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

CASE NUMBER: 069787/2023

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

F. MARCANDONATOS

21 October 2024

In the matter between:

S[...] T[...] C[...]

Applicant

and

K[...] Z[...] K[...]

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 21 OCTOBER 2024

JUDGMENT

MARCANDONATOS AJ:

INTRODUCTION

- [1] This is an Interlocutory Application for an Order uplifting the Bar in terms of Rule 27 of the Uniform Rules of Court, as well as an Interlocutory Application in terms of Rule 30(1) of the Uniform Rules of Court to have the counterclaim dated **21 September 2023** and served on Applicant's attorney on **23 September 2023**, set aside as an irregular step. The parties agreed for me to hear and for them to argue, the two applications together.
- [2] In the Rule 27 Application, the husband (**S[...]** **T[...]** **C[...]**) is the Applicant therein and the wife (**K[...]** **Z[...]** **K[...]**) is the Respondent. In the Rule 30 application, the wife is the Applicant whilst the husband is the Respondent therein. Given that the respective roles of the Applicant and Respondent are reversed in the Rule 30 application, for ease of reference, I shall simply throughout this Judgment refer to the husband as the Applicant and the wife as the Respondent. However, for convenience of this Judgment, I shall deal with each application separately, commencing with the Rule 27 application and thereafter the Rule 30 application.

RULE 27 :- RELEVANT BACKGROUND

- [3] On **20 July 2023**, the summons was served on Applicant's appointed attorney who at all material times represented the Applicant.¹
- [4] On **21 July 2023**, the Applicant served a Notice of Intention to Defend the divorce action.²
- [5] On **15 August 2023**, the Applicant served a Notice in terms of Rule 35(14) on the Respondent's attorney.³ The Rule 35(14) has not been uploaded to CaseLines, however, the Respondent's reply thereto was⁴ and in terms whereof the Respondent objected to the production of the documents requested by Applicant on the grounds that they were not required for the

¹ Applicant's Founding Affidavit: par 4, CaseLines 06-7

² Applicant's Founding Affidavit: par 4, CaseLines 06-7 and Respondent's Answering Affidavit: par 10, CaseLines 06-10

³ Applicant's Founding Affidavit: par 5, CaseLines 06-7

⁴ CaseLines 0-76 to 0-78 and Respondent's Answering Affidavit, par 11, CaseLines 06-19

purpose of pleading, were not clearly specified and were not relevant to a reasonably anticipated issue in the divorce action. The Respondent's reply to the Applicant's Rule 35(14) Notice was served on the Applicant's Attorney on **22 August 2023** and uploaded to CaseLines on **29 August 2023**.⁵

[6] In terms of Rule 18 of the Uniform Rules of Court the Applicant was required to deliver his Plea on or before **18 August 2023**.⁶

[7] The Applicant did not do so.

[8] On **22 August 2023**, the Respondent's attorney wrote to the Applicant's attorney calling upon the Applicant to deliver his Plea, failing which a Notice of Bar would be served.⁷

[9] No Plea was delivered. As a result, on **28 August 2023**, the Respondent caused a Notice of Bar to be served on the Applicant's attorney.⁸

[10] No Plea was delivered within the extended time (5 days) demanded by the Notice of Bar.⁹ The Applicant was accordingly *ipso facto* barred.

[11] On **12 September 2023**, after the expiry of the Notice of Bar, the Applicant served his Plea to the Respondent's Particulars of Claim. Same was not uploaded to Court Online and CaseLines by the Applicant's attorney. As a result of the failure on the part of the Applicant or his legal representative to upload same to CaseLines, the Respondent's attorney uploaded the Applicant's Plea to CaseLines on **01 November 2023**.¹⁰

⁵ Respondent's Answering Affidavit, par 11, CaseLines 06-19

⁶ Uniform Rule of Court 1 where the word "deliver" means to serve copies on all parties and file the original with the Registrar.

⁷ Respondent's Answering Affidavit: par 12, CaseLines 06.1-5

⁸ Respondent Answering Affidavit: par 12, CaseLines 06.1-5; CaseLines 02-18 to 02-21

⁹ Rule 26 of the Uniform Rules of Court providing that any party may by notice served upon him require him to deliver such pleading within 5 days after the day on which the notice is delivered. Any party failing to deliver the pleading within the time referred to in the notice or such further period as may be agreed between the parties shall in the fault of filing such pleading, be *ipso facto* barred.

