

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4140/09

In the matter between:

MARIUS MARE

Applicant/Plaintiff

and

MYBURGH & JORDAAN ATTORNEYS First Respondent/First Plaintiff

ALWYN ABRAHAM MYBURGH Second Respondent/Second Plaintiff

JUDGEMENT: J.P. DAFFUE, AJ

HEARD ON: 27 MAY 2010

DELIVERED ON: 28 MAY 2010

[1] **INTRODUCTION**

This is an application for an order in the following terms:

- 1.1 that condonation be granted to the applicant for the non-compliance of the court rules relating to service and process;
- 1.2 that the bar constituted by respondents' notice of bar dated 9 March 2010 be uplifted;

- 1.3 that applicant be granted leave to file his plea within 5 (five) days from date of this order;
- 1.4 that, in the event of them opposing this application, the respondents be ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved;
- 1.5 further and alternative relief.

[2] **THE PARTIES**

- 2.1 Applicant is Marius Mare, a chartered accountant, cited as defendant in the main action under case no. 4140/2009.
- 2.2 The respondents are Myburgh & Jordaan Attorneys and Alwyn Abraham Myburgh, being first and second respondents respectively. They instituted action under case no. 4140/2009 as first and second plaintiffs respectively.

[3] **REPRESENTATION OF PARTIES**

3.1 For the sake of convenience the parties will be referred to herein as cited in this application.

3.2 Mr. M.C. Louw appeared for the applicant and Mr. D.M. Grewar for the respondents.

[4] **BACKGROUND**

The salient facts can be summarised as follows:

4.1 Respondents issued summons against applicant, claiming damages allegedly caused by applicant due to *inter alia* his breach of contract insofar as he acted recklessly or negligently and not as could have expected of a qualified auditor.

4.2 Respondents claim so-called direct damages (direkte skade), being the amounts paid by first respondent to the South African Revenue Services pertaining to penalties in the amount of R166 714,00. This amount is claimed by both respondents, although second respondent personally has not been penalised *ex facie* the particulars of claim.

- 4.3 The respondents also claim R200 000,00 in respect of so-called non-patrimonial damages insofar as their status and goodwill have been affected negatively. There is no indication which amount is claimed in respect of which respondent.
- 4.4 On 1 December 2009 the combined summons was served on applicant. Notice of intention to defend was given on 17 December 2009. The date of the notice is 15 December 2009 but the document was only served on 17 December 2009, the 16th of December being a Public Holiday.
- 4.5 A notice of bar was served on applicant's Bloemfontein attorneys on 11 March 2010 at 15h27 and filed at court on 12 March 2010.
- 4.6 No plea was filed and consequently as on 19 March 2010 applicant was *ipso facto* barred in accordance with the provisions of rule 26.
- 4.7 On 24 March 2010 an application for default judgment

was served on applicant's Bloemfontein attorneys.

4.8 On 25 March 2010 applicant's Bloemfontein attorney, Mr. D.A. Honiball, informed respondents in writing of applicant's intention to launch an application for condonation for the late filing of the plea. It was foreseen that the application would be delivered by 26 March 2010.

4.9 When informed by the Registrar that the application for default judgment had to be set down for hearing in open court, respondents proceeded to set the matter down for hearing on 29 April 2010.

4.10 On 23 April 2010 the application *in casu* was served and filed. This necessitated a postponement on 29 April 2010 to 27 May 2010 by agreement, costs of the postponement to stand over.

[5] **THE NEGLECT OF THE APPLICANT**

5.1 No affidavit was filed by applicant who relies on the version of his Johannesburg attorney, Mr. Kevin

Gordon Cross (Mr. Cross) as confirmed by the Bloemfontein attorney, Mr. Honiball.

5.2 The allegations contained in paragraphs 10 to 13 of the founding affidavit are vague. Much more detail could have been provided. However it is clear that defendant stays in Cape Town whilst his attorney is based in Johannesburg. His legal representatives requested him to prepare certain documentation to enable them to prepare a plea on his behalf.

5.3 Apparently little, if anything, was done by applicant between November 2009 to March 2010 and consequently no plea was filed.

5.4 During the period 17 March 2010 to 22 March 2010 Mr. Cross was away on leave for the long weekend. On his return to office on 23 March 2010 he for the first time became aware of a fax dated 16 March 2010 and sent the same date to him by his Bloemfontein correspondent. The notice of bar accompanied the faxed letter.

- 5.5 The notice of bar was served on 11 March 2010 and the Bloemfontein correspondent took three days to inform the office of Mr. Cross of this important notice.
- 5.6 There is no indication that defendant was aware of the notice of bar and/or the possible consequences thereof.
- 5.7 I also take cognisance of the allegation that the notice of bar was not preceded by any letter in accordance with the so-called collegial practice that has developed in the Gauteng. I may pause to add that I personally was always under the impression that attorneys in Bloemfontein have been following such collegial practice for many years. Mr. Cross alleges in par. 16 of the founding affidavit that no letter(s) requesting the plea preceded the notice of bar. This has not been denied by second respondent. However, I do have to point out that second respondent alleged in par. 8 of the answering affidavit that various requests were made to applicant's attorneys to file a plea. However

no letters are attached to the answering affidavit in support of this allegation.

