

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: YES/NO

Of Interest to Other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 4268/2016

In the matter between:

MAFUBE LOCAL MUNICIPALITY

Applicant

and

MINISTER OF WATER AND SANITATION

Respondent

In re:

The matter between:

MINISTER OF WATER AND SANITATION

Plaintiff

and

MAFUBE LOCAL MUNICIPALITY

Defendant

HEARD ON: 21 APRIL 2022

DELIVERED ON: 12 MAY 2022

JUDGEMENT BY: LOUBSER, J

[1] In September 2016 the Plaintiff sued the Defendant for payment of an amount in excess of R130 million for, inter alia, water usage charges and water research levies, plus interest. In the years that followed, the matter became

delayed by an application for default judgment and an exception that was noted by the Defendant, amongst others. Presently there are three more applications before me arising from the main action. In order to avoid confusion, and for ease of reference, I will refer to the parties by name and not as they are cited in the applications as Applicant or Respondent.

- [2] The exception noted by Mafube was eventually dismissed with costs by a Court of this Division on 18 November 2021. Mafube thereafter failed to file its Plea to the Summons in the time allowed for such filing. This failure caused the Minister to deliver a Notice of Bar on Mafube on 18 January 2022. Yet again, Mafube failed to file its Plea within the five days allowed for such filing, with the result that Mafube became *ipso facto* barred from doing so in terms of the provisions of Rule 26 of the Uniform Rules of Court.
- [3] Despite having been barred from filing a Plea, Mafube went ahead and filed its Plea on 28 January 2022, which filing took place 3 days outside the period of time allowed in the Notice of Bar. The Minister was quick to respond by filing a Rule 30 application on the same day to have the filing of the Plea declared an irregular step. This Rule 30 application is one of the applications presently before me. The application was removed from the roll, on 3rd March 2022 with costs to stand over.
- [4] Subsequently, Mafube filed an application in terms of Rule 27 for extension of the period for filing its Plea to 28 January 2022, and for uplifting the Notice of Bar served on 18 January 2022. This application is also before me for adjudication. Having regard to the two applications mentioned so far, it is clear to the Court that the only question underlying the present issues and disputes is the question whether Mafube has shown good cause for its delay in filing its Plea within the period allowed. This is so, because if it is found that good cause was indeed shown, then the irregular step application will fall away by itself.
- [5] This, however, is not the only disputes before this Court. There is also an application by the Minister before me for leave to file a supplementary affidavit showing that the Minister had already served a Notice to declare an Intergovernmental dispute on Mafube during the course of 2016. In an earlier affidavit in the proceedings such a Notice filed on the Beaufort-West

Municipality was attached by the Minister. The supplementary affidavit sought to be filed states that this Notice was filed in error, and is now substituted by the correct Notice. This application to file the supplementary affidavit is opposed by Mafube.

- [6] I consider it appropriate to consider this application to file a supplementary affidavit first. To begin with, it is my impression that this affidavit is relevant because it introduces some evidence which could place Mafube's defence on the merits of the action in some perspective. It shows beyond all reasonable doubt that there was at least an effort by the Minister to comply with his Constitutional and Statutory obligations. I therefore intend to allow the filing of the affidavit, and no order as to costs shall be made.
- [7] The next question is whether the filing of the Plea by Mafube constituted an irregular step as contemplated by Rule 30. It speaks for itself that by the time the Plea was filed, Mafube was already *ipso facto* barred from doing so. On the face of it, an irregular step was taken by Mafube in this respect, and normally a court would not hesitate to strike out the Plea so filed.
- [8] As indicated earlier, however, everything hinges on the question whether Mafube has succeeded in showing good cause for an extension of time and the upliftment of the bar. Rule 27(1) expressly provides that a Court may "on good cause shown" make an order extending any time prescribed by the Rules. Rule 27(2) makes provision for the retrospective extension of time by the Court, as is sought by Mafube in this application. It has already become trite that an applicant for extension of time must provide a full and reasonable explanation for his delay. The application must also be *bona fide*, and the applicant must satisfy the court that he has a *bona fide* defence.¹ This means that the defence must *prima facie* carry some prospect of success.
- [9] As for the requirement of a full and reasonable explanation for the delay, the attorney for Mafube filed a founding affidavit saying that he was out of town attending a CCMA matter during the week in which the Plea had to be filed.

¹ *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 574 F-H; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at 640 H-I; *Geldenhuis v National Director of Public Prosecutions* 2009 (2) SA 310 (CC) at 316B – 317C.

Before he left his office, he placed the Plea, which was already settled, on the case file on 21 January 2022 with a note that same must be urgently served and filed. He only suspects the file was not attended to while he was away, and he further submits that the delay of 3 days was not excessive. As far as a *bona fide* defence is concerned, he submitted that Mafube has such a defence. The claim is for some R 130 million and Mafube would be severely prejudiced if the claim is granted in the present circumstances, he says.

- [10] In its Plea that was filed out of time, Mafube pleads that the Minister failed to comply with Section 41(1)(h)(vi) of the Constitution and with Section 5 and 40 of the Intergovernmental Relations Framework Act 13 of 2005 before the action was instituted. The effect of all the provisions contained in the different sections, is that the Minister may not institute judicial proceedings unless the dispute has been declared an intergovernmental dispute and all efforts to settle the dispute were unsuccessful.
- [11] In the papers before me, the Minister strongly denies that Mafube has succeeded in providing a full and reasonable explanation for each delay, and that a *bona fide* defence has also not been shown. To a certain extent, the views of the Minister in these respects must be supported. For instance, the attorney for Mafube does not say what steps he had taken to ensure that the Plea would be filed in time before he left, and he also does not provide any detail concerning the Minister's alleged failure to comply with his Constitutional and Statutory duties. This is especially so because it is now clear that a Notice declaring a dispute was indeed filed by the Minister.
- [12] Having said this, I am also of the view that the mere 3 days delay in filing the Plea is of a negligible nature. This is therefore a matter which calls for a flexible approach by the Court, because the main action itself did not become delayed to any extent that is worth mentioning. In my view, all other considerations are overshadowed by this fact. After all, the test for condonation also includes the question of the interests of justice and the importance of the issue to be determined.² The application for extension of time and the upliftment of the bar should therefore succeed. Since the Minister had good reason to oppose the

² *Ferris v FirstRand Bank Ltd* 2014(3) SA 39 (CC) at 43G – 44A

application on the premise that Mafube had not shown good cause that can be accepted as entirely sufficient, I am of the view that Mafube has to pay the costs of the application. The Minister was also fully entitled to make application in terms of Rule 30, and for that reason the Minister is entitled to his costs in that application as well.

[13] The following orders are made:

1. The application by the Minister to file a supplementary affidavit, succeeds with no order as to costs.
2. The application by Mafube for an extension of time succeeds, and the period for the filing of the Plea is extended to 28 January 2022 and the bar served by the Minister is uplifted. Mafube is ordered to pay the Minister's costs of opposing the application.
3. The application by the Minister in terms of Rule 30 and Rule 30A is dismissed, and Mafube is ordered to pay the costs of the application, including the costs of 3 March 2022.

P. J LOUBSER, J

For Mafube Local Municipality:

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For the Minister of Water and Sanitation:

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