¹⁰ Respondent's Answering Affidavit: par 13, CaseLines 06-20

- [12] On **12 September 2023**, the Applicant's attorney, aware that Applicant was *ipso facto* barred, asked the Respondent's attorney what her stance was in regard to the late filing of the Applicant's Plea. The Respondent's attorney responded that the Applicant should bring an Application to uplift the Notice of Bar and for condonation.¹¹
- [13] On **22 September 2023**, the Applicant's attorney again requested that he be advised whether the Respondent was "*prepared to indulge my client so it will be unnecessary to launch a substantial Application*".¹²
- [14] On **27 September 2023**, the Respondent's attorney (*again*) informed the Applicant's attorney that the Respondent was not willing to agree to the upliftment of the Bar and that the Applicant's Counterclaim, which was served on the Respondent's attorney on **22 September 2023**, after service of the Plea, was an irregular step.¹³
- [15] On **06 November 2023**, another attorney, Nherera Attorneys, acting on behalf of the Applicant, uploaded to Court Online, an Application to uplift the Bar in terms of Rule 27 of the Uniform Rules of Court and sought an Order that the Respondent pay the costs of the Application.¹⁴ The Applicant's attorney who had appointed himself as attorney in terms of the Notice of Intention to Defend, did not withdraw as attorney of record. Nherera Attorneys did not, despite being requested to do so, appoint themselves as attorney of record but did deliver a Notice of their Withdrawal as Attorney of Record on **15 January 2024**.¹⁵
- [16] The aforesaid Application was not served on the Respondent's attorney despite her request to the Applicant's attorney to serve same upon her. Instead, the Applicant's attorney proceeded to set the Rule 27 Application down on the roll for hearing on **28 November 2023**. Despite the

¹¹ Respondent's Answering Affidavit, par 17.1, CaseLines 06-21

¹² Respondent's Answering Affidavit, par 17.2, CaseLines 06-21

¹³ Respondent's Answering Affidavit, par 17.3, CaseLines 06.22; annexure "AA3", CaseLines 06-29.

¹⁴ Notice of Motion: prayers 1 and 2, CaseLines 06-2

¹⁵ CaseLines 02-28 to 02-31

Respondent's request that the Application be served upon her and the failure on the part of the Applicant's attorney to do so, the Respondent briefed Counsel to protect her interests and Counsel for the Respondent appeared on **28 November 2023**. There was no appearance on behalf of the Applicant and the matter was removed from the roll.¹⁶

[17] The Application has still not been served on the Respondent's attorney, however, the Respondent nevertheless delivered an Answering Affidavit in respect of the application to uplift the Bar.

RULE 27 :- THE APPLICANT'S RELEVANT SUBMISSIONS

[18] In explanation for the delay in filing his Plea timeously, the Applicant states that:-

18.1. he was involved in the Zimbabwean election campaign and is a "*party official*";

18.2. the election took place on **23 August 2023** in Zimbabwe;

18.3. he did not foresee receiving a summons when he was "*out of town*";

18.4. he was not in a position to consult his lawyers and file pleadings timeously;

18.5. the pleadings were filed "*as soon as I could under difficult circumstances*".¹⁷

[19] The founding affidavit lacks any factual allegations addressing the Applicant's prospects of success. Upon enquiry by me during argument about this, Applicant addressed me thereon in terms of which he conceded that nothing

¹⁶ Respondent Answering Affidavit, par 5, CaseLines 06-18

¹⁷ Founding affidavit, par 13, CaseLines 06-8

stated by him in this application deals therewith and submitted that the only reference is at paragraph 5 of his Founding Affidavit¹⁸ wherein he states:

“5. On 15 August 2023 I filed a notice in terms of Rule 35(14) of the Uniform Rules requesting information necessary to plead to the allegations on the accrual.”

[20] In terms of the delay, the Applicant states that the period of time between the filing of the notice to defend and the plea, was 36 court days out of the prescribed 20 court days, making the delay only a fortnight, which is not an unreasonable amount of time and has not prejudiced the Plaintiff/Respondent.¹⁹

[21] Applicant further submitted that before this application, on **12 September 2023**, a letter was sent to the Respondent's attorney seeking agreement in respect of the removal of the bar, to which the Respondent's attorney replied on **13 September 2023**, advising that an application for the removal would be necessary.²⁰ Then again on **22 September 2023** another letter was sent requesting agreement. The Plaintiff/Respondent provided no explanation as to why she would oppose the upliftment.²¹

RULE 27 :- THE RESPONDENT'S OPPOSITION TO THE RELIEF CLAIMED BY APPLICANT

[22] It is submitted on behalf of Respondent that the Court should have regard to the following:- ²²

22.1. the Applicant is no ordinary litigant. He is an Advocate of this Court who one can accept is aware of the Rules of Court and the consequences of not delivering a Plea following service of a Notice of Bar and that the

¹⁸ CaseLines 06-7

¹⁹ Applicant's founding affidavit, par 8, CaseLines 06-7

²⁰ Applicant's Founding Affidavit, par 10, CaseLines 06-7

²¹ Applicant's Founding Affidavit, paras 11 and 12, CaseLines 06-8

²² Respondent's Heads of Argument: par 22, CaseLines 06.1-9 to 06.1 - 11

litigation history shows that the Application has had no regard for either the Rules of Court, the administration of justice or the rights of the Respondent and has acted in an extra-ordinary cavalier manner;

