

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2023-050619

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED. YES
	
In the matter between:	24/6/2024
SIGNATURE	DATE

In the matter between:

**THE MEC FOR THE PROVINCIAL DEPARTMENT
OF INFRASTRUCTURE DEVELOPMENT**

Applicant/Defendant

and

PRO-PLAN CONSULTING ENGINEERS (PTY) LTD

Respondent/Plaintiff

Coram: Maenetje AJ

This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time for handdown is deemed to be 10h00 on 24 June 2024.

JUDGMENT

Maenetje AJ:

Introduction

- [1] The applicant brings an application for condonation for the late filing of a plea, for lifting the bar and leave to file a plea within five days from the date of the order. The respondent opposes the application, essentially on the basis that the applicant has failed to make out a good case for condonation and the lifting of the bar.

The facts and contentions

- [2] The chronology of events is fairly straight forward. The respondent served summons on the applicant on 7 June 2023. The applicant delivered a notice of intention to defend on 13 June 2023. The defendant's plea was due on 12 July 2023. For no apparent reason, the applicant filed another notice of intention to defend on 27 June 2023. Instead of the respondent objecting to this as an irregular step, it wrote to the applicant and afforded it an opportunity to file its plea on 25 July 2023. The applicant failed to file the plea within the extended time frame. On 26 July 2023 the respondent filed a notice of bar. This afforded the applicant five days in which to file the plea under bar. The five days expired on 3 August 2023. The applicant failed to file its plea on 3 August 2023.
- [3] The explanation offered by the applicant's attorney, i.e. the state attorney, for failing to file the plea under bar is that Mr Mncube, the state

attorney, prepared a plea to be filed and signed it on 31 July 2023. He instructed his professional assistant to have the plea filed on 31 July 2023. He explains that unbeknown to him, the professional assistant did not file the plea on 31 July 2023 or at any time prior to 3 August 2023.

- [4] Mr Mncube explains that he only discovered that a plea had not been filed as per his instructions on 16 August 2023 when the respondent served an application for default judgement. He then sent an email to the attorney for the respondent to explain that he had given an instruction for the plea to be filed on 31 July 2023 and attached the signed plea to his email. He explains further that after discovering that the plea had not been filed and, instead, the respondent had delivered an application for default judgement, he initiated the process for the appointment of counsel to deal with the matter. Due to the procurement processes that need to be followed within the office of the State Attorney, it took until 12 October 2023 for counsel to be briefed.

- [5] Once briefed, counsel then needed to consider a voluminous amount of documents and consult with various officials of the applicant to get instructions to enable him to prepare the necessary papers to oppose the application for default judgement and to bring the present application for condonation and for the lifting of the bar. The documents that were considered included a transcript of a recording of a meeting between the applicant and the respondent on 27 January 2022 where the issues regarding the non-payment of invoices to the respondent, which form the

basis of the claim against the applicant, were discussed. The applicant explains that the recording was provided to counsel on 6 November 2023. It was urgently transcribed and printed over the weekend of 11 November 2023. The availability of the transcript enabled counsel to finalise this application on 14 November 2023.

[6] The applicant explains that it has a genuine defence to raise against the claim by the respondent. In summary, it says that the services for which invoices were raised were not authorised. These were for additional services that were not approved. The additional services were not incorporated into the agreement between the applicant and the respondent as deliverables nor as chargeable items. It explains that the claim is for a significant amount of over R4 million and that it would be appropriate for the applicant to be given the opportunity to defend the action. It also says that the agreement between the parties, which forms the basis of the respondent's claim, contains an arbitration clause. Part of the special defences that it shall raise is that it is permitted to defend the action and that the matter should be referred to arbitration.

[7] In response to the argument by the respondent that the plea that has so far been filed, which is the plea signed on 31 July 2023, does not raise the special plea of arbitration, counsel for the applicant responded that after the extensive consultations held to prepare for the present application, the plea that was filed under bar is likely to be amended.

- [8] The applicant submits that it has provided a reasonable explanation for its default, i.e. in failing to file its plea on time even after the notice of bar was delivered. It submits that it stands to suffer significant prejudice if it is not permitted to defend the action, whereas the respondent will be able to obtain judgment in its favour if indeed its case is not answerable.

