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**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]**

CASE NUMBER: 14210 / 2014

24/7/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

4 ACES NEW AND USED SPARES CC

APPLICANT / DEFENDANT

And

PA CARGO

RESPONDENT / PLAINTIFF

JUDGMENT

MAVUNDLA, J.

[1] The applicant approached this court seeking in terms of Rule 27 of the Uniform High Court Rules an order condoning the late filing of its plea and

uplifting of a notice of bar and costs of the application. I am of the view that the application stands to be dismissed with costs.

[2] It is common cause that that summons was served on the corresponding attorneys' offices on the 20 February 2014. Rule 19(1) affords a defendant ten days after service of the summons to file a notice of appearance to defend. *In casu* the applicant's notice of intention to defend was only served on the 4 April 2014. Subsequent thereto the respondent served a notice of bar on the corresponding attorneys' office on 13 May 2014. It is this notice of bar the applicant seeks to have uplifted.

[3] It is trite that the grant of condonation is a matter of the discretion of the Court. The party seeking condonation bears the *onus*, to advance a satisfactory and reasonable explanation for the delay. In considering whether it should exercise its discretion in favour of the applicant, the Court will have regard to the following: "(a) the cause of the delay; (b) a reasonable explanation which covers the entire period of the delay; (c) the nature and defect causing the delay; (d) the effect of the delay in the administration of justice; (e) the prejudice to be suffered by any of the other parties. The list is not exhaustive; *vide eThekweni Municipality v Ingonyama Trust*¹ ; *Van Wyk v Unitas Hospital*²; and *Gumede v Road Accident Fund*³; *Immelman v Loubser en Ander*.⁴

[4] The reason advanced by the applicant in his purported affidavit for the delay, is that: "there was a mishap pertaining to the email address to which the notice of bar was sent. The correspondent attorney for the applicant, upon whom the notice of bar was served, sent *via* email to Mr Naeem Essop, a candidate attorney in the process of completing his duly registered articles of clerkship in the employ of *Gani Attorneys*. The email containing the notice of bar was erroneously sent to Mr Essop's private email address, namely [.....] This address is however not used at our offices and accordingly did not come to Mr. Essop's attention timeously. The official address used by *Gani Attorneys* are [.....] and [.....]"

[5] According to the applicant, he only became aware of the fact that a notice of

¹ 2014 (3) SA 240 (CC) at 246- 247 paras [24]-[28) respectively.

² 2008 (2) SA 472 (CC) at 477E.

³ 2007 (6) SA 304 CPD) at 307 at para[7].

⁴ 1974 (3) SA 816 (AD) at 820E-H.

bar was served, on the 28 May 2014, when Mr Essop inquired from the respondent's attorneys about the status of the matter. His founding affidavit was deposed to and lodged with his application on the very same day of the 4 June 2014. Seen in isolation, the period from the 28 May 2014 to the launch of the application for condonation on 4 June 2014 cannot be said is an inordinate delay. But that is not the only consideration this Court must have regard to, in deciding whether or not to exercise its discretion in favour.

[6] The appearance to defend, as pointed out herein above, was only served and filed on the 4 April 2014, 21 (twenty-one) days out of time. A party who realises that he is out of time in complying with the Court rules, must immediately approach the Court for condonation, and explain the cause of the delay. There is no explanation with regard to this delay of 21 days. Neither was condonation sought in this regard.

[7] The respondent's attorneys could only have served the notice of bar at the address provided to them by the applicant's attorneys, which was the email address, now contended by the applicant that it was not regularly used. The delay is not only confined to the period of the notice of bar, but stretches from the very day on which the summons was served on the applicant, which latter period the applicant has failed to explain. In my view, the conduct of the applicant and his attorneys from the moment the summons was served upon them, demonstrate a measure of nonchalance and disdain to the Court rules. The Courts have held that such conduct should not be countenanced nor tolerated. The Courts have long held that a party cannot hide behind the remissness of the attorney; *vide Chetty v Law Society, Transvaal* ⁵ *Salojee and Another v Minister of Development*; ⁶ *Municipality v Ingonyama Trust (supra)* at 246 para [26].