5.8 On 24 March 2010 Mr. Honiball requested second respondent, a practising attorney of this court, for an extension of the time allowed to file the plea, but to no avail. A letter was also sent by Mr. Honiball to plaintiffs dated 25 March 2010 upon receipt of the application for judgment by default. There was no response to this letter.

5.9 Mr. Cross and counsel consulted with applicant on 29 March 2010 when it appeared that counsel still needed further documentation, whereupon a second consultation was arranged for 1 April 2010.

5.10 Counsel was, on the version of Mr. Cross, involved in an intricate Supreme Court of Appeal matter at the time, but he promised to give his attention and prepare the plea over the Easter weekend. The plea was eventually drafted, discussed and thereafter forwarded to Bloemfontein for service on 13 April 2010.

5.11 Hereafter the present application was prepared, filed and served on plaintiffs. The application was to be heard on 29 April 2010, the same day as the application for default judgment enrolled by respondents for hearing in open court.

5.12 The last day for filing of the plea in order to prevent an automatic bar, was 18 March 2010. The plea was served and filed 15 court days late.

[6] **RESPONDENTS' CRITICISM OF THE CONDUCT/OMISSIONS OF APPLICANT AND/OR APPLICANT'S ATTORNEYS**

6.1 Respondents are severe in their criticism of not only the conduct or the lack thereof of applicant, but also and especially the Johannesburg attorney, Mr. Cross.

6.2 Mr. Cross is accused of recklessness and intentional and flagrant disregard of the rules of court.

6.3 I fully appreciate the frustration of respondents who believe that applicant not only negligently failed to

comply with his contractual obligations and thereby causing them damages, but continued to show no sign of responsibility to ensure that his legal team was put in a position to file a plea on his behalf.

6.4 I accept that the respondents, an incorporated firm of attorneys and a practising attorney respectively, would like to see that colleagues act promptly, without negligence and complying with the rules of court at all times.

[7] **APPLICATION OF THE APPLICABLE PRINCIPLES**

7.1 An applicant applying for condonation, extension of time or removal of bar must comply with two main requirements, i.e.

7.1.1 He must file an affidavit satisfactorily explaining the delay. The court must be put in a position to understand how and/or why the delay came about in order to assess the conduct or lack thereof.

7.1.2 Secondly, an applicant must satisfy the court that he has a *bona fide* defence. The defence should

be shown not to be patently unfounded.

See: **DU PLOOY v ANWES MOTORS (EDMS)**

BPK 1983 (4) SA 212 (O) at 216F – 219E.

7.2 It is apposite to refer also to the approach adopted in **SMITH, NO v BRUMMER, NO AND ANOTHER** 1954 (3) SA 352 (O) at 357H – 358B in which decision the requirements for removal of bar were set out. My English translation of the dictum of Brink J is as follows:

“The tendency is to grant applications for removal of bar where

- a) a reasonable explanation for the delay has been given;
- b) the application is *bona fide* and not made with the object of delaying the respondent’s claim;
- c) there is no indication of reckless or intentional disregard of the rules of court;
- d) the applicant’s case is clearly not ill-founded; and
- e) any prejudice caused to the other party could be compensated for by an appropriate order as to costs.”

7.3 It is also important to emphasise that condonation for

the non-observance of rules of court is not a mere formality, but having said that, any consideration of an application for condonation must have regard to the merits of the matter seen as a whole.

See **GUMEDE v ROAD ACCIDENT FUND** 2007 (6) SA 304 (C) at 307C – 308A.

- 7.4 Another aspect which cannot be disregarded although not mentioned in the case law normally quoted in applications for condonation, is section 34 of the Constitution of the Republic of South Africa, 108 of 1996, which reads as follows:

“34 Access to courts - 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.”

- 7.5 There is little doubt that a more comprehensive explanation could have been given. The apparent lack lustre approach adopted by applicant since the receipt of the summons cannot be ignored. To a certain

extent applicant and his attorney, Mr. Cross, can be accused of disorganisation and slackness. However insofar as the focus at this stage should be on the period after receipt of the notice of bar, I have been presented with a reasonable explanation as indicated *infra*.

7.6 Applicant could not have been aware that the Bloemfontein attorney did not inform Mr. Cross per telephone, telefax or e-mail on the very same date the notice of bar was received, i.e. 11 March 2010. Three court days lapsed by the time that the fax was sent on 16 March 2010. Applicant could also not be aware of the further neglect of Mr. Cross or his staff who did not respond to the fax immediately, but only after the long weekend.

