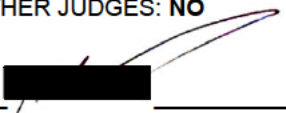


REPUBLIC OF SOUTH AFRICA



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

Case Number: **2022-026280**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
4 November 2024	
DATE	SIGNATURE

In the matter between:

ARTE LIFESTYLE GROUP (PTY) LTD

Applicant

and

ZAKHELE MKHIZE N.O.

Respondent

In Re:

ZAKHELE MKHIZE N.O.

Plaintiff

and

ARTE LIFESTYLE GROUP (PTY) LTD

First Defendant

CINEMA ARCHITECTS CC

Second Defendant

AUDI SNYMAN INTERIOR DESIGN CC

Third Defendant

Date of Hearing: 29 October 2024

Date of Judgment: 4 November 2024

JUDGMENT

ESTERHUIZEN, AJ

Introduction

- [1] This is an application in terms of which the Applicant seeks an order whereby the late filing of its plea is condoned and the bar, delivered by the Respondent, uplifted.

Background

- [2] What has given rise to this application is the Applicant being placed under bar for failing to file its plea timeously. The relevant background that resulted in the Applicant being placed under bar can be summarised as follows:

- . The Respondent instituted an action against three separate defendants, one of whom is the Applicant in this application, during September 2022. The Applicant entered an appearance to defend the action on 7 October 2022. The Respondent's erstwhile attorneys of record delivered a notice of bar on 25 April 2023.
- . The Applicant's attorney became aware of the notice of bar on 26 May 2023 during a telephone call with the Respondent's present attorney of record. The Applicant's attorney immediately, on being so advised, contacted the Respondent's erstwhile attorney of record. Correspondence was exchanged pursuant to which the Applicant's plea was delivered on 29 May 2023.
- . Following the delivery of the plea, the Applicant's attorney telephonically requested the respondent's previous attorneys of record on whether the Respondent had applied for default judgment. It was confirmed to him that the Respondent had not applied for default judgment and that as long as the plea is served, they would not have a problem with the late filing of the plea. There is a dispute regarding this averment but ultimately it is of no consequence. Notwithstanding this the Applicant's attorney of record received the Respondent's application for default judgment on 21 June 2023. On 24 July 2023, the Respondent's attorney of record confirmed that the Respondent would not condone the late delivery the

Applicant's plea. It is pursuant hereto that this application became necessary.

Condonation for late filing of the respondent's answering affidavit.

- [3] Before dealing with the substance of the matter the First Respondent's application for condonation for the late filing of his answering affidavit in this matter must be considered.
- [4] The reason for the late filing is explained by the Respondent as being due to the application only coming to his attention after the matter had already been enrolled on the unopposed roll. This was so, he states, because when the application was served on 7 August 2023, the Applicant served its application on him via email and the sender was a Ms Pienaar, ("Pienaar") employed by the Applicant's attorney. Because Pienaar had never emailed him before the email did not reach his inbox but was in fact reverted to his "Junk mail" folder.
- [5] It was only on 3 October 2023, that he noticed that Pienaar had also sent an email on 21 September 2023, which was a follow up email to the 7 August 2023. It was at this stage that this application by Applicant was moved from the unopposed roll to the opposed roll.
- [6] The Applicant, however, argues that this explanation does not hold water as a read receipt in respect of the email of 7 August 2023 was received from the Respondent's attorney of record indicating that it had been read. Furthermore, the email of 18 September 2023, attaching the notice of set down, was dispatched to the Respondent's attorney, by the Applicant's attorney of record himself which had previously communicated with the Applicant and therefore there is no reason why it would not have been delivered.
- [7] After the application was removed from the unopposed roll the Respondent filed his answering affidavit and the Applicant its replying affidavit.
- [8] No prejudice can be said to be caused if condonation is to be granted as the arguments presented have been crystalised on the papers. The matter is

properly before me, and it would not be in the interest of justice if condonation is to be refused. The late filing can be remedied with the appropriate cost order. I therefore grant the Respondent condonation for the late filing of the answering affidavit.

Discussion

[9] Turning now to the application before me. Rule 27(1) of the Uniform Rules of Court provides:

“In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time 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.”