22.2. there is no proper and/or adequate explanation for the delay. The Applicant's explanation is in essence that he was away attending to other matters;

22.3. the Applicant has acted in a cavalier manner by:-

22.3.1. not serving the present Application on the Respondent's attorney of record;

22.3.2. not ensuring that his Plea was served timeously and delivered by uploading to Court Online and CaseLines;

22.3.3. not delivering his Counterclaim together with his Plea but served same only on **22 September 2023**, which has resulted in the Respondent, as the Applicant, bringing an Application in terms of Rule 30 of the Uniform Rules of Court;

22.3.4. failing to set the matter down or meet any of the requirements of the Practice Manual for the enrolment of the matter;

22.3.5. ignoring requests to attend settlement meetings.

RULE 27 :- VALUATION AND LEGAL ANALYSIS

[23] The Applicant/Defendant would have to satisfy the requirements to uplift the Bar.

[24] This should be formulated in terms of good cause being shown in respect of which there are two requirements, (1) the Defendant/Respondent must put forward a satisfactory explanation for the delay and (2) the

Defendant/Respondent must show that he has a *bona fide* defence. In respect of the first requirement, it was held by Schreiner JA²³ that the Defendant must at least furnish an explanation in full for his default comprehensively, such that the Court should be able to determine his motives. In respect of the second requirement, Brink J stated²⁴ that good cause will be considered as follows:

“In an application for removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the Court is to grant such an application where:-

- (a) the applicant has given a reasonable explanation for his delay;*
- (b) the application is bona fide and not made with the object of delaying the specific party’s claim; and*
- (c) there has not been a reckless or intentional disregard of the Rules of Court;*
- (d) the applicant’s action is clearly not ill-founded, and*
- (e) any prejudice caused to the opposition party could be compensated for by an appropriate order as to costs;*

The absence of one or more of these circumstances might result in the application being refused.”

[25] Good cause shown, has been expressed in **Du Plooy and Anwes Motors (Edms) Bpk**²⁵ wherein the Court held that in addition to showing “good cause” for the delay, an Applicant also should disclose a defence. The Applicant had to furnish a reasonable explanation for the delay. The Applicant had to show that the Application had been made *bona fide* without the intention of delaying the action.

²³ Silber v Ozen Wholesalers (Pty) Limited 1954 (2) SA 345 (a) at 353 (a)

²⁴ Smith N.O. v Brummer N.O. & Another 1954 (3) SA 352 OPD

²⁵ 1983 (4) SA 212 (O)

[26] This was confirmed by the SCA in **Ingosstrakh v Global Aviation Investments (Pty) Limited & Others**²⁶ wherein it was held that :-

*“generally, the concept of “good cause” entails a consideration of the following factors: a reasonable and acceptable explanation for the default, a demonstration that a party is acting bona fide, and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the Court may assess the explanation.”*²⁷

[27] Rule 27(1) of the Uniform Rules of Court provides that:

“In the absence of agreement between the parties, the Court may upon application on notice and on good cause shown, make an Order extending ... any time period prescribed by these Rules ... for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”

[28] Rule 27(2) of the Uniform Rules of Court further provides that:-

“Any such extension may be ordered although the application therefore is not made until the expiry of the time prescribed or fixed, and the court ... may make such order as to it seems meet as to the recalling, varying, cancelling of the results of the expiry of the time so prescribed or fixed”

[29] Albeit trite that a Court has a wide discretion in an Application for removal of a Bar depending upon the circumstances of each case, the inclination to grant such an Application has been articulated by the Constitutional Court and the test when considering an Application for Condonation.²⁸ Yacoob J on behalf

²⁶ (934/2019) [2021] ZASCA 69 (04 June 2021)

²⁷ Ibid, par 21

²⁸ Grootboom v National Prosecuting Authority & Another [2013] ZACC 37

of the majority of the Court in a judgment dismissing an Application for Condonation, said as follows:-

“[22] I have read the judgment of my colleague, Zondo J. I agree with him that, based on Brummer²⁹ & Van Dyk,³⁰ the standard for considering an application for condonation is the interests of justice. However, the concept “interest of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrates, it includes: the nature of the relief sought; the extent of the cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issues to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Dyk emphasises that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of the factors are relevant.

[23] It is now trite that the condonation cannot be had for the mere asking. The party seeking condonation must make out a case entitling it to the Court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the Rules or Court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.”³¹

Further at paragraph 51 Zondo J states that:

“The interests of justice must be determined with reference to all the relevant facts. However, some of the facts may justifiably be left out of consideration in certain circumstances. For example, where the delay

²⁹ Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC)

³⁰ Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as amicus curiae) 2008(2) SA 472

³¹ Von Abo v President of the Republic of South Africa 2009 (5) SA 345 (CC)

is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is nonexistent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

RULE 27 : - CONCLUSION

[30] Significantly and importantly, one must not lose sight of the fact that the Applicant is not an ordinary litigant. He is an admitted Advocate of this Court and is practising as such.

