

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE:

(1)	REPORTABLE:	NO
(2)	OF INTEREST TO OTHER JUDGES:	NO
(3)	REVISED:	NO
	31 MAY 2024	
	DATE	SIGNATURE

CASE NO 55272/2021

In the matter between -

EOH MTHOMBO (PROPRIETARY) LIMITED

First Plaintiff/Applicant

EOH AFRIKA (PROPRIETARY) LIMITED

Second Plaintiff/Applicant

EOH MANAGED SERVICES PS
(PROPRIETARY) LIMITED

Third Plaintiff/Applicant

and

ARNOLD, PHILIP HENRY
(Identity Number [...])

First Defendant/Respondent

ALTERAM MUNICIPAL SOLUTIONS
(PROPRIETARY) LIMITED

Second Defendant/Respondent

ALTERAM SOLUTIONS

(PROPRIETARY) LIMITED	Third Defendant/Respondent
AM TO PM STRATEGIC (PROPRIETARY) LIMITED	Fourth Defendant/Respondent
CLIPPER FINANCIAL SERVICES (PROPRIETARY) LIMITED	Fifth Defendant/Respondent
ULTIMAX CONSULTING (PROPRIETARY) LIMITED	Sixth Defendant/Respondent
MONICA COWIN N.O.	Seventh Defendant/Respondent
ANKIA VAN JAARSVELDT N.O.	Eighth Defendant/Respondent
NORMAN KLEIN N.O.	Ninth Defendant/Respondent
DIMAKATSO ARNOLD MICHAEL MOHASOA N.O.	Tenth Defendant/Respondent
MAHOMED MAHIER TAYOB N.O.	Eleventh Defendant/Respondent

JUDGMENT

BOKAKO AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 31 May 2024.

INTRODUCTION

1. This application for condonation pertains to the late filing of Plaintiff's replication dated 7 February 2023 to Defendant's plea in the main action. Plaintiff claims damages and losses sustained due to a scheme perpetrated by the Defendant. The Plaintiff's case against the first respondent is that he developed an unlawful scheme from January 2014 to April 2018.

2. Defendant opposed this application because the replication had been introduced woefully late, and it is not "to be taken" that the issues raised in the replication are triable in the sense required to permit the amendment of the pleadings by the introduction of the proposed replication.

3. The Plaintiffs were entitled to file a replication within ten days of the First Defendants filing their plea, i.e. on or before 12 December 2022. The Plaintiffs failed to file their replication on this date and, by Rule 26 of the Uniform Rules of Court, were ipso facto barred from doing so.

CONDONATION PRINCIPLES

4. Compliance with time limits indicated in the court's rules or a court directive is mandatory. Any delay obligates the party concerned to seek the court's indulgence as soon as it becomes aware of the necessity of an application for condonation.

5. For an application for condonation to succeed, the applicant must provide a detailed explanation of the cause of the delay.

6. One of the most critical considerations for granting condonation is ensuring that the interests of justice are served.

FACTUAL MATRIX

7. The facts summarised briefly are that the Plaintiffs sue the Defendants for damages and losses sustained due to the alleged fraudulent scheme they perpetrated. The full details of Plaintiff's case against the first Defendant appear in the Particulars of Claim. The Plaintiffs further contend that the first Defendant, from

January 2014 to April 2018, developed an unlawful scheme in which he would procure the appointment of a company as a so-called subcontractor regarding projects undertaken by the first, second, or third Plaintiffs. The Plaintiff sought to institute action proceedings against the first respondent based on the information provided.

8. The combined summons in this matter was issued on 23 November 2021. The First Defendant delivered his plea, incorporating two special pleas, on 22 November 2022. The Plaintiffs condoned the late filing of the First Defendant's plea.

9. The Plaintiffs were entitled to file a replication within ten days of the First Defendant filing his plea, i.e., on or before 12 December 2022. The Plaintiffs failed to file their replication on this date.

10. Plaintiff contends that the first Defendant delivered his plea and special pleas on 21 November 2022. His plea is almost exclusively comprised of bare denials, and his special pleas seek to avoid liability for his alleged fraudulent conduct based on a pleaded non-compliance with a notice provision in the Apportionment of Damages Act, 34 of 1966 and prescription.

