

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 44187/2009

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

In the matter between: -

DATE: 12/6/2015

HENDRIK J OLWAGEN

Applicant

And

MINISTER OF AGRICULTURE

Respondent

JUDGMENT

KOOVERJIE AJ:

A. NATURE OF THE MATTER:-

1. This is an application launched by the Applicant (Olwagen) in terms of Rule 27 of the Uniform Rules of Court for an order condoning his failure to file a plea within the prescribed time period and for the Respondent's bar in respect of the plea be uplifted.

For the purposes of this decision the parties will be referred to as "***Applicant***" and "***Respondent***" as identified in this application.

B. BACKGROUND:-

2. The time line regarding the pleadings is as follows:

2.1 The summons was served on 27 July 2009;

2.2 A notice of intention to defend was served on 26 August 2009;

2.3 Three years later, the Respondent's declaration was served on 24 August 2012;

2.4 Two years later, a notice of bar was served on 20 August 2014;

2.5 The *dies* within which the Applicant should have filed his plea lapsed on 3 September 2014;

- 2.6 Shortly thereafter the Applicant on 11 September 2014 requested the Respondent's attorney for an indulgence to file its plea and to uplift the bar. The Respondent refused to consent to such extension of time;
- 2.7 Consequently the Respondent enrolled its application for default judgment, and which was to be heard on 28 October 2014;
- 2.8 Despite the set down, the Applicant persisted in its defence and served the condonation application on 7 October 2014, which included the Applicant's proposed plea and special plea which were intended to be filed in the event that the notice barring the Applicant to do so was uplifted.
3. Counsel for the Applicant vehemently argued that the Respondent's attorney's conduct demonstrated unethical colleagueship in not firstly communicating its intention to file a notice of bar with the Applicant's attorney, prior to doing so.
- **The delay**
4. Moreso the delay in not bringing this application earlier was due to the fact that upon receipt of the notice of bar, Mr Döman, the Applicant's attorney had immediately arranged with the Respondent's attorney, the State Attorney office to furnish him with a set of the pleadings in this matter.

5. Mr Döman indicated that due to two burglaries on his premises the office file on this matter went missing. He was not aware of it being missing until the notice of bar was served.
6. He eventually received the papers from the State Attorney on 27 August 2014, which was a week after the notice of bar was served.
7. Mr Döman thereafter made numerous attempts with the State Attorney to have the bar uplifted so that the Applicant could file its plea. The State Attorney refused the request for this indulgence.
8. Its only remedy was then to approach this Court for relief in terms of Rule 27.

- **Nature of the Debt**

9. This litigation arose from a credit facility provided by the Department of Agriculture to Olwi Boerdery (Pty) Ltd. An agreement between the parties was entered in this regard referred to as ***“Farming Assistance Credit Agreement”*** in August 1992.
10. Olwi was liquidated on 25 October 1994.
11. On 4 March 2002, the Respondent received payment from the proceeds of the dividend in the liquidation of Olwi in an amount of R150 658,01. At that stage, an amount of R210 000,00 remained outstanding.

12. Approximately 6 years later, in September 2009, the Respondent instituted action against the Applicant for such outstanding amount.

C. CONDONATION IN TERMS OF RULE 27:-

13. Rule 27 gives the Court a discretion to condone any non-compliance with the Rules and to make an order extending or abridging any time period prescribed by the Rules, in the event when no agreement between the parties exist.
14. The granting of condonation is not an automatic right. The full, detailed and accurate account for the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons for such delay¹.
15. In ***Smith NO v Brummer NO 1954 (3) SA 352 (O)*** at 357-388B, the court after a review of the authorities, taking cognisance its wide discretion, held that courts are inclined to grant applications for the removal of bar where –
- (a) a reasonable explanation for the Applicant's delay is forthcoming;
 - (b) the application is *bona fide* and not made with the intent to delay the other party's claim;

¹ ***Uitenhage Transitional Local Council v SA Revenue Service 2004 (1) SA 292 SCA at 297***

- (c) there has not been a reckless disregard of the Rules of Court;
- (d) the Applicant's case is not without foundation;
- (e) the other party is not prejudiced to an extent which cannot be rectified by a suitable order as to costs.

16. In principle this Court should exercise its discretion with regard to the merits of the matter as a whole².

D. ANALYSIS:-

- **Applicant's case**

17. In argument, counsel for the Applicant submitted that not only has the Applicant furnished a detailed explanation for not filing the plea within the prescribed time period, but raised a *bona fide* defence with good prospects of success, particularly in light of the proposed issues raised in the special plea and plea.

18. Insofar as the merits are concerned the following disputes were raised:

² *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O); *Gumede v Road Accident Fund* 2007 (6) SA 304 (C0 at 307C-308A)

- 18.1 The Respondent's cause of action is based on the suretyship agreement which cannot be sustained since there was never any suretyship agreement in existence, nor had the Applicant entered into such agreement with the Respondent;
- 18.2 The declaration itself does not contain any allegation to the effect that members of Olwi concluded a written deed of suretyship in favour of the Minister and it cannot be said that such agreement was effected by the conduct of Olwagen;
- 18.3 If such a suretyship agreement was entered into, it certainly did not comply with the General Law Amendment Act (50 of 1956);
- 18.4 A further issue was whether an oral compromise agreement between the Applicant and the Respondent was entered into where the full and final settlement in respect of this debt in an amount of R30 000,00 was agreed upon.

