



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: NO/YES |
| (2) | OF INTEREST TO OTHER JUDGES: NO/YES |
| (3) | REVISED. ✓
07/07/2021 |

CASE NUMBER: 1590/2017

**THE MEC FOR DEPARTMENT OF HEALTH,
LIMPOPO PROVINCE**

1ST APPLICANT

DR. MP CHABA AND 67 OTHERS

2ND APPLICANT

And

MAPIKWA SITHOLE

RESPONDENT

JUDGEMENT

AML PHATUDI J

Introduction

[1] This court is vested with wide inherent power to, among others, indulge or prohibit litigants from having access to courts¹ under certain circumstances.² In this application, the applicants approach this court with this Court's Uniform Rule 27 hat in their hands for an indulgence in setting aside the respondent's Notice of Bar and they be granted leave to

¹ Section 34 of constitution provides everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum

² Eke v parsons 2016 (3) SA 37 CC

file their plea within five (5) days from the date of this court's order. They tender costs occasioned by this application only in the event of it being unopposed. The respondent opposes the application.

[2] The applicants are defendants in the main action and the respondents, the plaintiff. For convenience, the applicants will be referred to as defendants and the respondent as the plaintiff.

[3] Litigation can be tedious and expensive. However, the rules of court may secure the inexpensive and expeditious completion of litigation if adhered to and applied to the letter. Ponnann JA penned in *Centre for Child Law*³ that ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules.

Factual Background.

[4] Mapikwa Daniel Sithole (the plaintiff) was appointed in 2011 by Department of Health, Limpopo Province, as a Senior Clinical Manager at Mecklenburg Hospital, Sekhukhune District, Limpopo. He instituted an action on 20 June 2018 against the MEC for Limpopo Department of Health and 68 Others, who are medical practitioners and other health service providers, for reduction of his rural allowance and commuted overtime which resulted in a breach of a valid employment contract concluded by and between the plaintiff and Limpopo Department of Health.

[5] The plaintiff's action is defended by the defendants who are duly represented by the State Attorneys. The defendants excepted to the plaintiff's summons. The exception and other *in limine* points raised were dismissed with costs on 16 November 2018. Saddened by the order, the

³ *Centre for Child Law v Hoerskool Foschville* 2016 92) SA 121 (SCA)



defendants sought leave to appeal. Leave to appeal was placed on the roll of 20 March 2019. On the said date, the court struck the matter off the roll due to non-appearance of the parties. The defendants alleges that there was no time allocated specifically for the hearing. They assumed that the matters would be heard at 10h00. Their counsel found that the matter had been struck off the roll at 09h30.

[6] The defendants' attorney handling the matter alleges that he drafted the application for reinstatement of the leave to appeal. The drafted notice got misplaced by the office cleaners.

[7] On 06 June 2019, the plaintiff served the defendants with a Notice of Bar. On 11 June 2019, the defendants countered with Rule 30 notice contending that the plaintiff's notice of bar is an irregular step. The plaintiff opposed the Rule 30 application and simultaneously filed his default judgment application with the Registrar. Thereafter the matter became dormant until 24 June 2020.

[8] On 24 June 2020, the plaintiff's new attorney of record wrote a letter, after placing themselves on record, to the defendants and enquired if they still pursue their Rule 30 application filed relating to the "irregular step" in respect of the notice of bar served by the erstwhile plaintiff's attorneys. The defendants exercised their rights to remain silent. Puzzled by the defendants' silence, the plaintiff's attorneys again enquired from the defendants by letter dated 03 July 2020 if they still pursue their notice. Once again, the plaintiff was never favoured with a response.

[9] On 17 July 2020, the plaintiff filed his notice to oppose and answering affidavit to plaintiff's Rule 30 application. The defendants responded by their letter dated 27 July 2020 asking for indulgence to file their plea and offered to withdraw Rule 30 notice. Instead of withdrawing their Rule 30



notice, the defendants filed this Rule 27 application for “extension of time, removal of bar and condonation”. On 6 August 2020, the plaintiff filed its opposition to the defendants’ Rule 27 application.