11. In response to the special pleas of the first Defendant, the plaintiffs delivered a replication on 7 February 2023. The replication, which must have been filed by 12 December 2022, was 20 court days late.

12. The plaintiffs further contend that, nonetheless, the plea was delivered approximately 11 months after the initial due date for the plea and over 25 court days after the plaintiffs offered the amended Particulars of Claim on 14 September 2022 and which amendment was in response to an exception that had been taken by the ninth and tenth defendants in action. Notwithstanding that the plaintiffs had granted Mr. Arnold an indulgence regarding the period for filing his plea, the first Defendant, Mr. Arnold, did not condone the late filing of the replication. In consequence, the plaintiffs instituted this application to seek condonation.

13. Defendant contends that the Plaintiffs have discounted the provisions of Rule 26 and that the Plaintiffs ought to have applied for the upliftment of the bar together with condonation for the late filing of the replication.

14. Further, the Plaintiffs have yet to seek the upliftment of the bar, and the days between 16 December and 15 January, i.e., *dies non*, ought to be counted as the period in which the Plaintiffs have delayed filing their replication. The delay is not simply a delay of 20 days, as alleged by the Plaintiffs in their founding affidavit. Their delay was far more than this period.

Replication

15. In its replication, the plaintiffs assert that they admit that the first Defendant was not sued in the EOH 2020 action but deny that no notice was given to him in terms of section 2(2)(a) of the Apportionment of Damages Act 34 of 1956 ("ADA") about the EOH 2020 action.

16. It is the Plaintiffs contention that on or about 1 February 2021, the first Defendant instituted an application ("the intervention application") against the third Plaintiff, Silver Touch I.T. Solutions (Proprietary) Limited (in liquidation) ("Silver Touch"), the seventh Defendant, the Master of the High Court, Gauteng Local Division ("the Master") and the Companies and Intellectual Property Commission ("CIPC") under case number 42876/2020. In the intervention application, the first Defendant sought leave to intervene as a respondent in an application ("the main application") instituted by the third Plaintiff against Silver Touch, the seventh Defendant, the Master and CIPC also under case number 42876/2020. In the intervention application, the first Defendant attached a copy of the Combined Summons and Particulars of Claim in the EOH 2020 action to his founding affidavit.

17. Plaintiff, opposed the intervention application and delivered an answering affidavit confirming the existence, content, and import of the EOH 2020 action.

18. The second, fourth, fifth, and sixth defendants are defendants in the EOH 2020 action. They are also, as alleged in paragraph 26.1 of the particulars of the

claim, the alter ego of the first Defendant who was the sole beneficial shareholder and was the directing force, controlling mind and will of each such entity and who exercised sole control over their affairs.

19. The other issue raised in the Plaintiff's replication is that before the close of pleadings in the EOH 2020 action on 21 September 2021, the first Defendant was informed of and had knowledge of the existence, content, and import of the EOH 2020 action. The plaintiffs complied with section 2(2)(a) of the ADA; alternatively, first, the Defendant waived his entitlement to rely on non-compliance.

20. Further contends in an alternative that should the court find that the plaintiffs have failed to comply with section 2(2)(a) of the ADA and that the first Defendant has not waived his right to rely on such non-compliance, which is denied, the Plaintiffs aver that the court ought to grant the Plaintiffs leave to pursue their claims in the above action against the first Defendant, under the provisions of section 2(4)(a) of the ADA because having regard to the first Defendant's conduct.

21. Further averred that the first Defendant was fully aware of the EOH 2020 action before pleadings closed in that action and that apprehension was reasonable in the circumstances, and the first Defendant failed and continues to fail to take steps to intervene in the 2020 EOH action. Further, the first Defendant will suffer no prejudice if the Plaintiffs are permitted to continue to pursue their claims in this action.

22. The other issue in the replication pertains to the Plaintiffs' strong prospects of success in the above action. Prosecution of the claim against the first Defendant is essential in contributing to the fight against corruption and holding defendants accountable for substantial wrongdoing.

