

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1886/2017

Heard on: 08/02/2019

Delivered on: 10/05/2019

In the matter between

BUSINESS PARTNERS LIMITED

Plaintiff/Respondent

And

**NOORDKAAP HARDWARE
(PTY) LTD**

Defendant /First Applicant

JOHAN STRYDOM

Defendant /Second Applicant

MARY MAGDELINE STRYDOM

Defendant/Third Applicant

JUDGMENT

PAKATI J

- [1] The first to third defendants/applicants, Noordkaap Hardware Pty Ltd, Mr Johan Strydom and Ms Mary Magdeline Strydom ("the applicants"), apply for condonation of the late filing of their plea in terms of Rule 27 (1) of the Uniform Rules of Court. They further seek an opportunity to file same within five days after condonation has been granted. The plaintiff/respondent, Business Partners Limited ("the respondent"), opposes the application.

- [2] On 16 August 2017 the respondent issued and filed summons against the applicants for payment of the amounts of money in respect of three claims as follows,
- (a) Claim 1: against the first applicant: R927 620-36 for outstanding balance on the loan agreement; R34 514-19, arrear royalties; R451 045-19; in respect of future royalties and interest on the said amounts at 12.5% per annum compounded monthly in arrears, *a tempora morae* from 26 June 2017;
 - (b) Claim 2: against second and third applicants as surety and co-principal debtor *in solidum* with the first applicant for the due and proper payment by the first applicant for the performance on demand of all obligations and debts owed to the respondent in terms of the loan and royalty agreements referred to in Claim 1 to the same amounts and
 - (c) Claim 3: Mortgage bond in respect of the third applicant who bound herself as surety *in solidum* and co-principal debtor limited to R600-000-00 in respect of the principal debt plus and additional R120 000-00 to cover legal expenses, costs, insurance, rates and taxes and interest.
- [3] It is not in dispute that the parties had agreed that all pleadings and notices would be exchanged and served electronically by email. The applicants filed a notice of intention to defend the action and subsequent to that the respondent applied for summary judgment which was opposed by the applicants by filing an opposing affidavit dated 07 November 2017. The respondent granted the applicants leave to defend the action. On 12 December 2017 the respondent's attorneys of record addressed a notice of bar *via* email to the applicants. In response the applicants' attorneys served a notice of exception on 13 December 2017 on the respondents' attorneys. The respondent requested an extension from 08 January 2018 until 15

January 2018 in order to remedy the cause of complaint, which was granted. The respondent filed a notice of intention to amend its particulars of claim on 26 January 2018 and not on or before 15 January 2018 as agreed by the parties. On 20 February 2018 the amended pages of the particulars of claim was served on the applicants' attorneys.

- [4] The respondent's attorneys served another notice of bar on the applicants' attorneys as per email dated 23 March 2018 at 01:04PM (Annexure "G"). The applicants contend that all pleadings and correspondence except the notice of bar was electronically served and received in the normal mail inbox of Mr Willemse of CJ Willemse Müller & Babinszky Attorneys. For reasons unknown to them the notice of bar was received in the junk mail inbox of Mr Willemse on 16 May 2018 when a notice of intention to apply for default judgment was served and received (a printout and screenshots from the junk email attached as Annexures "H1" & "H2"). The email therefore did not come to the attention of Mr Willemse due to unforeseen occurrence of events which was not due to their fault, the argument goes. They urge the court that they should not be penalised for that.
- [5] When Mr Willemse learnt of the application for default judgment and the reasons thereto he requested for condonation for failure to file their plea from the respondent's attorneys, who refused the request. The applicants insist that they have a *bona fide* defence to the claim.
- [6] The respondent alleges that the applicants have failed to apply for the bar to be uplifted as well as filing a satisfactory explanation by way of an affidavit dealing with the merits of the case. Ms Kayley Joan Leverton, attorney of record of the respondent and the deponent to the answering affidavit, states that the averments made by the applicants in the opposing affidavit opposing summary

judgment did not deal with the merits of the claim and were calculated to exploit what was perceived to be deficiencies in the summons. The five day period permitted by Rule 26¹ of the Uniform Rules of Court expired on 03 April 2018. According to Ms Leverton the applicants have to file an affidavit on the merits and make a proper application in which they explain the nature of their defence. She argues that the fact that the notice of bar did not come to the applicants' attention was due to their inattention. This is so because they have no defence to the claim. She urges the court to dismiss the application with costs on a scale as between attorney and own client as appears from clause 6 of the loan agreement which gave rise to these proceedings.

