

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 92483/19

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

Date: 16 October 2023

In the matter between:

ITUMELENG TLHABANYANE

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Respondent

JUDGMENT

DE VOS AJ

- [1] The applicant seeks to uplift a notice of bar in terms of Rule 27 of the Uniform Rules of Court.
- [2] The main dispute involves the non-payment of a home loan agreement. The respondent issued summons for the non-payment. The applicant failed to file his plea in time. In fact, the applicant failed to take any steps to move the matter forward for 18 months. During this 18-month inaction, the applicant's arrears grew from R 220 000 (6 months of non-payment) to more than R 1 million (25 months of non-payment). Eventually, the respondent gave the applicant notice of its intention to place the applicant under bar. The applicant failed to respond and was placed under bar.
- [3] The applicant wishes to uplift the notice of bar in order to file his plea, which includes six special pleas. The applicant contends that he has shown good cause to uplift the bar. The applicant complains that the respondent's insistence on the bar is excluding him from participating in the main proceedings. The applicant has raised the impact of the notice of bar on his constitutional right of access to courts protected in section 34 of the Constitution. As the notice of bar prevents the applicant from filing a plea, the applicant contends his right to access to courts has been limited.
- [4] The respondent opposes the relief. The respondent's case is that the applicant has failed to show good cause. The opposition rests on two grounds. First, the applicant has not sufficiently explained his delay in filing his plea. Second, the applicant has not shown a bona fide defence. The respondent contends that the applicant is seeking to delay the proceedings and has no real defence against the respondent's claim.
- [5] The central issue to be decided is whether the applicant has shown good cause. This must be considered in light of the main dispute between the parties.

The main dispute

- [6] In 2005, the parties entered into a home loan agreement. The applicant registered a covering bond over the home. The respondent advanced a sum of R 1.5 million to the applicant. A second home loan agreement was concluded in 2016 for a sum of R 1,38 million, again with a bond registered over the property. The market value of the property is about R 4 million. The monthly instalments are in the region of R 40 000.

- [7] The applicant fell into arrears. The Court does not know exactly when or why, but by September 2019 the arrears was over R 220 000. This means that the applicant had fallen about six months behind in his payments. In October 2019, the respondent sent the applicant a letter of default in relation to outstanding payments. No response was received. On 21 October 2019, the respondent sent a notice in terms of section 129 of the National Credit Act to the applicant through registered post. The applicant does not deny that he received the notice. The applicant did not respond to this notice and failed to make payment of the outstanding amount.¹
- [8] The respondent attempted to regularise the applicant's payments, but the respondent's 74 calls were left unanswered, and its instructions to its attorneys to engage with the applicant yielded no outcome. After these attempts were unsuccessful, on 11 December 2019, the respondent issued summons. The respondent claimed payment of R 3 484 973.22 with interest and for the applicant's property to be declared specially executable and sold in a public sale.
- [9] The applicant filed his notice of intention to defend on 8 January 2020. The applicant's plea was due on 5 February 2020. The applicant failed to file his plea. The applicant took no steps to move the matter forward for a year after filing his notice of intention to oppose and would take no further steps at all until 16 August 2021.
- [10] In the meantime, on 19 January 2021, the respondent wrote to the applicant, reminding him that the Easysell mandate had been terminated and that the applicant remained in default of his plea. The respondent did not respond to this and took no steps to pay the debt or move the matter forward.
- [11] On 21 January 2021, the respondent filed a notice of bar. It provided, as is required, the applicant with five days to file his plea. The applicant had until 29 January 2021 to file his plea to avoid being barred. The applicant did not respond to the notice of bar.
- [12] By 2 June 2021, the applicant's arrears had climbed from R 220 000 in 2019 to R 1 004 965.14. The applicant was, at that stage, 25 months in arrears with his payments.

