



**OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 7011/2016

In the matter between:

VERUSHA SUCHIT

Applicant

and

MAJORIE'S TRADING ENTERPRISES CC

First Respondent

Registration No: 2000/008150/23

YUSAIR PROPERTY DEVELOPERS (PTY) LTD

Second Respondent

Registration No: 2014/052651/07

HUSSAN FAROUK MOTALA

Third Respondent

ORDER

- (a) The application is dismissed.
- (b) The Applicant is directed to pay the First Respondent's costs.

JUDGMENT

Delivered on: 12 August 2019

TOPPING AJ

[1] This is an application for condonation for the late filing of a plea.

[2] The Applicant in this application is the First Defendant in an action instituted out of this court by Majorities Trading Enterprises CC, who is the First Respondent herein. The parties have been referred to in these papers as they are cited in the action and I shall accordingly do likewise.

[3] This application has been set down at the instance of the Plaintiff. Notice of such set down was served upon the First Defendant's attorneys of record on the 10th of December 2018 and upon the Second and Third Defendants, via the Deputy Sheriff, on the 25th of January 2019. The Plaintiff's heads of argument and practice note were served upon the First Defendant's attorneys of record on the 27th of July 2019. It would appear from the foregoing therefore that the First Defendant has had notice of these proceedings and is aware that the matter has been set down on the opposed roll for hearing.

[4] There was no appearance for the First Defendant at the commencement of these proceedings, despite her name having been called out prior to the commencement thereof. At the commencement of the proceedings, counsel appearing for the Plaintiff sought the application to be dismissed, with costs. I enquired of counsel whether I was enjoined to decide the matter on its merits, and after some debate, it was decided that it would be appropriate for me to do so. By virtue of the conclusion I have reached in this matter, the outcome remains the same, save that, by virtue of my decision having been based upon the merits of the application, a measure of finality will be

achieved thereby, as opposed to the application simply being dismissing by virtue of a non-appearance by the First Defendant.¹

[5] The application is brought pursuant to the provisions of Rule 27 of the Uniform Rules of Court.

[6] The background to the application, which I have gleaned from the First Defendant's founding affidavit, is as follows:

- (a) the Plaintiff institute action, jointly and severally, against the First, Second and Third Defendants (who are cited as the Second and Third Respondents herein) for payment of R 700,000.00;
- (b) the summons was served upon the First Defendant in July 2016 and she entered an appearance to defend on the 6th of September 2016;
- (c) an application for summary judgment was instituted by the Plaintiff, which was refused on the 18th of November 2016 and the Defendants were given leave to defend the action;
- (d) it appears that a Notice of Bar was served on the First Defendant's local correspondents on the 18th of January 2017;
- (e) it is alleged that she was unaware that the Notice of Bar had been served;
- (f) the First Defendant alleges that she became aware that an application for default judgment had been instituted against her by the Plaintiff on the 28th of May 2017;
- (g) that application was set down for hearing on the 30th of May 2017;
- (h) it is alleged that the First Defendant endeavour to file a plea on the 29th of May 2017, after becoming aware of the application for default judgment;
- (i) it is contended that she filed the plea in the hope that the Plaintiff would agree to remove the bar;
- (j) it is also contended that, despite the plea being served, no agreement was reached and the Plaintiff persisted with its application for default judgment, which was set down for hearing on the 27th of April 2018;

¹ With regard to the Plaintiff's entitlement to a reasoned decision based on the merits, I refer to what was stated in *Ketler Investments CC t/a Ketler Presentations vs Internet Service Providers*

(k) this application for condonation then appears to have been instituted on the 21st of February 2018.

[7] The reasons given by the First Defendant for her failure to file a plea are as follows:

- (a) after the summary judgment application was refused on the 18th of November 2016, the First Defendant alleges that she experienced a “grave trauma” and “massive upheaval” in her life;
- (b) she alleges that she was diagnosed with Hodgkin’s lymphoma (respiratory cancer);
- (c) in support of this allegation she puts up a letter from a medical practitioner, dated the 21st December 2018, stating that she had been ill since January 2017 and that she was diagnosed with Hodgkin’s lymphoma in September 2017;
- (d) she states that she did not file a plea immediately as she was unable to perform any of her duties satisfactorily due to her illness;
- (e) she states that she received no correspondence from the Plaintiff advising that it intended to place her under bar;
- (f) she alleges that, had she received such notice, she would have filed a plea immediately;
- (g) on the 28th of May 2017, she had occasion to visit her correspondent’s offices and was advised that the Plaintiff had instituted an application for default judgment.

[8] On perusing the application, she discovered that it was alleged that a notice of bar had been served upon her on the 17th of January 2017.

[9] She alleges that she was totally unaware of such notice, as her correspondents had not advised her of the receipt of same.