[7] Ms Leverton states further that the bar was the second one to be issued and that accepting the manner of service via emails was the risk the applicants were willing to take. She disputes that the applicants have a *bona fide* defence to the claim and therefore no proper case has been made out for the relief sought. She urges the court to dismiss the application with costs.

[8] Rule 27² provides:

'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 Court or fix 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 therefore is not made until after expiry of the time prescribed or fixed, and the Court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.

¹ Rule 26 of the Uniform Rules of Court provides: 'Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred.'

² Uniform Rules of Court

(3) The Court may, on good cause shown, condone any non-compliance with these Rules.'

[9] In **CHASEN v RITTER**³ Burger AJ held:

'The power conferred on the Court by Rule 27 (3) is wide:

'The Court may, on good cause shown, condone any non-compliance with these Rules.'

The use of 'any' emphasises the absence of any restriction on the Court to condone or to waive the requirements of its own Rules. This is also the view of Van Zyl J in *Mynhart v Mynhart 1986 (1) SA 456 (T)* at 463G where he points to 'enige nie-nakoming van die Reëls', and say that there is no justification to limit the wide words of Rule 27 (3). Ultimately one is left with the position that the Rule authorises the condonation of any non-compliance with the requirements of these Rules. The requirement that the Registrar sign the summons is a requirement of 'these Rules'.

The only limitation would be that which is inherent in the requirement to administer justice, and in particular to ensure a fair trial. This is the paramount consideration transcending all rules. As was said in *Ncoweni v Bezuidenhout 1927 CPD 130*:

'The Rules of Procedure of this Court are devised for the purpose of administering justice and not for hampering it and where the Rules are deficient, I shall go as far as I can in granting orders which would help to further the administration of justice.'"

[10] In **CITY OF CAPE TOWN /INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION obo MALOY**⁴ the test applicable in a condonation application was stated thus:

'The test applicable to applications for condonation is well known and I do not intend, for purposes of this brief award, to analyse the case law in any great detail. It will suffice to state that the factors that need to be considered in an application for condonation are the degree of lateness, the explanation for the delay, the prospects of success, prejudice to the parties and the importance of the matter to the parties. I will accept that, insofar as the application for condonation placed before me is concerned, the same considerations apply.'

[11] Rule 27 (3) does not require that the applicants file a satisfactory affidavit dealing with the merits of the case or show that they have a *bona fide* defence to the main action but show '*upon application on notice and on good cause*' why they did not comply with the Rules. The applicants explained why they could not receive the

³ 1992 (4) SA 323 (SE) at 328-329

⁴ [2013] JOL 23815 (SALGBC) at para 9.

notice of bar dated 23 March 2018 and this could not be disputed by the respondent. Paragraph 14 of the respondent's answering affidavit in response to the applicants' explanation states:

'I note the allegations in paragraphs 3.12, 3.13 and 3.13.1. It was agreed that the pleadings would be exchanged by e-mail, and the risk of the communication not coming to the attention of the recipient was therefore the risk which the defendants agreed to accept. The Notice of Bar was properly served. In any event, a reasonably prudent attorney would have been on the lookout for a Notice of Bar given the amount of time which had lapsed and no plea submitted. No explanation for not having prepared the plea has been submitted.'

[12] Henochsberg J in **NATHAN (PTY) LTD v ALL METALS (PTY) LTD**⁵ had this to say:

'At any rate, the Court has an inherent jurisdiction to raise the bar notwithstanding that the Rules of Court may make no provision therefor. In any such application, if the applicant can show good cause for the indulgence of the Court which is asked, the Court will come to his assistance and remove the bar unless it appears that he has recklessly disregarded his obligations under the Rules of Court, or the case appears to be a hopeless one, or the Court is convinced that he does not really intend to proceed. The Court exercises its discretion according to the circumstances of each case, and generally leans towards the granting of relief where it is satisfied that the defendant is *bona fide* in his belief that he has a good defence and that his delay is reasonably excusable, and it would not seem to be necessary for the defendant in such circumstances to state the nature of his defence by way of an affidavit of merits.'