¹ CL 011-7 para 17 – Founding Affidavit

- [13] On 24 June 2021, the respondent applied for default judgment. The default judgment was set down for the week of 25 August 2021. After being served with the default judgment application, the applicant still took no steps to move the matter forward for two months – until the week before the default judgment application was set down.
- [14] The week before the hearing of the default judgment application, on 16 August 2021, the applicant wrote to the respondent asking if the bar could be uplifted by mutual agreement. No agreement was reached. The applicant launched the application to uplift the bar on 18 August 2021, resulting in the default judgment application being removed from the roll.
- [15] Having set out the main dispute, the Court considers whether the applicant has met the good cause requirement in Rule 27.

Good cause

- [16] The test for the upliftment of the bar is settled. The Court exercises a discretion in terms of Rule 27, and the applicant bears the onus to advance a satisfactory and reasonable explanation for the delay. The applicant must provide an explanation for his delay in the papers before the Court. The Court must exercise its powers with judicial discretion and upon sufficient and satisfactory grounds shown by the applicant.² It is by now “axiomatic.”³ that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the Court seized with a matter based on the facts of that particular case. The requirements for the favourable exercise of a court's discretion have been crystallised in the decision of *Smith N.O. v Brummer N.O.*⁴:

- a) the applicant has given a reasonable explanation for 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 defence 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.

² IL & B Mrow Caterers Ltd v Greatermans SA Ltd 1981 (4) SA 108 (C) at 112H-113A

³ Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at 477E

⁴ 1954 (3) SA 352 (O) at 358A

- [17] Whilst the list is not exhaustive,⁵ it provides a framework within which the application can be considered.
- [18] The Court must be satisfied that the applicant has adequately disclosed reasons for the entire period of his default. A full and reasonable explanation, which covers the entire period of delay, must be given.⁶ The Court must be put in a position to understand how and/or why the delay came about in order to assess the conduct of the applicant or the lack thereof. In *Grootboom v National Prosecuting Authority*,⁷ the Constitutional Court held that a party must give a full explanation for the non-compliance with the rules and that of “great significance, the explanation must be reasonable enough to excuse the default.”
- [19] I start with the first requirement: the applicant must give a reasonable explanation for his delay. The delay in question is the 18 months between January 2020 and August 2021. During this period, the applicant failed to file his plea. In fact, the applicant was entirely silent during this period. The applicant explains the delay with reference to four factors. The applicant refers to a delay as a result of the amendment of the summons, the COVID regulations, attempts at settlement and the failure of his previous attorneys to inform him of the notice of bar. The Court considers the four explanations.
- [20] First, the explanation that the delay was caused by the amendment. On 9 April 2020, the respondent gave notice of intention to amend his summons. The respondent amended his summons in April 2020. By this stage already, the applicant's plea was three months out of time. The respondent's plea was due on 5 February 2020. The amendment could not have caused the late filing of the plea – as it was amended after the plea was due. The Court notes that the applicant relies on an event of April 2020 to justify its failure to act in the preceding three months. The explanation is not satisfactory.

⁵ eThekweni Municipality v Ingonyama Trust 2014 (3) SA 240 (CC) at 246- 247 paras [24]-[28] respectively; Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at 477E; Gumede v Road Accident Fund 2007 (6) SA 304 (CPD) at 307 at para[7]; and Immelman v Loubser en Ander 1974 (3) SA 816 (AD) at 820E-H.