[31] Without derogating from this fact, but rather in the context thereof, the following is noted:

31.1. the Applicant elects not to accept service of the Divorce Summons personally and instead consents to substituted service thereof on his attorney, Howard Woolf Attorney;

31.2. the Divorce Summons is then duly served on the Applicant's nominated and appointed attorney on **20 July 2023**;

31.3. his nominated attorney served a Notice of Intention to Defend of the Divorce Summons on **21 July 2023**;

31.4. in bringing this Application the Applicant does so *via* another attorney not formally appointed in terms of a Notice of Appointment and/or Substitution;

31.5. the Applicant files a Founding Affidavit in support thereof, consisting of three pages and does not serve the Founding Affidavit on the Respondent's Attorney;

31.6. he elects not to file a Replying Affidavit;

31.7. the Applicant chose to represent himself and argue this Application (*with the blessing of his Attorney*), yet conflates the issues by not only arguing the matter as an Advocate, but also attempts to lead evidence from the bar and/or via his Heads of Argument;

31.8. he argues that the delay in respect of the service of his plea (*not uploaded on CaseLines*) was a mere "*six days*", however, this is not correct as the service of his plea (*after the expiry of the Bar on 4 September 2023*) was served six **court** days thereafter, i.e. served on **22 September 2023**;

31.9. notwithstanding his concession that once the *dies* in respect of the Bar expired that he was *ipso facto* barred, as well as the Respondent's clear written advices to his Attorney that no indulgence would be provided, which request for indulgence was only made after the plea was served, he only launched this Application in terms of Rule 27 of the Uniform Rules of Court on **6 November 2023**, yet not served on the Respondent – only filed on CaseLines i.e. some two months and almost weeks after the Notice of Bar;

31.10. in paragraph 13 of the Applicant's Founding Affidavit he states:

"13. *The reason why I could not file pleadings within 20 days was because I was out of town in the middle of the Zimbabwean election campaign. The Plaintiff knew that I am a party official and would be involved in that election campaign. The election took place on 23 August 2023 in Zimbabwe. I did not foresee receiving summons in a divorce action at the time that I would*

be out of town. I was not in a position to consult with my lawyers and file pleadings on time. The pleadings have been filed as soon as I could under difficult circumstances."³²

31.11. it therefore follows in terms of the above statement that the Applicant only explains the delay in serving his Plea within the “*20 days*”, i.e. from service of his Notice to Defend (served on **21 July 2023**) to **18 August 2024** when his Plea was due and then provides a flimsy and bald explanation with no details provided of exactly where he was, and if out of town outside of the Republic of South Africa, when he left South Africa, when he returned to South Africa and why it is that he was not able to communicate with his attorney and/or could not give him instructions, yet was nonetheless able to do so in respect of the Notice of Intention to Defend and the Rule 35(14) Notice;

31.12. the Applicant fails to detail his prospects of success and/or his alleged prejudice and his reference to paragraph 5 of his Founding Affidavit in support of prospects of success, in my view, falls short of a **full** explanation as to his prospects of success;

31.13. given that the Rule 35(14) Notice was not uploaded onto CaseLines, only annexed to his Plea, which is not before this Court, *ergo*, same is therefore not available to me for consideration;

31.14. whilst the Respondent attempts to hide behind the Rule 35(14) Notice served on the Respondent as a requirement to enable him to plead to the allegations on the accrual, he only serves the Rule 35(14) Notice three court days before his Plea is due and ostensibly during the period he was “*out of town*”, without any explanation of how he was able to provide instructions to his Attorney in terms thereof, but not to discuss the status of his divorce action, bearing in mind that the importance of and purpose of a full explanation for the delay, sufficiently so, is to

³² Founding Affidavit, par 13, CaseLines 06-8

enable this Court to understand how it really came about and to assess his conduct and motives; and

31.15. it seems that in the Respondent's mind, he is automatically entitled to the relief he seeks given the short delay described by him, however, regardless thereof and even if the delay is short, the Respondent still needs to deal with the remaining requirements, for example, his prospects of success, to repeat, so that this Court can assess his conduct and motives, yet the Respondent has lost sight of the remaining requirements, which he failed to deal with.

[32] The Applicant furthermore argued that he has a constitutional right to access the Court in his own divorce action, which includes the right to plead and give evidence with reference to Section 34 of the Constitution which states:

“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.”³³

[33] However, in the case of **Brümmer v Minister for Social Development and Others**,³⁴ handed up by Respondent's Counsel during argument, and in support of countering the Applicant's submissions in regard to Section 34 of the Constitution, and by which decision I am bound, Ngcobo J held that:

“[49] The High Court found that the 30-day period is 'grossly inadequate to enable an ordinary applicant' to approach a court for relief. It held that the fact that there is an opportunity for condonation matters not, what does 'is the adequacy of the opportunity and not what he may do in order to retrieve the lost opportunity'. It therefore held that s 78(2) constitutes a limitation of the right of access to court which is guaranteed in s 34 and that this limitation is unreasonable and unjustifiable.”