[13] When the agreement was made to exchange pleadings electronically by e-mail, I do not think that any of the applicants foresaw that some of the correspondence would be discovered in the Junk Mail Inbox especially when all other correspondence was served and received in the normal inbox. Immediately when Mr Willemse received the notice of intention to apply for default judgment served in the normal mail box he requested for an application for condonation for their failure to file the plea, which was refused.

[14] When the request was turned down the applicants filed a notice of motion in terms of Rule 27 on 23 May 2018. The respondent states that a great deal of time has elapsed but does not elaborate on how much time and therefore does not give detail of the prejudice it

⁵ 1961 (1) SA 297 (N) at 300C-E.

would have suffered. The respondent confirms that the fact that the notice of bar did not come to the attention of the applicants was indeed unfortunate.

[15] Both parties did not address the prospects of success. However, I take into account the fact that the applicants were granted an opportunity to defend the matter when the application for summary judgment was heard suggesting that they believed that they had a *bona fide* defence to the claim. I also take into consideration that it is undisputed that the matter is important to the parties. Both parties indicated an interest that the matter reaches finality.

[16] For the reasons explained above I am satisfied that the applicants have given a detailed and acceptable explanation for their failure to comply with the time periods. They have also shown good cause as to why the Court has to grant condonation. The non-compliance is not so severe that litigation would be found to be a nullity.⁶ The degree of lateness is reasonably excusable. The applicants have also shown that they are *bona fide* in their belief that they have a good defence. The application for condonation ought to be granted.

COSTS

[17] In his heads of argument Adv Eillert, on behalf of the applicants, urges me to grant the application for condonation with costs on an attorney and client scale including costs of counsel. In prayer 3 of the notice of motion the applicants ask for costs of suit on a party and party scale only in the event of the application being opposed.

[18] In its heads of argument the respondent asked me to dismiss the application with costs. In its answering affidavit it asked for costs on a scale as between attorney and own client scale. Yet in its supplementary heads of argument filed on 06 February 2019, Ms

⁶ See Minister of Prisons & Another v Jongilanga 1985 (3) SA 117 (A) at 123.

Snyders, for the respondent, requested me to consider awarding costs against the applicants to include that:

'2.1 The respondent was tasked by the applicant to draft, serve and file the notice of set down;

2.2 Paginate the Court file; and

2.3 File the applicants' heads of argument on the court file.

3. Generally speaking, a party seeking an indulgence should pay the costs of the application, including the costs of the other party, unless it is found that the opposition was unreasonable.'

It is clear that the above was raised late and the applicants did not have an opportunity to respond to same. This was supposed to have been raised in the answering affidavit giving an opportunity to the applicants to reply. For that reason, I will disallow it.

[19] The general rule that costs follow the event is not applicable to successful applications for the grant of an indulgence by the court. The general rule is that the applicant may even be ordered to pay the costs of opposition to the application.⁷ Where a litigant applies to court for condonation of non-compliance with the provisions of statutes or rules of court and for consequential relief, the general rule is that the applicant should pay the costs of the application.⁸

[20] The applicants seek an indulgence for its non-compliance with the Rules and should therefore pay for that. In my view, it was not unreasonable for the respondent to oppose the application for condonation.

In the circumstances I grant the following order:

1. Condonation is granted to the applicants for the failure to file their plea in the prescribed time period.

⁷ Smith en 'n Ander v Van Heerden en Andere [2002] 4 All SA 461 (C) 474-475.

⁸ Van Marseveen v Union Government 1918 AD 60.

- 2. The applicants are ordered to file their plea within (5) five Court days after the granting of prayer 1 above**
- 3. The applicants are ordered to pay costs of this application on a scale as between party and party.**

BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Plaintiff: Adv A Eillert
Instructed by: Haarhoffs Attorneys

On behalf of the Defendant: Ms J Snyders
Instructed by: Engelsman Magabane