spent his

money spuriously without attaching any evidence or documents in support of such a claim.

[7] The plaintiff's counsel on the other hand contended that the defendant has been dilatory in his approach. Further that it cannot be correct that the defendant had challenges with uploading documents on CaseLines. The defendant was accordingly served with notice of bar and was subsequently represented by an advocate at the divorce hearing who did not even formally place himself on record on behalf the defendant. Consistent with his cavalier posture the defendant had to be compelled before filling his heads of argument in respect of his application for the upliftment of the bar.

[8] In addition, so went the plaintiff's counsel, the defendant has failed to meet the requirements for the upliftment of the bar. The test for the application is that good cause must be shown and furthermore that a party must provide the reasons for the delay. The defendant was represented, and his attorneys also contributed to the delay in the prosecution of the action. That notwithstanding the defendant failed to serve a replying affidavit in this application.

[9] The contention that the plaintiff's case is excipiable is also unfounded as it is true that the defendant has not maintained the property of the parties and it has further been stated that the defendant does not financially support the plaintiff. These assertions form the basis why the plaintiff has prayed for the forfeiture of benefits against the defendant.

[10] In any event, so went the argument, notice of exception is not pleading and cannot be construed as a pleading in reaction to the notice of bar.

[11] There was a request before the defendant's attorneys withdrew that the court should award costs *de bonis propriis* and this is no longer being persisted, so submitted the counsel, with since the said attorney has now withdrawn as attorney of record.

[12] The defendant stated in reply that he was not aware that a reply in the application uplifting the bar is required. He further conceded that indeed he was assisted by Oupa S[...] who ultimately withdrew. He has now approached the office of the Legal Aid and awaiting its response. He has studied LLB degree and has been looking for articles of clerkship. Further that to his understanding and contrary to the arguments advanced by the plaintiff's counsel an exception is also a pleading. When asked by the court the defendant could not give a coherent account as to why the Legal Aid office was not representing him.

Evaluation and legal analysis.

[13] The defendant would have to satisfy the requirements to uplift the bar which should be predicated on good cause being shown. In trying to demonstrate good cause there are two requirements, first, the defendant must put forward a satisfactory explanation for the delay. It was held in this regard that the defendant must at least furnish an explanation in full for his default comprehensively such that the court should be able to determine his motives.¹ Secondly, the defendant must show he has a bona fide defence.² This was confirmed by the SCA in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others*³ where it was held that “[G]enerally, the concept of ‘good cause’ entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation.”⁴

¹ Silber v Ozen wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A.

² In the matter of Smith, N.O. V Brummer, N.O. And Another 1954 (3) SA 352 (OPD), Brink J stated that good cause will be constituted as follows “In an application for removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case. 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; (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; The absence of one or more of these circumstances might result in the application being refused”.

³ (934/2019) [2021] ZASCA 69 (4 June 2021)

⁴ At para [21].

[14] The defendant contend that he struggled to access CaseLines, and his invitation to CaseLines was found in his junk mail folder. The fact that the defendant could not access CaseLines could not have been used as a bar for the exception to be proceeded with. The exception and the process of setting it down could have been done with the assistance of the court officials. It however appears that the defendant may have misconstrued the court directive on filing on CaseLines to say that the *dies* is suspended until the document are uploaded on CaseLines. This is certainly incorrect.

[15] The defendant appears to have been let down by the legal representatives who assisted him in the preparation of his case. The fact that the representatives frustrated him cannot be used against the plaintiff who may have wanted the matter to be finalised.⁵ The reason why the court has established a family court meant to exclusively attend to family court is primarily because such matters need to be unnecessarily delayed and should be dealt with expeditiously. The defendant having made a choice of a legal representative must bear the consequences of his choice.⁶

[16] The entering into and adapting to digitization and online processes will have its attendant challenges and is beset with difficulties especially for the legal practitioners and would obviously be worse for the lay people. Strict application and compliance may impact on the right to access the courts by the indigent populace, and this cannot be countenanced by the courts. The efforts taken by the defendant in serving notice to defend and Rule 23 notices cannot be considered a conduct consistent with a party being nonchalant in prosecuting his defence. The service of papers on the opponent ipso facto was intended to see to the prosecution or advancement of the matter. Adapting to online service is aimed at expediting resolutions of disputes but at the same time pitfalls will be met during the teething stage. Attaining the objective of expeditious resolution of

⁵ This may not be the absolute truth as the plaintiff did not bother to react to the notice of exception which was served timeously on her attorneys, without having to await for same to be enrolled and argued.

⁶ That notwithstanding the SCA in *Huysamen & another v Absa Bank Limited & Others* (660/2019) [2020] ZASCA 127 (12 October 2020) has however noted at para [14] that "Courts, in general, are ordinarily loath to penalise a litigant on account of his attorneys' negligence."

disputes should not mean to sacrifice access to justice in the alter of formalism and convenience.

[17] That notwithstanding the court need to determine that, despite his lack of knowledge which generally cannot be used as excuse, whether there is a good cause founding the application for the upliftment of the bar. As set out above the defendant is enjoined to demonstrate that there is a bona fide defence.⁷ The defendant contended that he is unemployed and as such it will injustice for the court to order that he pays maintenance even worse R7000.00. To this end the submission that such a prayer cannot be sustained as he is unemployed has merit.

[18] The defendant's further defence is that there are no valid grounds presented to justify that he must forfeit the benefits from marriage in community of property. The defendant contends that he applied the proceeds of his pension monies to the benefit of the parties. Due to paucity of details in the particulars of claim with regard to the parties' assets it would not readily enable the court to adjudicate in the forfeiture. That notwithstanding the order for forfeiture may implicate the defendant's right to property. To this end proper ventilation of the defence at trial would be justified.

[19] It is noted that the application relates to the uplifting of the bar and condonation for the late filing of the exception is not included and it therefore follows that the only order would be for upliftment of the bar on the understanding that the defendant would have to serve the plea within *dies* as allowed by the rules.

Costs

[20] The divorce action commenced in 2021 and ordinarily it should have been finalised and to this end the plaintiff was not necessarily unreasonable in

⁷ See Civil Procedure in the Superior Courts. Harms at B-180. An applicant who seeks to have a bar removed must show good cause. This requires an affidavit dealing with the merits, setting out the defence. See also *Dalhousie v Brummer* 1970(4) SA 566(C).

challenging the application brought by the defendant. In the premises it would be justifiable that each party pay their respective costs.

[21] I therefore grant the following order:

1. That the bar is uplifted and the defendant is ordered to serve his plea within 15 days of the order.
2. Each party to pay own costs.

MV Noko
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg.

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 25 August 2023.

Appearances

For the Defendant:	In person: Mr A[...] M[...]
Counsel for the Plaintiff:	Adv RJN Brits
Attorneys for the Plaintiff:	VR Law Inc Attorneys
Date of hearing:	17 July 2023
Date of Judgment:	25 August 2023