³³ Applicant's Heads of Argument, par 32 and 33, CaseLines 03.1-10

³⁴ Supra fn 29

[51] *The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The 'enquiry turns wholly on estimations of degree'. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive."*

[34] I find the Applicant's failure to have communicated with his attorney conducting the litigation for him and to discuss the matter with his attorney and find out what was happening, quite incomprehensible.

[35] Furthermore, the Applicant appears to have been dismissive in:

35.1. not filing the Rule 35(14) Notice onto CaseLines;

35.2. not serving this application on the Respondent;

35.3. not filing a Replying Affidavit;

35.4. arguing from the Bar in respect of evidence not in his Founding Affidavit;

- 35.5. generally thereby demonstrating a lack of regard to the Uniform Rules of Court; and
- 35.6. not adhering to the trite requirements in respect of an application to remove a bar and in respect of which it was incumbent upon him to do so, yet he failed to do so; and
- 35.7. not providing all relevant facts in the interests of justice, which is a double-sided coin, i.e. as much as the interests of justice must be taken into account when considering this Application, equally, the interests of justice must also be taken into account in respect of the Respondent and the Applicant's failure to comply with the Rules of Court and the requirements of the removal of the Bar, collectively severely prejudices the rights of the Respondent.

[36] The onus is on an Applicant to prove the requirements that are trite.

[37] It appears to me that the Applicant's affidavit leaves a significant deficiency in the proof required to discharge his onus and that the explanation given by the Applicant falls short of the requirements, which explanation for the delays are superficial and unconvincing.

[38] Whilst a Court should normally be careful to see that a litigant is not disadvantaged by virtue of his failure to observe the Rules that govern litigation, on consideration of the above and that the Applicant is not an ordinary litigant but a practising Advocate, presumably having an understanding of the proper way to conduct litigation, in my view, he has failed to discharge his onus.

[39] After all and as stated in the matter of Grootboom at paragraph 32:

"The rules of court serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively. Invariably this will lead to the orderly management of our court rolls, which in turn will

bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever increasing costs of litigation which if left unchecked will make access to justice too expensive.”

And then at paragraph 33 wherein reference is made to the matter of **eThekwini**³⁵:

“The conduct of litigants failing to observe rules of this court is unfortunate and should be brought to a halt. This term alone, in eight out of 13 matters set down for hearing, litigants fail to comply with the time limits in the rules and directions issues by the Chief Justice. It is unacceptable that this is the position.”

[40] It is further noted that the Applicant refers to and relies upon the matter of **Ndivhoniswani Aaron Tshidzumba and Others v Special Investigation Unit**³⁶ which matter redefines the legal position that condonation is not there for the taking and setting out the trite requirements in respect thereof, yet the Applicant himself fails to adhere thereto in terms of his Founding Affidavit in support of the relief sought.

[41] Given the Applicant's contentions as detailed above that the Applicant is an Advocate and has provided no reasonable explanation for the delay and/or his prospects of success, it therefore follows that the only Order would be to deny the Application for the upliftment of the Bar on the basis that the Applicant has failed to make out a case that it is in the interests of justice that condonation be granted and that the Notice of Bar be uplifted.

RULE 27 :- COSTS

³⁵ eThekwini Municipality v Ngonyama Trust 2014 (3) SA 214 (CC)

³⁶ 10124/2020 annexed to Applicant's Heads of Argument as Annexure "TC2", CaseLines 03-22 to 03-32

[42] The norm is that costs follow the event. I am inclined to grant a costs order in the Respondent's favour.

RULE 27 :- ORDER

It is accordingly ordered that:-

[1] the Application is dismissed with costs;

[2] the Applicant's Plea dated **11 September 2023** is struck out.

RULE 30 :- RELEVANT BACKGROUND AND PARTIES' SUBMISSIONS

[43] On **20 July 2023**, the summons in the Divorce Action was, by agreement, served by way of substituted service on the Applicant's erstwhile attorney of record.³⁷

[44] On **21 July 2023**, the Applicant served a Notice of Intention to Defend the Divorce action.³⁸

[45] In terms of Rule 22(1), read together with Rule 24(1) of the Uniform Rules of Court, the Applicant's Plea and Counterclaim, if any, was required to be delivered by no later than **21 August 2023**, being 20 days after the Applicant's Notice of Intention to Defend.³⁹

[46] The Applicant failed to deliver his Plea and Counterclaim within the timeframes prescribed in the Rules of Court. As a result of his failure to deliver a Plea, the Respondent caused a Notice of Bar to be served on the

³⁷ Respondent's Founding Affidavit, par 3, CaseLines 03-5

³⁸ Respondent's Founding Affidavit, par 4, CaseLines 03-5

³⁹ Uniform Rule of Court 1 "**deliver** means to serve copies on all parties and file the original with the Registrar." Uniform Rule of Court 22 provides as follows:

"Plea

- (1) *Where a defendant has delivered notice of intention to defend, he shall within 20 days after the service upon him of a declaration or within 20 days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention or with or without application to strike out"*

Applicant's attorneys on **28 August 2023**⁴⁰ The Notice of Bar was uploaded to Court on Line on **29 August 2023**⁴¹.