Law.

[10] The extension of time, removal of bar and condonation applications are governed by the provisions of Rule 27 of the Uniform Rules of this Court. The Rule empowers the court, in the absence of the agreement between the parties, to make an order extending or abridging any time prescribed by the rules on good cause shown by the applicant on notice.⁴ The rule further provides that ‘the court may, on good cause shown, condone any non-compliance with these rules’.⁵

[11] It is trite law that condoning non-compliance with the rules of court or direction is an indulgence. The court has a judicial discretion whether to grant condonation. There are factors this court usually considers in an application for condonation. They include, but not limited to- the degree of non-compliance with the time frame stipulated in the rules; the explanation of such non-compliance which may be considered as a good cause; and the avoidance of unnecessary delay in the administration of justice. Above all factors adumbrated, the Constitutional Court held that the standard for considering an application for condonation is the interest of justice.⁶

[12] In *Uitenhage Transitional Local Council v South African Revenue Services*⁷, the Supreme Court of Appeal stated that

⁴ Rule 27(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 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.

⁵ Rule 27(3)

⁶ *Fraser v Naude* 1999 (1) SA 1 CC ; [para 7]; *Brummer v Gorfil Brothers Investments (Pty) LTD and Others* 2000 (2) SA 837 CC; *Vanwyk v Unitas Hospital and Another* 2008 (2) SA 472 CC [para 20]

⁷ 2004 (1) SA 292 SCA (para 6)

“Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility [that is bestowed on it in exercising its judicial discretion]’.

Issue

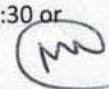
[13] The issues to be determined is whether it will be in the interest of justice to set the plaintiff’s Notice of Bar aside and condone the late filing of the defendants’ plea.

Evaluation

[14] The plaintiff’s action morphed, with the effluxion of time, into an arduous legal battle in which the plaintiff demonstrates his eagerness in bringing the matter to finality on the one hand and, on the other, the defendant’s quest to recover from the slump occasioned by Mangena’s AJ judgement dismissing their exception to the plaintiff’s particulars of claim. The defendants’ slump left them wanting on what procedure to take.

[15] It is common cause that the defendants filed leave to appeal Mangena’s AJ judgement. The application was struck off the roll due to non-appearance on the day it ought to have been heard. It is common practice that applications for leave to appeal are heard either at 09h30 or 14h00⁸. The Judge normally directs, in consultation with the parties concerned, as to the date and time for hearing of their application. The defendants’ contention that they thought the application would be heard at 10h00 has not been supported by any evidence. The defendants should at least take this court into their confidence by attaching the set down depicting the time they allege was allocated for hearing. This aspect is, in

⁸ Clause 11.8- Limpopo: Practice Directions: Applications for leave to appeal are normally enrolled for 9:30 or 14:00.



any event, moot because the defendants have abandoned their application for leave to appeal.

Setting aside of the Notice of Bar

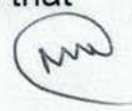
[16] The plaintiff served the defendants with a notice of bar on 6 June 2019. Instead of delivering their Plea, the defendants served the plaintiff with Rule 30 application alleging that it is an irregular step to file a notice of bar “whilst the application for leave to appeal is pending.” In my view, the defendants were correct.

[17] The defendants withdrew the said Rule 30 application on 27 August 2020. The issue of that application has since become moot. In any event, the plaintiff had already applied for a judgement by default on 16 July 2020. This prompted the defendants to bring this Rule 27 application served on the plaintiffs on 30 July 2020.

[18] It is not clear as to what happened between 6 June 2019 to 16 July 2020. However, the defendants’ founding and replying affidavits are riddled some unfathomable emotions that, in my view, removed their focus from showing the good cause for their delay and concentrated on personal attacks of the opponent’s legal practitioners. Both parties’ legal practitioners got themselves tangled in one another’s personal attacks. The language is unpalatable. I loath to venture in their personal attacks.