[10] She addressed an email to the correspondents on the 29th of May 2017, enquiring whether such notice had been served upon them, and was advised that such had not. In support of this she puts up an email from the correspondents reflecting that they had not received the said Notice.

[11] On the 29th of May 2017, she addressed a letter to the Plaintiff's attorneys explaining that she had not received the Notice of Bar and alerted them that she intended to file a plea. She also requested that the application for default judgment be adjourned or withdrawn.

[12] The First Defendant contends that she has a *bona fide* defence to the Plaintiff's claim.

[13] The Plaintiff's claim is based upon the First Defendant's alleged negligence as a consequence of her paying the sum of R 700,000.00, which had been held in her attorneys trust account on its behalf, to the Second Defendant.

[14] The First Defendant's expressed defence to the claim is that she had paid the monies on the instructions from the Plaintiff's representative, one John Sondela.

[15] In its opposing affidavit, the Plaintiff challenges the *bona fides* of the First Defendant's reasons for the delay. The Plaintiff contends that:

- (a) the First Defendant has not adequately explained what transpired between the period when the summary judgment was refused and the time when the Notice of Bar was served, and why she did not file a plea within the time periods prescribed in the Uniform Rules of Court;
- (b) the Plaintiff challenges the First Defendant's failure to engage the assistance of counsel in filing a plea timeously;
- (c) the Plaintiff contends that the First Defendant is endeavouring to utilise the letter from the medical practitioner as a smokescreen for her failure to file a plea;
- (d) the Plaintiff criticises the First Respondent's failure to enquire whether a Notice of Bar had been received prior to the 29th of May 2017; and finally

(e) alleges that this court should not accept the First Defendant's explanation for her failure to file the plea timeously.

[16] As far as the First Defendant's alleged defence is concerned, the Plaintiff contends that:

- (a) the First Defendant has failed to set out sufficient evidence to establish why she believed that the said John Sondela (now named John Sodlane) was a director of the Plaintiff;
- (b) the Plaintiff contends the First Defendant has not produced the documents which gave rise to the fact that she satisfied herself that he had authority to represent the Plaintiff; and
- (c) it is further contended that the First Defendant's credibility is at stake as she has contradicted herself in the submissions she made to the KwaZulu-Natal Law Society.

[17] The Plaintiff points out, insofar as the latter contention is concerned, that the First Defendant alleges in her founding affidavit that the monies were paid upon the express instruction of the said John Sondela and goes no further than that. The Plaintiff has put up the First Defendant's submissions to the KwaZulu-Natal Law Society. Such is in the form of an affidavit deposed to in July 2016. Specific reference is made to paragraphs 7 and 8 of the affidavit, wherein it is alleged by the Plaintiff that the First Defendant has contradicted herself.

[18] If one has reference to what is contained in paragraph 7, it is alleged by the First Defendant that, during December 2015, she had been contacted by "John", which is a reference to John Sondela, and was advised that he had secured the Plaintiff and a third-party contractor, as companies to complete projects that had been defined by the Third Defendant. She was advised that John had requested that the Plaintiff pay a "security deposit" into her trust account and that the R 700,000.00, forming the subject of the Plaintiff's claim, was so paid into her account on the 15th of December 2015. She then goes on to state that she thereafter received a telephone call from John who requested that she release the monies from the trust account to the "recipients" as

instructed by him. She then somewhat curiously states that she “duly complied with such instructions but did not pay out the monies”. She states that she received calls from the Third Defendant insisting that the monies be released, failing which the “company would lose the project” and that she “felt highly pressured and forced into releasing the funds”. In paragraph 8 she then states that “after many calls and threats” she eventually agreed to release the monies.

[19] The Plaintiff therefore submits that it would appear, from what is stated in her affidavit to the KwaZulu-Natal Law Society, that the First Defendant paid out the monies at the behest, and upon the threats, of the Second Defendant and not, as alleged in her founding affidavit, upon the instruction of John Sondela.

[20] It was submitted on behalf of the Plaintiff that, in an application of this nature, there are three principal requirements for me to exercise my discretion in favour of granting this application, namely that:

- (a) the First Defendant has to furnish a full and reasonable explanation which covers the entire period of delay and her failure to file the plea;
- (b) the First Defendant must satisfy me that she has a *bona fide* defence to the action; and
- (c) the indulgence sought must not prejudice the Plaintiff in any way that cannot be compensated by a reasonable order of costs.

[21] Insofar as the First Defendant’s reason for the delay are concerned, she has, in essence, admitted that she was remiss in failing to file her plea timeously. It is clear that she did not file a plea within the 20 days prescribed in the Uniform Rules of Court.