[8] There is also one disconcerting aspect in this matter, which sways this Court not to exercise its discretion in favour of the applicant. *In casu*, there are two bundles of documents in the Court file. On this bundle on the Index page dated 2014-07-25 and 2014-07-27 it is inscribed with black ink the words: "Original". I shall refer to this bundle as the "ORIGINAL" bundle. In this latter

⁵ 1985 (2) SA 756 (A) at D-E.

bundle, is contained, *inter alia*, the affidavit of Mr Fareed Tayob, upon which the application is premised. The signature of Mr Tayob is on paginated page 9 of the papers. This page reveals, *inter alia*, the following:

"5.4 Wherefore I humbly pray for an order condoning the late filing of the Plea, uplifting of the Notice of Bar and an extension of the date for filing the Plea until the date hereof.

DATE AT ____ ON THIS THE ____ DAY OF ____ 2014

Signature of deponent

DEPONENT

Thus signed and sworn to before me at _____ on this _____ day of _____ 2014, the Depotent having acknowledged that he knows and understands the contents of this affidavit, that it is both true and correct to the best of his knowledge and belief, that he has no objection to the taking the prescribed oath and that the prescribed oath will be binding on his"

And continues at paginated page 10 as follows: " conscience as required by Government Gazete Nos R1258 of 21 July 1972 and R1648 of 19 August 1977.

SIGNATURE OF THE COMMISSIONER

ANA ALMEIDA

COMMISSIONER OF OATHS Commissioner of oaths of South Africa

FULL NAMES: Ex-Officio (Sworn Translator)

DESIGNATION: (Commissaria de Juramentos)

ADDRESS: (Tradutora Oficial)

[...] Main Road, Erasmia. 0183"

- [9] This purported founding affidavit found in the Original bundle, was signed by Mr Tayob at paginated page 9. The spaces provided for the place at which, and the date on which the affidavit was signed and deposed to by the deponent and commissioned were left blank. The Commissioner's signature appears on paginated page 10, where there is no date.

⁶ 1965 (2) SA 135 AA at 141.

[10] In the matter of S v Stevens⁷ the Appellate Court held as follows:

"In terms of regulations promulgated in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (see Government Notice R1258, published in Government Gazette 3619 of 21 July 1972, as amended by Government Notice R1648, published in Government Gazette 5716 of 19 August 1977) a commissioner of oaths, when attesting a written declaration under oath, is required (i) below the deponent's signature to certify that he (the deponent) has acknowledged that he knows and understands the contents of the declaration and to state the manner, place and date of the taking of the declaration (reg 4 (1)); (ii) to sign the declaration and print his full name and business address below his signature (reg 4 (2) (a)); and (iii) to state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio (reg 4 (2) (b)). In the case of exh "D" the commissioner of oaths attesting Olivier's declaration under oath complied with requirement (i) above, but did not properly comply with requirements (ii) and (iii). In fact all that appears in response to these requirements is an illegible signature above the roneoed words "Kommissaris van Ede ex officio". (The document was completed in Afrikaans". *In casu*, the requirement "(i)" was not complied with in that the place and date of the taking of the declaration was not complied with. The affidavit upon which the application is premised is therefore defective.

[11] This matter was on the opposed role of the 10 November 2014, but allocated to be heard on 11 November 2014. At the time this Court had already read papers. On the basis of the "ORIGINAL" bundle of documents, the application was doomed to fail. On the 11 November 2014 the application was postponed at the request of the applicant, to the 2 December 2014. The applicant was ordered to pay the costs of postponement on attorney and client scale.

[12] When the matter resumed on the 2 December 2014, there were two bundles of documents, namely the first "ORIGINAL" bundle of documents and the second bundle of documents. The second bundle was paginated up to page 89, while the "ORIGINAL" bundle ends with paginated page 60. The

⁷ 1983 (3) SA 649 {AD} at 658C.

second bundle contains, *inter alia*, an affidavit of Mr Naeem Essop, who is an attorney from the offices of the applicant's attorneys of record.⁸ The latter's affidavit was commissioned and signed on 28 November 2014.