[47] Pursuant to delivery of the Respondent's Notice of Bar, the Applicant's Plea and Counterclaim, if any, was due on **4 September 2023**, being 5 days after delivery of the Notice of Bar. The Applicant failed to deliver his plea within the timeframes set out in the Respondent's Notice of Bar.⁴²

[48] On **12 September 2023**, 15 days after the Applicant's Plea was originally due and 5 days after the expiry of the period stipulated in the Respondent's Notice of Bar, the Applicant caused his plea to be served on the Respondent's attorney.⁴³ The Respondent's Plea was uploaded to CaseLines on **1 November 2023**.⁴⁴

[49] The Applicant's Plea was served in the absence of an agreement between the parties or an Order of Court entitling him to serve his Plea. Accordingly, the Applicant was *ipso facto* barred from delivering his Plea.

[50] In the absence of any agreement between the parties or an Order of Court, on **22 September 2023**, the Applicant caused his Counterclaim⁴⁵ to be served on the Respondent's attorney.

[51] Following the Applicant's irregular or improper delivery of the Counterclaim, on **27 September 2023**, the Respondent caused a Notice in terms of Rule 30(2)(b) to be served upon the Applicant's attorney.⁴⁶

[52] The Rule 30(2)(b) Notice informed the Applicant that the service of the Counterclaim constituted an irregular or improper step and succinctly

⁴⁰ Respondent's Founding Affidavit, par 6, CaseLines 03-5

⁴¹ Notice of Bar, CaseLines 02-18 to 02-21

⁴² Respondent's Founding Affidavit, par 7, CaseLines 03-5

⁴³ Respondent's Founding Affidavit, par 8, CaseLines 03-6

⁴⁴ *Supra*, fn 10

⁴⁵ *Supra*, fn 7

⁴⁶ Respondent's Founding Affidavit, par 11, CaseLines 03-7, and Rule 30(2) Notice, CaseLines 02-6 to 02-10

specified the particulars of the irregularity or impropriety to be *inter alia*, as follows:

52.1. service of the Applicant's Counterclaim did not comply with Rule 24(1) in that:

52.1.1. the Counterclaim was not delivered together with the Plea; and

52.1.2. the Applicant did not consent to the delivery of the Counterclaim separate from the Plea, nor was there an Order of Court to that effect;

52.2. the Counterclaim was not signed by an attorney with Rights of Appearance as directed by Rule 18(1) of the Uniform Rules of Court.

[53] The Rule 30(2)(b) notice afforded the Applicant a period of 10 days until **11 October 2023**, within which to remove the cause of complaint.

[54] The Applicant failed to remove the cause of complaint.

[55] The Applicant opposes the Rule 30 Application and raises several defences.

[56] The first defence raised by the Applicant is that the Rule 30 Application was not timeously brought to his attention and blames his former attorneys of being tardy in bringing the present application to his attention.⁴⁷ In support of his allegation that his erstwhile attorneys were tardy, the Applicant attaches an email⁴⁸ dated **24 October 2023**, which he sent to his erstwhile attorneys.

[57] The second defence raised by the Applicant is that the Applicant's erstwhile attorneys and therefore the Applicant himself, had conceded that he was under Bar and that he would launch an Application for the upliftment of the

⁴⁷ Applicant's Answering Affidavit, par 4, CaseLines 03-17

⁴⁸ Applicant's Answering Affidavit, Annexure "TC1", CaseLines 03-20

Bar which he has subsequently done in terms of the Application in terms of Rule 27 to uplift the Bar which is opposed.

[58] The third defence raised by the Applicant is that the Respondent failed to disclose correspondence in which he concedes that he is under Bar and intends to launch an application to uplift the Bar.⁴⁹

[59] The fourth defence raised by the Applicant is that his attorney, Mr Bryer, is a senior attorney with decades of experience and therefore denies that his Counterclaim falls foul of Rule 18(1) of the Uniform Rules of Court.⁵⁰

RULE 30 :- VALUATION AND LEGAL ANALYSIS

[60] Rule 30 of the Uniform Rules of Court provides as follows:

“30. Irregular proceedings

- (1) *A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
- (2) *An application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if:-*
 - (a) *the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
 - (b) *the applicant has, within 10 days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 days;*