⁶ Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at 477E–G

⁷ 2014 (2) SA 68 (CC) at para 23

- [21] In any event, even if the Court were to accept the applicant's explanation, it only covers January to April 2020. This leaves the period from April 2020 until August 2021 unexplained. The explanation is not satisfactory, nor does it explain the entire period of the delay.
- [22] Second, the applicant relies on settlement discussions to explain the delay. The settlement negotiations terminated on 31 January 2020. The plea was due on 5 February 2020. In other words, even on the applicant's timeline, the settlement discussions ended before the plea was due. Again, the applicant raises an explanation which is demonstrably not supported by the chronology and is not satisfactory.
- [23] In addition, even if the applicant's explanation was to be accepted, it still leaves the period from 31 January 2020 until August 2021 unexplained. The applicant's reliance on the settlement discussions leaves a lengthy period, as long as a year, unexplained.
- [24] In addition, the respondent notes that the applicant has not provided any particulars in relation to the alleged settlement discussions. The Court considered the applicant's papers, and they show that the applicant indeed provided no particulars regarding the alleged settlement discussions. The Court is not told when these discussions took place, what they yielded or who were involved. The Court is told no more than there were settlement discussions. The applicant has, therefore, not provided the Court with a full explanation in this regard.
- [25] The respondent, in response to the vague allegation of settlement discussions, pleads a detailed response. The only engagement which could be perceived as a settlement discussion is the respondent's offer for the applicant to enter into an "Easysell" agreement with the respondent. The respondent tendered this offer to the applicant in December 2019. The offer is for the respondent to value, market and sell the property. The applicant did not avail the property for valuation, and the respondent terminated the Easysell mandate due to "no contact" in January 2020. This is the only "settlement" engagement between the parties.
- [26] The Court has no version from the applicant regarding the alleged settlement discussions and a detailed version from the respondent. The detailed version from the respondent indicates, at best, a lacklustre response from the applicant to settlement

discussions. In any event, the only version before this Court – from the respondent in motion proceedings seeking final relief – is that these discussions terminated in January 2020. The applicant's reliance on settlement discussions does not provide a full explanation and is disputed by the respondent.

[27] In any event, as with the other explanations, even if it were to be accepted, it still leaves the entire period from January 2020 until August 2021 without any explanation – let alone an adequate explanation.

[28] Third, the applicant contends that the Covid regulations resulted in a delay in settlement negotiations. The applicant provides no particularity to bolster this explanation. In any event, the settlement negotiations terminated in January 2020. The Covid pandemic impacted South Africa from March 2020. Again, the applicant raises an explanation which is demonstrably not supported by the chronology. The events of March 2020 could not impact negotiations, which terminated in January 2020. This explanation is not borne out by objective facts. It is, therefore, neither a full explanation nor a reasonable one.

[29] Fourth, the applicant blames his former attorney for not responding. The applicant states that only when he was confronted with the default judgment application did he consult with his current attorneys, who informed him of the notice of bar. The applicant pleads, in generalised terms, that he left the issue to his former attorneys to deal with.

[30] The problem with this explanation is two-fold. First, the applicant provides only this conclusion and pleads nothing in support of this contention. There are no foundational facts presented to the Court and only the conclusion that his former attorneys were entrusted to deal with this matter. The Court is not told whether the applicant made any inquiries about the summons hanging over his head, his non-payment of more than a year or the pending litigation. The Court is not told when the applicant changed from his former attorneys to his present attorneys. The explanation is not reasonable and leaves the Court with more uncertainty as to the applicant's seriousness in wishing to have this matter finalised.

- [31] It also weighs with the Court that a party cannot hide behind the remissness of his attorney.⁸ In this case, the applicant has failed to show any moment of action to counter the 18 months of inaction – or pleaded a case sufficiently to be able to lay the blame at the feet of his previous attorneys.
- [32] In summary, the explanations proffered – even if accepted at face value - do not cover the entire period of delay. The difficulty is that if all these explanations are accepted, they do not provide an explanation for the period of delay or even most of the period of the delay. The delay of more than a year from April 2020 until August 2021 is, even on the applicant's version, explained. This is sufficient to conclude that the applicant has not satisfied the first requirement for the upliftment of the bar.
- [33] In addition, the explanations proffered cannot be accepted by the Court as either being a full disclosure or an explanation. The explanations are also not borne out by the chronology of events. The Court notes that not one of the four explanations provides a reasonable explanation for the delay. Aside from not aligning with the full period of delay, these explanations are not satisfactory.
- [34] I draw from the Constitutional Court's approach in *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*("Van Wyk").⁹ In *Van Wyk*, the Constitutional Court dismissed an application for condonation,¹⁰ which is of assistance as it also deals with the non-compliance with the rules of Court. The Court noted that the failure by parties to comply with the rules of Court or directions is not of recent origin. The Court held that a party seeking condonation must make out a case entitling it to the Court's indulgence. It must show sufficient cause. This requires a party to give a "full explanation" for the non-compliance with the rules or the Court's directions. Of great significance, the "explanation must be reasonable enough to excuse the default." The Court identifies the purpose which underpins this approach as "to ensure that the business of our courts is run effectively and efficiently". Invariably, this will lead to the orderly management of our courts' rolls, which "in turn will bring about the expeditious disposal of cases in the most cost-effective manner".