23. Further avers in their replication that section 11(d) of the Prescription Act provides that the period of prescription of debts, other than those referred to in sections 11(a), (b) and (c), shall, save where an Act of Parliament prescribes otherwise, be three years; section 12(1) of the Prescription Act provides that "subject to the provisions of sections (2), (3) and (4), prescription shall commence to run as

soon as the debt is due"; section 12(2) of the Prescription Act provides that "If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt"; and section 12(3) of the Prescription Act provides that "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

24. The Plaintiffs aver that the particulars of claim were served on the first Defendant within three years of the Plaintiffs coming to know of the existence of the debts, in circumstances in which the first Defendant and complicit executives of the plaintiffs wilfully prevented the plaintiffs from coming to know of the existence of the debts, *alternatively* within three years of the plaintiffs knowing the identity of the first Defendant as debtor and of the facts from which the first Defendant's debts arise.

25. In the alternative, the Plaintiffs aver that section 13(1)(b) of the Prescription Act delays the running of prescription for so long as a debtor is outside the Republic unless the debtor consents to service of process claiming the debt in a South African court); at all material times the first Defendant was outside the Republic thus delaying the running of prescription against him; that impediment was removed only on 19 February 2021 when the first Defendant consented to jurisdiction and service in this action, and would only be completed on 19 February 2022 and that the summons was served on the first Defendant before 19 February 2022.

26. The opposition raised by Defendant appears to be that the proposed replication is ultimately excepiable, and permitting it to be delivered at this stage would accordingly serve no purpose; no case for condonation has been made.

27. Contending that the first Defendant is the joint wrongdoer, within the term's meaning in Section 2(1) of the apportionment of damages Act 34 of 1956, with Laher and Mackay about the EOH 2020 action.

28. The first Defendant was not sued in the EOH 2020 action, and no notice was given to him in terms of Section 2(2) (a) of the Apportionment of Damages Act. Therefore, the Plaintiffs are precluded from proceeding against the first Defendant, who has failed to procure the leave of the court in this action.

Submissions

29. The Plaintiff submits that the delay was limited and the explanation for the delay is satisfactory, taking into cognizance that the first Defendant does not contend that the delay of 20 court days in filing the replication has caused him or any of the other litigants any prejudice or that the delay has any prejudicial impact on the administration of justice. He does not dispute the plaintiffs' explanation for the cause of the delay or contends that the explanation proffered for the delay is not satisfactory.

30. Further, the first Defendant opposes condonation for the late filing of the plaintiffs' replication because the plaintiffs' prospects of success are not strong. Consequently, the defendants will be charged a substantial cost in dealing with an unsustainable matter, which would also inconvenience the court.

31. Further, it contends that the First Defendant did not comprehend that the application for condonation pertains only to the plaintiffs' replication of his special pleas. The plaintiffs elaborated in the replying affidavit that they intend to persist with the action, which action they consider has excellent prospects of success. Also, the contention made by the first Defendant that the matters raised by the plaintiffs in the replication have no prospects of success is similarly flawed.

32. The Plaintiffs further argued that the first Special Plea by the first Defendant seeks to avoid liability for his fraudulent conduct based on an alleged failure by the plaintiffs to give him notice as a "joint wrongdoer" in terms of section 2(2) (a) of the Apportionment of Damages Act), and the content regarding the second Special Plea, he seeks to avoid liability for his fraudulent conduct by relying on section 11 of the Prescription Act, 68 of 1969.)

33. The Plaintiff further argued that there are excellent prospects of success in the replication vis-à-vis the First Special Plea. The first Defendant was sued in the EOH 2020 action, and notice was given to him in section 2(2)(a) of the Apportionment of Damages Act, and, in the circumstances, the plaintiffs are not precluded from proceeding against him in this action. The plaintiffs deny that no notice was given to the first Defendant, Mr Arnold. Therefore, the allegations in his First Special Plea ought to be dismissed.

34. Further, Mr. Arnold was informed of and knew of the existence and content of the EOH 2020 action and that the plaintiffs complied with s 2(2)(a) of the Apportionment of Damages Act; alternatively, Mr. Arnold has waived his entitlement to rely on non-compliance.

35. The Plaintiff refutes the contention in the answering affidavit filed on behalf of Mr. Arnold that his "special plea based on the Apportionment of Damages Act is sustainable, and the Plaintiffs have not disclosed a defense to this plea in their replication is, consequently and manifestly, unsustainable. In their replication, the plaintiffs have disclosed three defenses, each of which is a complete answer to Mr. Arnold's First Special Plea.