⁴⁹ Applicant's Answering Affidavit, par 5(e), CaseLines 01-18,

⁵⁰ Applicant's Answering Affidavit, par 5(f), CaseLines 03-18

(c) *the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of sub-rule (2).*

(3) *If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or against some of them, and grant leave to amend or make any such order as to it seems meet.”*

[61] Rule 30(3) of the Uniform Rules of Court contemplates a two-stage process. First, a Court must be satisfied that the proceedings or step is irregular and improper. Second, the Court is required to make an order. Rule 30 confers wide powers on a court hearing a Rule 30 application. The Court may set aside the proceedings in their entirety or in part, grant leave to amend or make any order as to it deems meet.⁵¹

[62] The Rule is intended to deal with matters of form and not substance. It deals with irregular steps taken by the parties during the course of litigation where the irregularity emanates from an inappropriate use of the Rules of Court.⁵²

[63] In terms of Rule 24(1):

*A defendant who counterclaims **shall, together with his plea**, deliver a claim in reconvention ...”* (my emphasis)

[64] The requirement that the Plea be delivered together with a Counterclaim, if any, does not entitle a Defendant to deliver a Counterclaim whenever he deems it appropriate. The purpose of the Rule is to avoid considerations of prejudice, postponements and costs.⁵³

⁵¹ Afrocentrix Projects and Services (Pty) Limited t/a Innovative Distribution v State Information Technology Agency SOC Ltd and Others [2023] ZACC 02

⁵² Afrocentrix Projects and Services *supra*

⁵³ Searle v Searle 1967 (2) SA 19 (O)

[65] Whilst Rule 24(1) provides that a Counterclaim must be delivered simultaneously with the Plea, it also provides flexibility for the Counterclaim to be delivered at a later stage, however, if so, this is only permitted where the Plaintiff has agreed to such later service and if the Plaintiff refuses to agree, it shall only be permitted where the Court has countenanced the late delivery.

[66] It is common cause that:

66.1. the Applicant's Counterclaim was not served simultaneously with the Plea;

66.2. the Applicant's Counterclaim was served at a time when he was *ipso facto* barred;

66.3. the Applicant did not have the Respondent's consent to serve his Counterclaim at a later stage, separate from the Plea;

66.4. the Applicant did not have leave of the above Honourable Court to serve his Counterclaim separate from the Plea;

66.5. the Counterclaim was served outside the timeframes permitted in the Rules of Court; and

66.6. the Counterclaim was only delivered (*uploaded to CaseLines*) on **1 November 2023**.

[67] In the circumstances, the Applicant's Counterclaim is an irregular or improper step for failure to comply with the provisions of Rule 24(1).

[68] The Respondent has complied with the provisions of Rule 30 of the Uniform Rules of Court in that she has not taken a further step in the cause with knowledge of the irregularity and she did within 10 days of becoming aware of

the step taken by the Applicant, by notice, afforded him an opportunity of removing the cause of complaint within 10 days.⁵⁴

- [69] She delivered her application within 15 days after the expiry of the 10 day period to remove the cause of complaint.⁵⁵
- [70] In terms of Rule 18(1), every pleading, *“except a summons shall be signed by both an advocate and an attorney or, in the case of an attorney who, under Section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995) has a right of appearance in the Supreme Court, only by such attorney.”*.
- [71] The purpose of Rule 18(1) is to ensure that by signing a pleading the attorney or advocate confirms to the court that he/she has been scrupulous in preparing the pleading.⁵⁶ This is intended to ensure that all pleadings are diligently prepared and contain clear and concise statements so as to enable the other party to ascertain what case they have to meet.
- [72] Where an attorney, with rights of appearance signs pleadings not as an individual but on behalf of the firm representing the litigant, it is appropriate for the attorney to sign the pleadings twice, once as an attorney (*certified in terms of Section 4(2) of the Right of Appearance in Courts Act*) and then again on behalf of the firm of the attorneys.
- [73] The Right of Appearance in Courts Act was repealed by the Legal Practice Act, 28 of 2014 with effect **1 November 2018**.
- [74] Section 25(3) of the Legal Practice Act has the same effect as Section 4(2) of the Right of Appearance in Courts Act.

⁵⁴ Notice to Remove Cause of Complaint in terms of Rule 30(2)(b), CaseLines 02-10 to 02-14

⁵⁵ Application delivered on 20 October 2023, Notice in terms of Rule 30, CaseLines 03-1

⁵⁶ Defendant's Counterclaim dated 21 September 2023 at *Motuswai v Road Accident Fund 2013* (3) SA 8 (GSJ) at 14 H

[75] The Applicant's Counterclaim was signed electronically by Eric Bryer, the Respondent's attorney.⁵⁷

[76] The signature of Eric Bryer is signed only once on the pleading and is appended on behalf of / in association with Howard Woolf.

[77] The Counterclaim does not state that Erick Bryer has rights of appearance in terms of Section 4(2) of the Right of Appearance in Courts Act or its successor (*Section 25(3) of the Legal Practice Act*).