[13] Mr Essop explains in his affidavit as follows:

"1.3 On the 4th June 2014 an affidavit in support of the condonation application was signed and commissioned. The purposes of this were to be served and filed.

1.4 My secretary made three copies prior to the commissioning thereof and it seems that only one copy was commissioned and fully completed at the time. There was thus no need for further copies to be made, however since erroneously not all original copies were not commissioned the commissioned copies were served.

1.5 Once my messenger returned from serving the affidavit I noticed that not all the copies were commissioned and subsequently filed the original immediately.

1.6 The Respondent in this matter set down on the opposed roll and indexed and paginated the file using the incorrect affidavit served on them. The reason for the incorrect affidavit being in the court file was that Applicants attorneys did not index the court file ourselves and accepted that the commissioned affidavit was on the file."

[14] Mr Essop does not furnish the date on which the "properly commissioned" founding affidavit was filed at Court. He has also failed to attach a confirmatory affidavit of his secretary. Neither does he state whether the properly commissioned affidavit was subsequently served on the respondent's attorneys of record. On the contrary it was submitted on behalf of the applicant that the respondent could not have been prejudiced because it did not resort to bringing an application in terms of Rule 30 to challenge any defective service. I do not agree with this submission. The fact that rule 30 has not been resorted to by the respondent, does not detract from the fact that it is the applicant who must, present satisfactory and reasonable explanation for any delay or non-compliance with the court rules.

[15] An applicant is confined to only two sets of affidavits. A fourth affidavit

⁸ Paginated page 72-74.

can only be filed with the Court's leave and with a penalty of costs. The affidavit of Mr. Essop mentioned herein above was filed without seeking the Court's indulgence. In my view, the affidavit of Mr Essop was tailored to relieve the pinch on the applicant's "shoe."

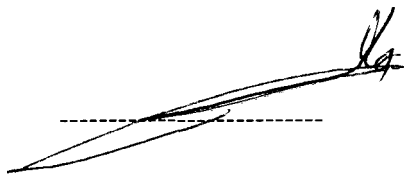
[16] The replying affidavit⁹ of Mr. Fareed Tayob, the applicant's attorneys of record, was commissioned on the 9 November 2014. The respondent's answering affidavit was deposed to and commissioned on the 25 June 2014, and filed with the registrar of this Court on 27 June 2014. The applicant's replying affidavit ought then to have been served within 10 days¹⁰ of receipt of the answering affidavit. This replying affidavit was more than four months out of time. There is no condonation sought for this late filing of the replying affidavit, neither is there any explanation proffered for the delay.

[17] The applicant disputes that it is indebted to the respondent in the amount claimed. It is instructive to note that this matter was predicated by an application for the liquidation of the applicant. The applicant, in the liquidation application, alleged in its papers that he paid an amount of R350 000. 00 to his attorneys of record, in order to show that it is not insolvent. Respondent contended that it was this allegation which moved it in withdrawing the liquidation application, and as a result it decided to issue summons. *In casu*, the applicant contended, *inter alia*, that it is not indebted to the respondent. The applicant and his attorneys of record have however failed to place proof of the aforesaid payment. In my view, empirical evidence of payment, is much persuasive than the mere denial of indebtedness. I am accordingly not persuaded that the applicant has a *bona fide* defence to the respondents' claim.

[18] In my view, the general conduct of both the applicant and his attorneys reflects a scant regard to Court rules. It is a conduct which in the circumstances of this case, *inter alia*, moved this Court, in not inclining towards exercising its discretion in favour of the applicant.

[19] In the result it is ordered that the application be and is dismissed with costs.

⁹ Paginated pages 53-65.



N .M. MAVUNDLA

JUDGE OF THE COURT

DATE OF JUDGEMENT : 24/07/2015

APPLICANT'S ADV: ADV S J VAN RENSBURG

INSTRUCTED BY: GANI ATTORNEYS

RESPONDENTS' ADV : ADV. M SEGAL

RESPONDENTS' ATT: ALAN MARGOLIS ATTORNEYS

¹⁰ Rule 6(5)(e) of the Uniform High Court Rules.