[22] If one has reference to Rule 26 of the Uniform Rules of Court however, a Defendant is only *ipso facto* barred if he or she fails to deliver a plea within five days of receipt of a Notice of Bar. There was accordingly no real sanction imposed upon the First Defendant until the Plaintiff’s Notice of Bar was served upon her local correspondents on the 18th of January 2017. During this time, it is alleged by the First Defendant that she was ill and was not giving her practice the required attention.

[23] The First Defendant however contends that she was not advised by her local correspondents that a Notice of Bar had been served upon her on the 18th of January 2017. It appears from annexure “E” to the papers, that the Notice of Bar was served upon her local correspondents on that date. For the First Defendant’s contention to be correct, the local correspondents must not to have taken cognizance of the document.

[24] Although it has not been able to gainsay the First Defendant’s allegations regarding her illness and the contention that her local correspondents did not advise her that a Notice of Bar had been served, the Plaintiff criticises the First Defendant’s inaction at the level of evidencing an intention on her part to simply delay matters for as long as she could. It was submitted that she ought, as an attorney, and if she was genuine in her defence of the action, to have timeously filed a plea.

[25] It is also submitted by the Plaintiff that it would appear to be somewhat “fortuitous” that the First Defendant became aware of the fact that a default judgment application had been instituted on the 28th of May 2017, two days before the matter had been set down for hearing. The Plaintiff again submitted that this is indicative of the First Defendant seeking merely to delay matters for as long as she could and only reacting when she was compelled to do so.

[26] As far as the First Defendant’s defence to the Plaintiff’s claim is concerned, it was conceded by its counsel that, if proved at trial, it would constitute a *bona fide* defence to the Plaintiff’s claim. The Plaintiff however criticises the amount of evidence that the First Defendant has set out to establish that such defence is in fact bona fide and that she has the confidence to present same in open court. In this regard, the Plaintiff refers to the apparent contradiction in the First Defendant’s version of events as outlined in her founding affidavit and the affidavit submitted to the KwaZulu-Natal Law Society.

[27] At the end of the day, I am enjoined to decide whether it would be in the interests of justice for this application to be granted or refused.

[28] Although the Plaintiff is not able to gainsay the contention that the First Defendant did not receive notification of the Notice of Bar or that she was ill during this period, and that, if proved at trial, the defence raised would constitute a defence to its claim, I am not satisfied that the First Defendant is genuine in her purported pursuit of such defence and there are clear indications that the First Defendant may be merely seeking to delay matters further by the institution of these proceedings.

[29] As pointed out by the Plaintiff's counsel during argument, it would appear from the chronology of events, that the First Defendant has only reacted in her purported defence of the action upon being compelled to do so by virtue of the Plaintiff having instituted some form of proceeding to progress its claim further. In support of this contention it was submitted that the First Defendant did not file her plea timeously, as she ought to have done as an attorney, and only instituted these proceedings immediately before the application for default judgment was to be heard, and in an endeavour to halt the determination thereof. The First Defendant was also criticised for not filing confirmatory affidavits by either her then correspondent attorney or the medical practitioner to support what she has alleged in the founding affidavit. She is also criticised for not filing a replying affidavit to dispute any of the allegations contained in the Plaintiff's answering affidavit, if they were untrue. This, so it was submitted, evidences that the First Defendant is not bona fide in instituting this application but is merely seeking to delay matters for as long as she is able to.

[30] I am in agreement with the aforesaid submissions. If the First Defendant was genuine in seeking to defend the Plaintiff's action, she, being an attorney, would have been more prudent and expeditious in ensuring that a plea was timeously filed. She would also, if she was genuine in the institution of this application, have ensured that the Plaintiff's allegations, as set out in its answering affidavits, were replied to and that this application was timeously set down for hearing and properly argued on her behalf. She has done none of the above and it has been left to the Plaintiff to set this matter down in order to seek finality on the matter. The lack of appearance on behalf of the First Defendant also leaves doubt as to whether she is bona fide in the institution of this application.

[31] Taking the above into consideration, I am of the view that the First Defendant has not evidenced that she is bona fide in the institution of these proceedings and it would appear, from her conduct in the prosecution thereof, that she is merely endeavouring to delay the finalisation of the Plaintiff's action for as long as possible. I am therefore of the opinion that the interests of justice would be served if this application were to be dismissed so as to entitle the Plaintiff to prosecute its claim to finality without further delay.

[32] I therefore make the following order:

- (a) The application is dismissed.
- (b) The Applicant is directed to pay the First Respondent's costs.

TOPPING AJ

Appearances:

For the Plaintiff : Ms R Singh
Instructed by: MN Moabi Attorneys, Pretoria.
c/o: Rajan Moodley & Associates, Durban.

For the First Defendant: No Appearance
Instructed by:

Date of hearing : 06 August 2019

Date Delivered : 12 August 2019