[78] In the circumstances, the Applicant's Counterclaim constitutes an irregular step as it falls foul of Rule 18(1).

[79] In respect of the Applicant's defences (1 to 4 referenced hereinabove), I align myself with the Respondent's stance⁵⁸ that none assists him in that:

79.1. he has mischaracterised the Respondents' application and purpose of the application and has therefore not put before the Court any credible defence;

79.2. the Respondent's claim does not relate to his delayed response to the Rule 30 application but rather his non-compliance with Rule 18(1) and 24(1) of the Uniform Rules of Court;

79.3. the e-mail correspondence dated **24 October 2023** does not address his non-compliance with the Rules as fully set out in the Respondent's Notice in terms of Rule 30(2)(b);

79.4. the defence of tardiness on behalf of the Applicant's erstwhile attorneys is, according to the Applicant, supported by an allegation that his new

⁵⁷ Applicant's Replying Affidavit, par 4, CaseLines 03-17

⁵⁸ Respondent's Heads of Argument, paragraphs 33-57, CaseLines 03.1-25 to 03.1-30

attorney,⁵⁹ had difficulty in uploading documents because there was a problem with the online filing system. This, however, is irrelevant. The Applicant was *ipso facto* barred from delivering a plea and his counterclaim was not delivered simultaneously with delivery of the Plea. Furthermore, the Applicant does not set out which documents his new attorney had a problem with uploading and how and why such documents are relevant to this interlocutory application and the allegation in respect of his new attorney and the problem he experienced, are not supported by a confirmatory affidavit by the new attorney and therefore constitutes inadmissible hearsay evidence;

- 79.5. the Applicant's intention to make application for the upliftment of the Bar is irrelevant to these proceedings as these proceedings do not relate to the lateness of the service of the Applicant's plea, which is dealt with in the application in terms of Rule 27 referred to hereinabove and rather relates to his non-compliance with Rule 18(1) and 24(1) in relation to his counterclaim;
- 79.6. it is irrelevant that he intended and has subsequently launched an application for the upliftment of the Notice of Bar, given that this application precedes the application to uplift the Notice of Bar;
- 79.7. the Applicant cannot cure his current non-compliance with Rule 24(1) by uplifting the Notice of Bar and would need to ask this Honourable Court for leave, in term of Rule 24(1), to serve his Counterclaim;
- 79.8. even if the Applicant succeeded in his application to uplift the Notice of Bar and this Court was inclined to condone the late filing of his Plea (which he did not), this will not cure the difficulties in respect of the Applicant's Counterclaim as the Counterclaim remains an irregular step;

⁵⁹ Nherea Attorneys who began dealing with the main action and interlocutory applications in or about late October/Early November 2023. They never delivered a notice of appointment as attorneys of record. They did, however, deliver a notice on 15 January 2024 withdrawing as attorneys of record on behalf of Applicant (Notice of Withdrawal as Attorney of Record, CaseLines 02-28 to 02-31)

79.9. the Applicant himself does not attach a copy of the correspondence he complains of that the Respondent failed to attach and dated **24 October 2023**;

79.10. to the extent that Applicant accuses the Respondent of misleading this Honourable Court, the accusations are not supported by evidence and are irrelevant to this application;

79.11. Mr Bryer's experience is irrelevant as Rule 18(1) does not deal with the experience of an attorney who signs the pleading, but rather whether such an attorney has rights of appearance in terms of the Superior Courts of South Africa and consequently, the authority to sign pleadings, which the Applicant failed to address and no confirmatory affidavit from Mr Bryer setting out that he has rights of appearance are attached and/or referred to.

RULE 30 :- CONCLUSION

[80] The Applicant's Counterclaim was not delivered simultaneously with the Plea. The delivery of the Counterclaim was done without the Respondent's consent or the leave of this Court.

[81] Delivery of the Counterclaim took place at a time that the Applicant was *ipso facto* barred from delivering a Plea.

[82] Furthermore, the Counterclaim was not signed in accordance with the provisions of Rule 18(1).

[83] The Applicant has not set out a reasonable or acceptable explanation for his failure to comply with the Uniform Rules of Court.

[84] In the circumstances I find that the Respondent has made out a case for the relief set out in the Notice of Motion.

RULE 30 :- COSTS

[85] The norm is that the costs follow the event, I am inclined to grant a costs order in the Respondent's favour.

It is accordingly ordered that:-

[1] the Defendant's Counterclaim dated **21 September 2023** and served on the Plaintiff's attorney of record on **22 September 2023** is an irregular proceeding and is set aside;

[2] the Defendant is ordered to pay the costs of this application.

F. MARCANDANATOS

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 22 July 2024

Judgment: 21 October 2024

Appearances

For Applicant: Advocate Katherine Harding-Moerdyk

Instructed by: Philippa Kruger Attorneys

For Respondent: Advocate Simba Chitando

Instructed by: Howard S Woolf