[10] The Applicant is required to show good cause to place the Court in a position to consider whether it should exercise its discretion to grant the relief sought by the Applicant. In *Gosstrakh v Global Aviation Investments (Pty) Ltd and Others* 2021 (6) SA 352 (SCA) para 21 the Supreme Court of Appeal (“SCA”) held that:

“[G]enerally, 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 prospects of success. Good cause requires a full explanation of the default so that the court may assess the explanation.”¹ (Emphasis added)

¹ Also see *Ingosstrakh v Global Aviation Investments (Pty) Ltd and others* [2021] 3 All SA 316 (SCA) the Supreme Court of Appeal in dealing with Rule 27 concluded:

*“[21] Rule 27 of the Uniform Rules deals with the extension of time, removal of bar and condonation. In terms of rule 27(3) the court may, on good cause shown, condone any non-compliance with the Rules. Thus, in order to succeed in this regard, *Ingosstrakh* would be expected to show good cause why condonation should be granted for its failure to deliver its plea. 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*

[11] I consider these requirements in turn.

Reasonable and acceptable explanation for the default and Applicant's Bona fides

[12] The Applicant filed its notice to defend on 7 October 2022 indicating its intention to defend the action. However, the Applicant's failure to file its plea thereafter resulted in the Respondent delivering a notice of bar on 25 April 2023 some six months later.

[13] During the time of the delivery of the notice of bar, various correspondence and court documents were exchanged between the Respondent and the remaining defendants. This pertained specifically to the exception delivered by the second defendant and an application to dismiss the Respondent's action.

[14] The Applicant's attorney admitted that because of this he completely 'missed' the email from the Respondent's erstwhile attorney of record which was sent on 25 April 2023 and which contained the notice of bar. The Applicant's attorney stated that he did not expect the delivery of a notice of bar, particularly given the fact that the second defendant's application for the dismissal of the Respondent's action was pending.

[15] As such, the Applicant's attorney, did not react to the notice of bar. But immediately on becoming aware of the bar the Applicant filed his plea within three days thereafter.

full explanation of the default so that the court may assess the explanation. I consider each of the above requisites, in turn.

[22] *With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence of Ingosstrakh's failure to file its plea. With regard to the former, Ingosstrakh served its notice of intention to defend the action on 30 September 2015. It therefore had up to 28 October 2015 to file its plea. There is simply no explanation whatsoever why a plea was not filed during that period." (Emphases added)*

[16] Having regard to this explanation I am of the view that the Respondent has put forward a reasonable and acceptable explanation for the delay. There is no suggestion nor evidence that the Applicant's actions were wilful. If anything, the acceptance of fault points to the *bona fides* of the Applicant's attorney.

[17] The Respondent argued that there should not only be an explanation from date of bar until the date of the plea but also for the period between the notice of intention to defend and the date which the bar was served. In this instance it was a period of 6 months. The Applicant argued that on the papers before me it is evident that the interlocutory challenges by the co-defendants, which were still ongoing at the time the bar was sent, could result in the dismissal of the Respondent's claim which would, so he argued, have had an impact on whether or not a plea was required. Other than this the papers make no mention of the period preceding the notice of bar. The Applicant argued that failure to deal with the period before the bar was filed is not an absolute bar on its application to uplift the bar. The Applicant, correctly so, argued that the court must not look at the adequacy of the explanation of the default or failure in isolation but in the light of the nature of the defence being raised. Even where a party is in wilful default it will not be an absolute deterrent for a court to exercise its discretion in favour of the party seeking relief. In *Harris v Absa Bank LTD t/a Volkskas 2006 (4) SA 527 (T)* the full bench of this division held:

*“[9] A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once wilful default is shown the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist. In the words of Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E)* at 708G,*

' . . . the wilful or negligent or blameless nature of the defendant's default now becomes one of the various considerations which the courts will take into account in the exercise of their discretion to determine whether or not good cause is shown'.

Also see *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300G - 301E.

[10] *A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.*

'Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole.'De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd (supra) at 711D.

[11] *In amplifying the nature of the preferable approach in an application for rescission of judgment, I can do no better than quote Jones J with whose dicta I am in respectful agreement:*

'An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties...He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of

the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.'(At 711F - I.) Also see *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W) at 464G - 466B; *Buckle v Kotze* 2000 (1) SA 453 (W) at 458D et seq; *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 1180J - 1181E."

- [18] Having regard to the authorities and applying it to the facts of this matter I cannot conclude that because the Applicant did not deal with the period prior to the bar is on its own reason enough to dismiss the Applicant's application. It is also a relevant consideration that the Applicant should not be prejudiced for the failure of his attorney to timeously file the plea. In *Buckle v Kotze* 2000 (1) SA 453 (W) a full court remarked:

"Returning to the facts of this case it is apparent that the conduct of the appellant's attorney caused the delay. The question is was the conduct of such a nature that it precludes the appellant from obtaining a rescission of judgment as the magistrate found. In my view, the facts in the present case are distinguishable from those in Du Plessis v Tager 1953 (2) SA 275 (O) on which the magistrate relied for his finding. In that case the attorney who was to blame for the delay furnished no explanation at all for such delay. In the present case the attorney has furnished an explanation which, although open to criticism, still constitutes an explanation as to what occurred which demonstrates no wilfulness on his part or that of his client, the appellant.