Evaluation

- [9] The court has a wide discretion to condone the delay in filing a plea and to lift a bar on good cause shown. The courts have not attempted to formulate an exhaustive definition of what constitutes good cause because to do so would hamper unnecessarily the exercise of discretion. The applicant must file an affidavit and satisfactorily explain the delay. The explanation must enable the court to understand how the omission or delay came about. The question of prejudice should be properly addressed. Prejudice to the respondent must not be such that it cannot in any way be compensated for by a suitable order as to postponement and costs. The application must be bona fide, and made with the intention to proceed and not to delay. The applicant must satisfy the court that it has a bona fide defence or that its action is not ill-founded. Facts must be set out that demonstrate this.¹

- [10] The applicant has provided facts that properly explain how the default came about. The conduct of the state attorney leading to the default is not satisfactory. The state attorney ought to have followed up to ensure

¹ Erasmus *Superior Court Practice* Service 39, 2012, at B1-171.

that the professional assistant had filed the plea on 31 July 2023. But this is not the only consideration. The applicant has set out sufficient facts that demonstrate sufficiently that it genuinely intends to proceed and defend the action and that it has a bona fide defence. Also, the prejudice that the respondent will suffer if relief is granted to the applicant is a delay in the matter. This delay can be compensated by a costs order against the applicant. There is no need for postponement because the matter is still far from being set down for trial.

[11] An additional factor is the importance of the case. The claim of over R4 million will be satisfied from public funds. The applicant had to use the office of the State Attorney to defend the action because that office has the legal mandate to represent the state in legal proceedings such as the present.² There is no complaint that the applicant acted in any negligent manner that led to the default. It would be unfair to the applicant in such circumstances to visit the omissions of the applicant's attorneys for the default and to penalise it by refusing condonation.

[12] Given that the omission has been properly explained, facts have been set out to show that the applicant has a bona fide defence and intends to proceed and not merely to delay, the importance of the case, including the public funds that would be involved in satisfying default judgment when the applicant may have a defence, and there was no intentional

² *Zuma v Democratic Alliance and Another* (1028/2019) [2021] ZASCA 39; [2021] 3 All SA 149 (SCA); 2021 (5) SA 189 (SCA) (13 April 2021) para 33.

disregard of the Rules of court, I conclude that it is in the interests of justice to grant condonation and to uplift the bar.³

Costs

[13] The court has a discretion regarding costs – to be exercised judicially. The respondent gave the applicant generous opportunities to file its plea. The applicant failed to file its plea timeously despite the generous indulgences. The explanation given for the delay in appointing counsel after the default was discovered is not entirely satisfactory and unnecessarily delayed the filing of this application. There is no explanation by the state attorney whether it was possible to obtain deviations from procurement processes in order to expedite the appointment of counsel. It is also not explained why documents were not readily made available by the time that counsel was appointed. For instance, it is not explained why the transcription of the important meeting was only done in November and not earlier. Surely, the gathering of documents and information to enable counsel to advise and to prepare the application did not have to wait until counsel was eventually appointed.

[14] My view is that the respondent was justified in these circumstances to oppose the application. The applicant has been afforded the indulgence

³

See *South African National Roads Agency Limited v City of Cape Town* (66/2016) [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) (22 September 2016) paras 80-81 for the factors to consider in determining the interests of justice in condonation cases.

despite this bona fide opposition. The delay that will be occasioned by the indulgence granted will prejudice the respondent by causing further delays in the finalisation of its claim. It is deserving to compensate the respondent for this delay by an order for costs against the applicant.

[15] In the circumstances, I made the following order:

- (1) The bar is removed.
- (2) Condonation is granted for the late filing of the applicant's plea.
- (3) Leave is granted to the applicant to file its plea within five days of the date of this order.
- (4) The applicant is to pay the costs of the application.



**NH MAENETJE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of hearing : 7 June 2024

Date of judgment : 24 June 2024

For the applicant/defendant: M Mkhathswa

Instructed by the State Attorney, Johannesburg

For the respondent/plaintiff: MS Patel

Instructed by Alan Jose Inc