36. There are excellent prospects of success in the replication vis-à-vis the Second Special Plea in that Mr. Arnold attempts to avoid liability for his alleged fraudulent conduct by relying on section 11 of the Prescription Act, 68 of 1969. Mr Arnold pleads that by April 2018, Plaintiff's claims involving transactions carried out from January 2014 to April 2018 fell due and that Plaintiff's summons were issued more than three years after the claims arose, and the claims have, consequently, been prescribed. It was argued that his contention on this aspect must fail.

37. The particulars of the claim were served on Mr. Arnold within three years of the plaintiffs coming to know of the debts in circumstances in which Mr. Arnold and the complicit executives of the plaintiffs wilfully prevented the plaintiffs from coming to know of the existence of the debts. Referring to section 12(3) of the Prescription Act provides that - "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises -

Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

38. It was further submitted that Mr Arnold was outside the Republic, thus delaying the running of the prescription against him. Therefore, this impediment was removed only on 19 February 2021, when he consented to jurisdiction and service in this action. Consequently, the summons was served on Mr. Arnold before the date the prescription would be completed, i.e., before 19 February 2022.

39. Further submitted that Mr Creswick does not qualify and cannot state that Mr Arnold has no defense to the merits of the claim against him. Plaintiff refutes this contention, in that the plaintiffs have laid relevant documentary evidence, precisely showing how Mr Arnold conducted his fraudulent scheme and received payments by misrepresenting to the plaintiffs, and he has baldly denied the allegations and has furnished not a shred of evidence that the work he billed for was done.

40. The Plaintiffs further submitted that their senior Counsel was unavailable because of health-related issues.

41. Defendant submits that the Plaintiffs have not given a proper and sufficient explanation to show good cause, and the application should be dismissed for several reasons.

42. Defendant contends that the Plaintiffs mistakenly calculated the delay and failed to explain the period of dies non, and did not explain why they have not requested the First Defendant to uplift the bar.

43. Further contending that the Plaintiff's replication admits paragraphs 1, 2, and 3 of the First Defendant's First Special Plea, in that their claim of damages against Laher and Mackay, amongst others, is arising from their fraudulent conduct in inducing payments by one or other of the Plaintiffs to one or other of the liquidated suppliers and also admit paragraphs 4 to 4.3 of the First Special Plea, thereby admitting that they pleaded that the First Defendant, Arnold, developed an unlawful scheme which was implemented in collusion with Laher and Mackay, under which

the First Defendant, colluding as aforesaid, procured payments to the relevant companies for work, which was not done.

44. Further, it was submitted that the Plaintiffs admitted that Arnold was not sued in the EOH 2020 action; however, they deny that no notice was given to him regarding section 2(2)(a) of the ADA about the EOH 2020 action.

45. Contending that the avoidance pleaded by the Plaintiffs in the replication must consist of averments which would comprise a complete defense to the allegations made by the First Defendant in his Special Plea. The avoidance defense now raised by the Plaintiffs necessitates correctly interpreting section 2(2) of the Apportionment of Damages Act.

46. It was also argued that it is imperative that notice be given to any joint wrongdoer who is not sued in that action, which can only be interpreted to mean that notice be given to a party who is alleged to be a joint wrongdoer. In other words, the notice must stipulate that the person giving the notice alleges that the party to whom the notice is given is a joint wrongdoer and that he is facing potential liability. The Plaintiff failed to stipulate such.

47. The allegations made by the Plaintiffs in their replication also infer that Arnold impliedly obtained notice of the EOH 2020 action. The Plaintiffs have failed to advance any material facts, such as that the first Defendant was notified of the EOH 2020 action before the closing of pleadings.

48. The notice should allege that the First Defendant was a joint wrongdoer with Laher and Mackay and that he was, in law, entitled to intervene in that action or to join as a co-defendant.

49. The Plaintiffs have not advanced any material facts in defense of the first special plea of the First Defendant and, accordingly, cannot avoid its consequences, which are submitted as an absolute defense to the Plaintiffs' claim against the First Defendant. The replication has not neutralized the allegations contained in the first special plea.

Discussion

50. Rule 27(3) of the Uniform Rules states that:

“The Court may, on good cause shown, condone any non-compliance with these rules.”

51. Rule 25(1) of the Uniform Rules states that:

“Within fifteen days after the service upon him of a plea and subject to subrule (2) hereof, the plaintiff shall, where necessary, deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with Rule 22.”