It can furthermore not be expected of a lay client who has entrusted the defence of his case to a qualified and competent attorney to sit on his attorney's shoulders and to check whether technical aspects like time limits have been observed (see Webster and Another v Santam Insurance Co Ltd 1977 (2) SA 874 (A) at 883G).

...

*It only remains to consider the attorney's failure to react to the notices of bar. Mrs Chamberlain's benevolent consideration of her employer in his overworked state may have been misplaced and be regarded as negligent conduct but such negligence should not necessarily debar the appellant from relief where he was in no way to blame. (See *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 23C.) There is, in my view, no question of Mr Pienaar or his staff's delay being imputed to the appellant who has always, it would seem, sought to defend the respondent's claim.*

.....

*In my view the effect of the magistrate's refusal of the application for rescission would be to penalise the appellant for his attorney's failure to file a plea within the time allowed. The appellant's conduct, which clearly shows his intention to defend the respondent's claim, does not support any inference that the application was not bona fide or that there is no bona fide defence. There are no facts to support the magistrate's finding of wilfulness which, so Franklin J held, 'import the notion of a deliberate act by the perpetrator who knows what he is doing, intends what he is doing, and is willing that the consequences of his default should follow'. (See *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 (2) SA 709 (W) at 713D.) I do not think that however gross the negligence of Mr Pienaar or his employees may have been their conduct can be said to fall within the concept of a wilful act or default."*

- [19] However, even though the mere fact that Applicant failed to provide an explanation for the period prior to the delivery of the notice of bar is not sufficient reason to dismiss its application it is not the end of the matter as the Applicant still needs to make out a case that he has a *bona fide* defence.

Bona fide defence which prima facie has some prospects of success.

- [20] In *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* 2017 JDR 1655 (SCA) [28]; the Supreme Court of appeal, in dealing with the substance of a *bona fide* defence, stated that:

“[28] It is trite law that an applicant in an application for rescission of judgment need only make out a prima facie defence in the sense of setting out averments which, if established at trial, would entitle her or him to the relief asked for. Such an applicant need not deal fully with the merits of the case and produce evidence that shows that the probabilities are in its favour. That is the business of the trial court. The object of rescinding a judgment is to restore the opportunity for a real dispute to be ventilated.”

[21] The Applicant raises various possible defences in respect of the Respondent's claims. The defences can be summarised as follows:

- . The Applicant, at all times, complied with its obligations in terms of the written agreement concluded between it and the Respondent.
- . The Applicant is not indebted to the Respondent.
- . The agreement between the Applicant and the Respondent had been terminated and thereafter the Respondent dealt directly with the respective third parties pertaining to the services and not via the Applicant. In the circumstances, in light of the termination of the relationship between the Applicant and the Respondent, the Applicant cannot be held liable for any breaches of these third parties.
- . The Respondent's claims, as pleaded in the amended particulars of claim, indicate that the Respondent allegedly paid certain moneys for services from a third party 'sub-contractor' which services, on the Respondent's version were not rendered but whereas the services were in fact rendered by the second defendant.
- . The Respondent's amended particulars of claim cannot stand because the Respondent:

- . has failed to plead compliance with the notice clause in the written agreement, in considering the fact that the Respondent relies upon the written agreement to substantiate its alleged claim against the Applicant;
 - . has failed to plead the basis on which the respective sums, as to the two claims, would automatically become due, owing and payable; and
 - . has failed to correctly plea the cause of action in respect of both claims.
- . The agreement contains a compulsory arbitration clause which means that the Respondent could never have instituted the current claim in court in the first place.

[22] The Applicant is not required to prove these defences at present but need only make out a *prima facie* defense in the sense of setting out averments which, if established at trial, would entitle it to the relief asked for. In my view the Applicant has complied with this requirement.

[23] The Applicant's prejudice if the relief is not granted outweighs any prejudice that the Respondent may suffer in the event that the Applicant is not afforded an opportunity to present its case at a trial.

Costs

There is no reason why the normal order that costs follow the result should not apply. In determining the scale, I have considered both parties non-compliance with the rules and am of the view that the appropriate scale would be scale B in this instance.

Therefore, I make the following order

Order

1. The Respondent's late filing of his answering affidavit is condoned.

2. The late delivery of the Applicant's plea is condoned, and the Respondent's bar uplifted.
3. Costs to be taxed on scale B.



JUDGE OF THE HIGH COURT
JOHANNESBURG

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