What caused the delay

[19] It is common cause that the parties paused their litigation after service of the plaintiff’s Notice of Bar on 06 June 2019. None acted on the matter for a year. Both parties resumed with their communicate after 24 June 2020. The defendants are not coming out clear on record what made them to be late with the filing of their plea. All the defendants says is that



“the matter became dormant until 25 June 2020 when we were served with notice of substitution. We then requested advise from counsel on our served notice in terms of Rule 30 which was served”.

[20] The defendants conceded that they are bared. This is what the defendants say:

“As a result of the above, the defendants were *ipso facto* barred from entering its plea as there is no pending interlocutory application in court as previously stated”

[21] The defendants concede that absent the application for reinstatement of application for leave to appeal Mangena’s AJ judgment, they are, “*de facto* and *de jure*, barred from pleading. It is common cause that the defendants are way out of time [a period of a year] in as far as the degree of non-compliance with the time frame stipulated in the rules. There is no evidence as to what occasioned such non-compliance with the Rules. There is further no evidence that would bring to the fore the explanation of such non-compliance which may be considered as a good cause. Tipping the scales, there is no evidence led as to the steps they took to avoid the unnecessary delay in the administration of justice.

Interest of justice

[22] The concept ‘interest of justice’ is very elastic. It can bent either way to suit the circumstances. In determining the interest of justice, the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other explanation for the delay, the prospects of success, must be considered.⁹



⁹ Grootboom v NPA (2013) ZACL 37

[23] It is common cause that the matter became dormant from June 2019 to June 2020. The plaintiff became represented by new set of attorneys when communique resumed.

[24] The umpteenth exchange of communique morphed from both parties seeking succour to progression in the matter to an arduous legalese battle to which this court frown upon. Of importance is whether there are any prospects of success in favour of the defendants.

[25] The defendants' attorney penned around 27 July 2020- in their quest to ask for the plaintiff's indulgence and said:

'We hereby as the defendants request indulgency in serving our plea after notice of bar within 5 days of your granting of indulgency and offer to withdraw our Rule 30 Application with costs....'

[26] In response thereto, the plaintiff had this to say:

"We, however, are unable to agree with you in granting you indulgence to file your plea as you have all along been aware or should have been aware that you had to deliver your plea. It further does not look like you have any justifiable defence to our client's claim, at least with regards to the merits of the matter. Unless you can demonstrate any *prima facie* defence, granting you any further indulgence will be amounting to us joining you in your tirade of playing delaying tactics in this matter as you have demonstrated by your conduct that you are not litigating this matter with the requisite enthusiasm and zeal expected from an officer of court".

[27] The defendants alleged that they have the prospect of success in the main application. In their quest to set out their prospects of success, the defendants says that the quantified amount claimed by the plaintiff is excessive. The defendants further says that "in assessment of damages for alleged defamation... it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed solatium for his or her injured feeling."



[28] It is clear from the defendants' evidence that they are more concerned with quantification of the claim and not the merits on their liability or the cause of action *per se*. There is no evidence on "reasonable prospects of success" on the merits of the case as set out in the particulars of claim. Quantification of the claim is often considered after the determination of the defendants' liability occasioned by the causes of action. The quantum is still to be determined during progression of the litigation. The defendants are still having the lifeline in disproving quantification as claimed by the plaintiff. The defendants have not made out a case entitling them to an indulgence.

Costs

[29] It is trite law that costs follow the event. The plaintiff succeeds with the opposition of defendant's application in terms of Rule 27 of Uniform Rules of this Court. The plaintiff is thus entitled to his costs occasioned by this application.

Order

[30] The Applicant's(defendants in the main action) application in terms of Rule 27 of the Uniform Rules of this Court relating to the setting aside of the plaintiff's Notice of Bar and condonation for the late filing of their Plea is dismissed with costs.



AML PHATUDI

JUDGE OF THE HIGH COURT

APPEARANCES

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Heard on: 19 April 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 July 2021.