- **Respondent's case**

19. The Respondent's case essentially was that Olwagen had indeed bound himself to be liable for repayment of the loan as surety by conduct. This arose when payment was made in the amount of R150 658,01 on 4 March 2002. Hence the cause of action arose against Olwagen in his personal capacity as shareholder/director of the company.

20. Subsequently the Respondent now rely on a different cause of action based on acknowledgment of debts.
21. During argument, counsel for the Respondent submitted that the Respondent as Plaintiff in the main action intends amending its declaration to that effect.
22. On the papers before the Court such a notice to amend was indeed filed in November 2014 claiming an amount of R500 000,00 based on the acknowledgement of debt. It appears further that no objection had since been filed by the Applicant.

E. FINDINGS:-

23. Having heard both parties, this Court is satisfied that a sufficient and reasonable explanation was proffered on the part of the Applicant for the delay in failing to file his plea timeously.
24. With regard to the merits raised by the Applicant and as set out in his proposed special plea and plea, the Court is satisfied that a *prima facie* case on the merits exists.
25. Surely a cause of action based on a suretyship, which is no longer relied upon by the Respondent cannot be sustained in such action proceedings. The declaration as it stands would be excipiable. The amendment to the

declaration has not materialised. The Applicant will have to be given an opportunity to object to such amendment if he so wishes.

26. This change of course goes to the very root of the pleadings. The cause of action set out in the declaration is based on a claim in respect of the suretyship agreement. It now bases its claim on acknowledgment of debts. It is trite that in terms of Rule 20 not only the nature of the claim must be set out, but a clear and concise statement of the material facts on which the plaintiff relies upon his claim must exist in order that the defendant can adequately reply thereto.
27. This Court is of the view that the issues in this matter deserve to be ventilated at a trial not only on the substantive matters raised, but also on the points *in limine*, which includes the issue of prescription as set out in the special plea.
28. Having regard to the history of this matter, which has been unreasonably prolonged by the Respondent for no legitimate or justified reason, surely there is no prejudice which the Respondent will now suffer if the condonation is granted.
29. In this regard, the following facts are reiterated:
 - 29.1 Summons in this matter was issued in 2008, the declaration was served four years later.

29.2 By agreeing to uplift the bar when requested to do so, the Applicant could have filed his plea and the matter would have become ripe for trial by now.

29.3 The Respondent's conduct portrays a reckless administration of this matter. This matter could have been dealt with in a more efficient and expedient manner.

30. The Court further finds that the Applicant sought relief from this Court within a reasonable time after the Respondent refused to uplift the bar. Hence the conduct of the Applicant throughout these proceedings does not in any way portray a motive to delay the finalisation of this matter.

F. COSTS:-

31. In argument the Applicant sought costs against the Respondent, particularly in light of the Respondent persisting with this application without good reason. Counsel for the Applicant requested for a punitive costs order on an attorney and client scale.

32. The Respondent likewise sought costs against the Applicant on the basis that this application was merely to prevent the finalisation of the matter.

33. The purpose of awarding costs to a successful litigant is to indemnify him for the experience to which he has been put through having been unjustly compelled to litigate or defend litigation, as the case may be³.
34. The general rule that costs follow the event is not applicable to successful applications for the grant of an indulgence by the Court. In such an event, the general rule is that the Applicant should pay the costs of the application.
35. However in respect of the costs of opposition to such application, Courts are inclined to find that the Applicant seeking the indulgence should pay all such costs as can reasonably be said to be wasted, unless such opposition was vexatious or frivolous⁴.
36. In considering the Respondent's version on the merits, the Court finds that it also justified its reasons for opposition and which in the Court's view may also sustained at trial.
37. It is trite law that the award of costs is a matter in the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have arrived at.

“... the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a

³ *Texas Co SA Ltd v Cape Town Municipality* 1926 AD 467 at 488

⁴ Herbstein and Van Winsen, Civil Practice of the High Courts, 5th Edition

bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties...”⁵.

38. In the premises the Court having exercised its discretion finds that a punitive costs order in the circumstances is not warranted.

G. ORDER:-

The following order is made:

- (1) Condonation is granted to the Applicant in terms of Rule 27 of the Uniform Rules of Court in respect of his failure to file his plea;
- (2) The notice of bar is uplifted and the Applicant is granted leave to file his plea within five (5) days of date of this order;
- (3) The Respondent to pay the costs of this application on a party and party scale.

H K KOOVERJIE
ACTING JUDGE OF THE HIGH COURT

⁵ Herbstein and Van winsen, Civil Practice of the High Courts, 5th Edition, Vol 2, p 954-955

DATE OF HEARING:	8 June 2015
JUDGMENT DELIVERED:	12 June 2015
FOR THE APPLICANT:	Advocate M Fabricius
ATTORNEYS FOR THE APPLICANT:	Döman Weitz Attorneys
FOR THE RESPONDENT:	Advocate Modisa
ATTORNEYS FOR THE RESPONDENT:	State Attorneys