⁸ Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at D-E; Salojee and Another v Minister of Development 1965 (2) SA 135 AA at 141

⁹ 2008 (2) SA 472 (CC)

¹⁰ Id 75F–H, 76C–D and 78B–79C

This is particularly important given the ever-increasing costs of litigation, which, if left unchecked, will make access to justice too expensive.¹¹

[35] The applicant has not demonstrated any *bona fides* in this application. The explanation proffered by the applicant for the delay in filing his plea falls short of what is required by our Courts. Moreover, the delay is inordinate, and the explanations are rejected.

[36] As the applicant's explanations are insufficient, that in itself is enough to dismiss the application. However, I will follow a belt and braces approach. In *Du Plooy v Anwes Motors (Edms) Bpk*,¹² it was held that the requirement of 'good cause' gives the Court a wide discretion¹³ which must, in principle, be exercised with regard also to the merits of the matter seen as a whole.¹⁴ The graver the consequences which have already resulted from the omission, the more difficult it will be to obtain the indulgence.¹⁵ There may also be an interdependence of, on the one hand, the reasons for and the extent of the omission and, on the other hand, the 'merits' of the case.¹⁶

[37] Whilst the Court is inclined to dismiss the application based on the paucity of the explanations provided, the Court is mindful of the applicant's claim that two constitutional rights are engaged. With this in mind, the Court considers the merits of the matter as a whole.

The defences

[38] The applicant raises, broadly, two defences.

[39] The first defence is that the respondent has failed to plead any reliance on the first agreement, yet it is claiming a debt owed in terms of the first and the second agreement.

¹¹ *Id*

¹² 1983 (4) SA 212 (O) at 216H–217D

¹³ *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H–217A

¹⁴ *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C–308A

¹⁵ *Silverthorne v Simon* 1907 TS 123 at 126–7; *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 573D–F; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217

¹⁶ *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217D

- [40] The respondent has pleaded that the second home loan agreement constitutes the repayment terms of the 'principal debt', which comprises a consolidation of the outstanding loan amount under both home loan agreements. Both home loan agreements are thus linked to the same account, and the monthly instalment payable by the applicant, as stipulated in clause 6 of the second home loan agreement, is in respect of the principal debt. The distinction between the first and second home loan agreements is thus superficial and without merit.
- [41] The second defence is that the applicant claims the respondent can only claim the arrears and not the full amount (principal debt). However, the agreement contains an acceleration clause. Clause 20 of the agreement entitles the respondent, in the event of persistent default, to claim payment of principal debt. The respondent communicated its reliance on this right in the section 129 notice dispatched by registered post to the applicant. The applicant did not dispute that he received this notice. The applicant was notified of the respondent's position and provided an opportunity to remedy the default. However, the notice indicated that were the applicant to fail to remedy his breach within the ten-day period, the respondent would be entitled to recover the full balance outstanding under the loan agreements. The respondent submits that this was the express wording of paragraph 11.1 of the section 129 notice. The notice complies with the provisions of section 129 of the NCA. The applicant has failed to show that it does not.
- [42] The applicant concedes that he received the 'notice' and did not respond thereto. The applicant was afforded an opportunity to remedy his default by bringing the arrears owed under the agreements up to date. His failure to do so, and his continued breach under the home loan agreements, triggered the acceleration clause and entitled the respondent to institute action by claiming the full balance outstanding under the home loan agreements, being the principal debt.
- [43] The respondent contends that the purported defences are what our Courts have on occasion termed 'sham defences'. They are not bona fide and not an answer which will defeat the Bank's claim. They are merely raised to delay the Bank's claim. This is evident by the applicant's conduct in this application, wherein he has taken no further steps to bring this matter to finality.