52. Defendant’s complains that Plaintiff has not complied with Rule 25(1), and a delay of 20 court days late has not been explained. Indeed, Plaintiff’s explanation for the delay in filing its replication might be considerably late and not be a blow-by-blow type of explanation.

53. In my analysis, the reason proffered by the Plaintiff is cogent and reasonable. The Plaintiff explained that their Senior Counsel had some serious health setbacks, which she was not in control of. Further alluding to the fact that the first Defendant’s plea was delivered approximately 11 months after the initial due date for the plea and over 25 court days after the plaintiffs offered the amended Particulars of Claim on 14 September 2022 and which amendment was in response to an exception that had been taken by the ninth and tenth defendants in action, and notwithstanding that the plaintiffs had granted Mr Arnold an indulgence regarding the period for the filing of his plea. It should be noted that this was not a deliberate act or suggestive that they are automatically entitled to such an indulgence.

54. The other explanation was that this application for condonation pertains only to the plaintiffs’ replication of the first Defendant’s special pleas.

55. Plaintiff explained that the Counsel deemed replicating Defendant’s special pleas appropriate.

56. Courts have consistently refrained from attempting an exhaustive definition of what constitutes good or sufficient cause for exercising its discretion.¹ Good cause or sufficient cause for the exercise of discretion, in my view, suggests that each case must be judged on its own merits.

57. The Plaintiff has ably set out the factors that count heavily in favour of condonation. The Defendant has not gained such factors.

58. Defendant does not dispute the Plaintiff's assertion that Plaintiff's claim had been formulated in such a way that allegations of the perpetration of a fraudulent and corrupt scheme by Mr. Arnold who, in perpetrating the unlawful scheme is also alleged to have committed an unconscionable and gross abuse of the juristic personalities of the other defendants.

59. As the initiator of legal proceedings, the Plaintiff cannot be told by any party in the proceedings how it should proceed in prosecuting its claim. They deem it appropriate that the first Defendant must be a party to this proceedings. Upon the Plaintiff realizing their case had not been appropriately presented before the court, he was bound to ask for the court's indulgence and present it properly.

60. As the Defendant did not consent to the Plaintiff's filing its replication out of time, it is therefore incumbent upon this court to exercise its discretion judicially in assessing whether there have been sufficient or convincing reasons and or good cause shown for the granting of the condonation in this regard.

61. It is common cause that this matter has not made its way to trial, and in such circumstances, the Plaintiff was at liberty to file an application for condonation for the late filing of its replication. Defendant did not take issue with the delay in finalizing the main action but confined its opposition to the late filing of the replication.

¹ Mynhardt v Mynhardt 1986 (1) SA 456 (T) at 463 E - F

62. The court had an opportunity to assess the conduct and motive of the Plaintiff, in doing such an exercise, this court is convinced that the Plaintiff would not have pursued this matter this vigorously if there were no prospects of success; a cogent explanation was made.

63. In my opinion, there appears to be no prejudice or potential prejudice to be suffered by the Defendant if this condonation is granted. In all fairness, this court has a duty to protect the interests of all parties. In the interest of justice and fairness, this duty is entrenched in the Constitution². How the Constitution is to be interpreted and applied is of paramount importance.

64. In addition, I am afraid I have to disagree with the assertion that the First Defendant should be absolved from taking responsibility in this regard. The plaintiffs have successfully advanced material facts that the First Defendant was given notice of the EOH 2020 action before the close of pleadings.

65. The first Defendant' attempts to avoid liability for his alleged fraudulent conduct by relying on section 11 of the Prescription Act, 68 of 1969. Such contention needs to be more substantial, and it stands to fail.

66. Mr. Arnold pleads that by April 2018, the Plaintiff's claims involving transactions carried out from January 2014 to April 2018 fell due, that the plaintiffs' summons were issued more than three years after the claims arose, and that the claims have, consequently, been prescribed. This contention stands to fail as well.

67. The Plaintiff posed a valid point in that the particulars of the claim were served on Mr. Arnold within three years of the Plaintiff's knowledge of the debts, in circumstances in which Mr. Arnold and the plaintiffs' executives wilfully prevented the plaintiffs from learning of the debts.