7.7 From 23 March 2010 onwards Mr. Cross started to act more expediently which led to the consultations with counsel, the eventual drafting of the plea and the filing thereof on 13 April 2010. It must also be taken into consideration that there was another long weekend in

this period.

7.8 The explanation since receipt of the notice of bar by Mr. Cross is reasonable, although only just.

7.9 I cannot find that there was a reckless disregard of the rules of court.

7.10 A *bona fide* defence has been raised. With reference to the defence raised, the following averments are made which, taken in conjunction or on their own, may well prevent respondents from obtaining judgment on the particulars of claim as it presently stands:

7.10.1 Respondents' claim is based on an alleged oral agreement in terms whereof applicant undertook to perform certain auditing functions in respect of first respondent's trust account. Respondents' income tax returns for 2005 and 2006 financial years were submitted on the basis of nil returns. This had to do with the first respondent's business and not its trust account. Applicant cannot be held responsible for these nil returns.

These returns were prepared by first respondent's financial manager, Hugo, and signed by second respondent. Applicant did not feature at all. After investigation by the South African Revenue Service it appeared that first respondent had in fact generated a profit of R108 268,00 for the 2005 financial year and R300 301,00 for the 2006 financial year. Furthermore a profit of R405 000,00 in respect of the sale of an immovable property was not declared. Penalties by way of additional taxes were imposed.

7.10.2 Bearing in mind the particulars of claim in its present format, there was no obligation on applicant to draft financial statements and/or to submit returns to the South African Revenue Services in respect of first respondent's business.

7.10.3 It appears reasonably possible that the damages suffered as a result of the penalties levied,

cannot be attributed to applicant, but to non-disclosure by first and second respondents. That being the case the second claim is also doubtful at this stage and it cannot be found that applicant's defence is ill-founded.

7.11 As indicated above, any prejudice caused to respondents could be compensated for by an appropriate order as to costs.

[8] **CONCLUSION**

Having considered the relevant principles, the facts placed on record by the parties and argument by both counsel, there is sufficient reason why applicant should be allowed to file his plea and to contest respondents' action in a court of law.

[9] **COSTS**

9.1 Applicant seeks an indulgence. The grant of an indulgence is something *sui generis*. The general rule in such cases is that costs do not follow the event.

See Cilliers **Law of Costs**, par. 2.30 and 2.31 and the

case law referred to.

Mr. Louw conceded that applicant is not entitled to the costs of the application, but requested that he be ordered to pay respondents' costs on an unopposed basis only.

- 9.2 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.

See **MALONEY'S EYE PROPERTIES BK EN 'N
ANDER v BLOEMFONTEIN BOARD NOMINEES
BPK** 1995 (3) SA 249 (O) at 257G – H.

- 9.3 Respondents knew prior to institution of this application what defences were raised in applicant's plea. They should have been advised that the defences raised were not ill-founded. In fact, they should have been alerted that the particulars of claim might have serious shortcomings.

- 9.4 The reasons for the delay were set out in the founding

affidavit and instead of accepting the reasonableness thereof, respondents filed an answer in which they took an extremely critical approach and unnecessarily duplicated evidence contained in the annexures to the combined summons.

- 9.5 Although respondents blame applicant for breaching the rules of court flagrantly, their counsel's heads of argument were filed at 15h55 on Tuesday, 25 May 2010 instead of 15h00. This is a transgression of rule 13.3 of the rules of practice published in GN 820 of 7 September 2002.

See Erasmus **Superior Court Practice**, loose-leaf edition, p. C3-21 and further and in particular C3-24B and 24C. Mr. Grewar informed me that he handed his heads of argument to the attorney at approximately 13h00, but that he could not explain the delay. Both counsel and respondents are supposed to be well aware of this rule.

- 9.6 In the exercise of my discretion I find that the opposition was unreasonable. Applicant who seeks an

indulgence should pay the costs of the application. I was initially of the view that the costs should be paid on an unopposed basis only, but applicant must bear the consequences of my dissatisfaction which will be reflected in my order.

9.7 The costs of 29 April 2010 stood over for later adjudication. There is no reason to make a different order as the one I propose to make in respect of the application as such.

[10] **ORDERS**

Therefore the following orders do issue:

- 10.1 Condonation is granted to applicant for the non-compliance of the court rules relating to service and process.
- 10.2 The bar constituted by respondents' notice of bar served on 11 March 2010 is uplifted.
- 10.3 Applicant is granted leave to file his plea within 5 (five) days from date of this order.
- 10.4 Applicant is ordered to pay 25% of the costs of this application on an opposed basis, such costs to include

the costs of 29 April 2010.

J.P. DAFFUE, AJ

On behalf of applicant/plaintiff:

Adv. M.C. Louw
Instructed by:
Matsepes
BLOEMFONTEIN

On behalf of first respondent/first plaintiff
and second respondent/second plaintiff:

Adv. D.M. Grewar
Instructed by:
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