[44] The applicant has failed to satisfy the Court that he has a *bona fide* defence. The defence is patently unfounded and/or dilatory.

[45] The applicant has relied on the right to access the Court. The argument appeared in the pleadings, but was not expanded on during oral argument, but the Court considers it in any event.

Access to courts

[46] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. This important right finds its normative base in the rule of law.¹⁷ The rule of law has come at “the cost of mighty historical efforts.”¹⁸ and only as a result of these efforts “has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities”. It is foundational to the stability of an orderly society.¹⁹ The right of access to Court is a “bulwark against vigilantism, and the chaos and anarchy which it causes”.

[47] The interplay between the right to access Courts and Rule 27 is one of the examples used by the Constitutional Court to highlight the impact of procedural rules on the right to access courts. O'Regan J in *Giddey* commented²⁰ that “for courts to function fairly, they must have rules that regulate their proceedings”. Those rules will often require parties to take certain steps “on pain of being prevented from proceeding with a claim or defence”. A common example is the rule regulating the notice of bar in terms of which defendants may be called upon to lodge their plea within a certain time, failing which they will lose the right to raise their defence.

[48] Many of the rules of Court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a plaintiff

¹⁷ *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 15

¹⁸ *Concorde Plastics (Pty) Ltd v NUMSA and Others* 1997 (11) BCLR 1624 (LAC) at 1644F - 1645A) quoting with approval Eduardo Couture *The Nature of Judicial Process* (1950) 25 *Tulane Law Review* 1 at 7. Quoted in *Chief Lesapo v Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 22

¹⁹ *Chief Lesapo* at para 22

²⁰ *Giddey NO* para 15

or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution.

[49] However, before me, the applicant has not challenged the constitutionality of Rule 27. Nor has he cited the correct respondents in order to do so. The Court is being presented with an allegation that the rule limits the applicant's right of access to courts without a challenge to the rule or without developing the argument. The Court can, in such circumstances, do no more than apply the rule.

[50] The Court is, of course, mandated by section 39(2) of the Constitution to interpret the rule – without straining the language of the rule – in a manner that best promotes the rights in the Bill of Rights. However, as the rule seeks to regulate our court processes in a way that protects the rights of others to access to courts, the Court is not persuaded, that another interpretation of the rule would better promote the rights in the Bill of Rights.

Costs

[51] The applicant has tendered the wasted costs in launching this application. However, he has stated that if the respondent opposes the relief sought, he will seek punitive costs.

[52] Even upon tendering the wasted costs, a party who has been barred is not entitled as of right that the other should consent to the removal of bar.²¹ In fact, it is a "general rule" that the applicant should pay all the wasted costs due to the application as the applicant seeks an indulgence.²² This would include any costs of reasonable opposition.²³

[53] In this case, I see no reason to depart from the general rule that costs should follow the result.

Order

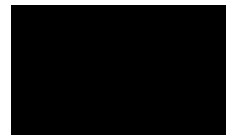
[54] As a result, the following order is granted:

²¹ Gool v Policansky 1939 CPD 386 at 390

²² Joffe High Court Motion Procedure: A Practical Guide p 1-38

²³ Gool

- a) The application is dismissed.
- b) The applicant is to pay the respondent's costs.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	P Makhambeni
	P Mbana
Instructed by:	SA Maninjwa Attorneys
Counsel for the applicant	P Long
Instructed by:	Rampsay Webber
Date of the hearing:	7 August 2023
Date of judgment:	16 October 2023