² The Constitution of the Republic of South Africa, Act 108 of 1996

68. The Plaintiff directs that the replication was filed as a result of the first Defendant's special pleas. The plaintiffs elaborated in the replying affidavit that they intend to persist with the action.

69. In the circumstances, there is no way that this court would dismiss the allegations by the Plaintiff that Mr Creswick does not, and is not able to, state that the first Defendant, Mr. Arnold, has any defense to the merits of the claim against him.

70. The plaintiffs have provided relevant documentary evidence, precisely how the first Defendant conducted his scheme and received payments by misrepresenting them to the plaintiffs. He has baldly denied the allegations and has furnished no evidence that the work he billed for was done. This court is convinced that Plaintiff has raised triable issues in its replication.

71. The replication filed by the Plaintiff is a further procedural step which proceeds to address various issues raised by the defendants in their special pleas.

COSTS

72. What remains is the issue of an appropriate cost order. In their application for condonation, the Plaintiffs requested costs regarding their notice of motion. In their heads of argument, Counsel for the Plaintiff sought a cost order, in that the Defendant's refusal in the first instance to condone the late filing of the replication, which necessitated the bringing of this application and, after that, the flimsy grounds upon which he has sought to oppose this application for condonation are vexatious, and yield the ineluctable inference that his continued opposition *"is in furtherance of the ulterior purpose of delaying and frustrating the progress of the action."*

73. Also, by the lengths to which the first Defendant has gone to avoid answering the claims against him and the companies he used as vehicles for fraud in other matters, and his refusal in this application to respond to the challenge to deal with these facts with relevant evidence, failing which the inference is that he has no answer to the case against him.

74. The plaintiffs consequently sought an order that the first Defendant pay their costs on the punitive scale of attorney and own client, including the costs of two counsels where two counsels were employed.

75. Generally, the awarding of costs is always at the court's discretion.³ The ordinary rule is that such costs should follow the result and be awarded to a successful litigant.

Is a punitive costs order warranted?

76. Costs on an attorney-client scale are to be awarded where fraudulent, dishonest, or vexatious conduct amounts to an abuse of the court process. In this regard, it was held in *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkers of S.A.*⁴ The scale of attorney and client is an extraordinary one that should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner.

77. Such an exceptional award is intended to be very punitive and indicative of extreme opprobrium." In *Fisheries Development Corp v Jorgensen and Another*⁵ "vexatious" was held to mean frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to any party.

78. Vexatious proceedings no doubt include proceedings which, although adequately instituted, continued with the sole purpose of annoying either party; 'abuse' connotes a misuse, an improper use, a use mala fides, a use for an ulterior motive."⁶

³Kruger Bros & Wasserman v Ruskin 1918 AD 69; Also, *Graham v Odendaal* 1972 2 SA 611 (A) at 616

⁴ 3 [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC)

⁵ 4 1979 (3) SA 1331(W) at 1339 E – G.

⁶ Also see *Marsh v Odendaalsrus Cold Storage Ltd* 1963 (2) SA 263 (W) at 270 C – F, where it was held that

79. I am not satisfied that the Defendant's conduct can fairly be described as vexatious.

80. In the present matter, this court, in exercising its discretion, is of the view that the appropriate costs to be awarded are costs to be reserved for determination by the trial Court.

CONCLUSION

81. It must be stated that none of the findings in this judgment should be construed as a finding on the merits in this case.

82. In line with the findings above, I conclude that the condonation sought by Plaintiff is justified and necessary to facilitate meaningful ventilation of the facts upon which Plaintiff seeks to hold Defendant liable. The Defendants' objections stand to be rejected.

83. In conclusion, the Plaintiff has made a proper case to grant condonation for the late filing of its replication.

ORDER

81. Following the findings in this judgment, an order is made that;
1. The Plaintiff's application for condonation is granted.
 2. The Plaintiff is permitted to file their replication dated 7 February 2023
 3. That the costs of this interlocutory application be costs in the cause.

T. BOKAKO

Acting Judge of the High Court

vexatious proceedings include proceedings that put the other side in unnecessary trouble and expense. The proceedings did not need to be reprehensible, malicious, or misleading.

APPEARANCES

Counsel for the Applicant	Adv. S Stein SC
Counsel for the Respondent	Adv. R Shepstone
Date of Hearing:	5 March 2024
Date of Judgment:	31 May 2024